

Record of Decision

Secretarial Determination Pursuant to the Indian Gaming Regulatory Act and Trust Acquisition of Approximately 320.04 acres in Kern County, California, for the Tejon Indian Tribe

**U.S. Department of the Interior
Bureau of Indian Affairs
January 2021**

U.S. Department of the Interior

Agency: Bureau of Indian Affairs

Action: Issuance of a Record of Decision (ROD) for a Secretarial Determination, pursuant to the Indian Gaming Regulatory Act (IGRA), and trust acquisition of the Mettler Site in unincorporated Kern County, California, for the Tejon Indian Tribe (Tribe).

Summary: In 2014, the Tribe submitted an application to the Bureau of Indian Affairs (BIA) requesting that the Department of the Interior (Department) acquire in trust approximately 320.04 acres of land in an unincorporated portion of Kern County, California, (the Mettler Site) for gaming and other purposes. The Tribe also requested that the Secretary of the Interior issue a Secretarial Determination, also known as a Two-Part Determination, to determine whether the Mettler Site is eligible for gaming pursuant to the Indian Gaming Regulatory Act. The Tribe proposes to develop the Mettler Site with a casino resort, recreational vehicle (RV) park, joint fire/sheriff station, and supporting facilities (Proposed Project).

The BIA analyzed the proposed Secretarial Determination and trust acquisition (Proposed Actions) in an Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act under the direction and supervision of the BIA Pacific Regional Office. The BIA issued the Draft EIS for public review and comment on June 12, 2020. After consideration of comments received during the public comment period and at the public hearing on the Draft EIS, the BIA issued the Final EIS on October 23, 2020. The Draft and Final EIS evaluated a reasonable range of alternatives that would meet the purpose and need for the Proposed Actions, analyzed the potential effects of those alternatives, and identified feasible mitigation measures.

With this ROD, the Department announces that it will implement Alternative A1 as the Preferred Alternative and implement the Proposed Action of issuing a Secretarial Determination pursuant to IGRA. A decision whether to implement the Proposed Action of acquiring the Mettler Site in trust pursuant to the Indian Reorganization Act will be made after the Governor determines whether he will concur with the Secretarial Determination as required by IGRA.

The Department considered potential effects to the environment, including potential impacts to local governments and other tribes. The Department has adopted all practicable means to avoid or minimize environmental harm and has determined that potentially significant effects will be adequately addressed by these mitigation measures, as described in this ROD. This decision is based on the thorough review and consideration of the Tribe's trust acquisition application, request for a Secretarial Determination; the applicable statutory and regulatory authorities governing acquisition of trust title to land and eligibility of land for gaming; the Draft EIS; the Final EIS; the administrative record; and comments received from the public, federal, state, and local governmental agencies; and potentially affected Indian tribes.

For Further Information Contact:

Mr. Chad A. Broussard
Environmental Protection Specialist, Division of Environmental, Cultural Resources
Management and Safety
Bureau of Indian Affairs
2800 Cottage Way, Room W-2820
Sacramento, CA 95825

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ATTACHMENTS

- Attachment 1 Final EIS Notices
- Attachment 2 Supplemental Response to Final EIS Comments
- Attachment 3 Mitigation Monitoring and Enforcement Plan

1.0 INTRODUCTION

1.1 SUMMARY

In 2014, the Tejon Indian Tribe (Tribe) submitted an application to the Bureau of Indian Affairs (BIA), requesting that the Department of the Interior (Department) acquire in trust approximately 320.04 acres of land in an unincorporated area of Kern County, California, (the Mettler Site) for gaming and other purposes.¹ The Tribe also requested that the Secretary of the Interior (Secretary) issue a Secretarial Determination, also known as a Two-Part Determination, to determine whether the Mettler Site is eligible for gaming. In addition, the Tribe is seeking approval of a management contract from the National Indian Gaming Commission (NIGC). These actions are the Proposed Actions.

The BIA analyzed the potential environmental impacts of the Proposed Actions in an Environmental Impact Statement (EIS). The Draft EIS, issued for public review on June 12, 2020, and the Final EIS, issued October 23, 2020, considered various alternatives to meet the stated purpose and need, and analyzed in detail potential effects of a reasonable range of alternatives. With this Record of Decision (ROD), the Department announces that Alternative A1 is the Preferred Alternative to be implemented, which consists of the construction of an approximately 715,800 square foot (sf) casino resort that includes a 400-room hotel, ancillary infrastructure, and mitigation measures presented in **Section 6.0** of this ROD.

The Department has determined that the Preferred Alternative would best meet the purpose and need for the Proposed Actions by promoting the long-term tribal self-sufficiency, self-determination, and economic development of the Tribe. Implementing the Preferred Alternative will provide the Tribe with the best opportunity for attracting and maintaining a stable, long-term source of revenue. This revenue will enable the Tribe to provide essential governmental programs, thereby improving the quality of life for tribal members and their families.

1.2 DESCRIPTION OF THE PROPOSED ACTION

The federal Proposed Actions are the transfer into trust of the Mettler Site pursuant to the Secretary's authority pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108, issuance of a Secretarial Determination pursuant to Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719 (b)(1)(A), and the approval of a management contract by the NIGC pursuant to IGRA, 25 U.S.C. § 2711. The Tribe subsequently proposes to develop casino resort, recreational vehicle (RV) park, fire and sheriff station, water infrastructure, wastewater treatment and disposal facilities, and other supporting facilities (Proposed Project). The remainder of the Mettler Site would remain in agricultural production for the foreseeable future; however, in the

¹ The Tribe's application used the figure 306 acres of land. Without changes to the boundaries of the Mettler Site, the Bureau of Land Management surveyors clarified and corrected the acreage in July 2020 to approximately 320.04 acres. The Tribe's use of 306 acres was based on Kern County's report of 305.82 acres that it used for tax purposes. However, the acreage shown on Kern County tax documents is for tax assessment purposes only and should not be used for title transfer. See Memorandum to Director, Office of Indian Gaming, from Regional Director, Pacific Region, Bureau of Indian Affairs (December 9, 2020). The clarified and corrected acreage does not affect the conclusions of the Environmental Impact Statement, which describes the Mettler site as having 306 acres, because it does not represent physical changes on the land or changes to environmental conditions.

coming decades the Tribe's vision is to utilize the remaining acreage to deliver governmental services to its members such as housing, health care, and wellness (referred to collectively herein as potential future developments). The Tribe would determine, in accordance with applicable law, what developments are needed to facilitate the provision of governmental services to its members. The Mettler Site is located in unincorporated portion of Kern County, west of the Town of Mettler and State Route 99 (SR-99), north of State Route 166 (SR-166), east of Interstate 5 (I-5), south of Valpredo Road, and approximately 14 miles south of the City of Bakersfield.

1.3 PURPOSE AND NEED

The purpose of the Proposed Actions is to facilitate tribal self-sufficiency, self-determination, and economic development. This purpose satisfies the Department's land acquisition policy as articulated in the Department's trust land acquisition regulations at 25 C.F.R. Part 151, and is the principal goal of IGRA as articulated in 25 U.S.C. § 2701. The need for the Department to act on the Tribe's application is established by the Department's trust regulations at 25 C.F.R. §§ 151.10(h) and 151.12, the Department's Secretarial Determination regulations at §§ 292.18(a) and 292.21, and the NIGC's regulations for review of management contracts at 25 C.F.R. Part 533.

1.3.1 BACKGROUND

In 1851, the United States established treaties with certain tribes including the Tejon Tribe (herein referred to as the 1851 Treaty). Under the terms of the 1851 Treaty, the signatory tribes agreed to cede their aboriginal lands to the United States in exchange for a 763,000-acre reservation between Tejon Pass and the Kern River. By February 1852, the 1851 Treaty, along with seventeen additional treaties negotiated with other California Indians, had been submitted to the United States Senate for consideration and ratification. On June 8, 1852, the Senate declined to ratify any of the treaties negotiated with the California tribes. Accordingly, the described reservation, identified as Royce Area 285,² was never formally set aside. The Mettler Site is located within the boundaries of the reservation that would have been set aside had the 1851 treaty been ratified.

The Tribe has requested the trust acquisition of the Mettler Site to reestablish a homeland and generate its own governmental revenues through gaming to improve its short-term and long-term socioeconomic conditions, to promote its self-sufficiency, and to strengthen its ability to serve its citizens.

1.4 PROCEDURAL BACKGROUND

The Proposed Actions require compliance with the National Environmental Policy Act (NEPA). Accordingly, the BIA published a Notice of Intent (NOI) in the *Federal Register* on August 13, 2015, (80 Fed. Reg. 48559) describing the Proposed Actions, announcing the BIA's intent to prepare an EIS for the Proposed Actions, and inviting public and agency comments. The comment period was open until September 14, 2015, and the BIA held a scoping meeting in City of Bakersfield on September 1, 2015. The BIA issued a report outlining the results of scoping in February 2019. The scoping report summarized the major issues and concerns from the comments received during the scoping process. The BIA considered the scoping comments in developing the

² Charles C. Royce, *Eighteenth Annual Report of the Bureau of American Ethnology, Part 2*, p. 782 (Bureau of American Ethnology, 1851).

project alternatives and analytical methodologies presented in the EIS. On September 1, 2015, Kern County requested cooperating agency status, which the BIA approved. Subsequently, the BIA formally invited four Cooperating Agencies: (1) Tribe; (2) the United States Environmental Protection Agency (USEPA); (3) National Indian Gaming Commission (NIGC); (4) California Department of Transportation (Caltrans). The Tribe, USEPA, NIGC, and Kern County accepted the invitation to serve as Cooperating Agencies.

The BIA circulated an administrative version of the Draft EIS to cooperating agencies in August 2019 for review and comment. The BIA took the comments into consideration and completed revisions as appropriate prior to public release. In June 2020, the BIA made the Draft EIS available to federal, tribal, state, and local agencies and other interested parties for review and comment. The BIA published the Notice of Availability (NOA) for the Draft EIS in the *Federal Register* on June 12, 2020, (85 Fed. Reg. 35930). This initiated a 45-day public review period. The BIA also published the NOA in *The Bakersfield Californian*, which circulated in Kern County and surrounding area on June 12, 2020. The BIA also mailed the NOA to interested parties. The NOA provided information concerning the Proposed Actions, public comment period, and information regarding the virtual public hearing. The BIA held a virtual public hearing on July 8, 2020. The comment period on the Draft EIS ran through July 27, 2020.

In preparing the Final EIS, the BIA considered public and agency comments on the Draft EIS received during the comment period, including those submitted or recorded at the virtual public hearing. Responses to the comments received were provided in Volume II, Appendix V of the Final EIS, and the BIA revised Volume I of the Final EIS as appropriate to address those comments. The BIA considered all comments received and made changes to the Final EIS as appropriate. The BIA published the NOA for the Final EIS in the *Federal Register* on October 23, 2020 (85 Fed. Reg. 67561). The BIA also published the Final EIS in the local newspaper, *The Bakersfield Californian*. The comments received during this period, and the BIA's responses to issues that were not previously raised and responded to in the EIS process, are included in **Attachment 2** of this ROD.

2.0 ANALYSIS OF ALTERNATIVES

2.1 ALTERNATIVE SCREENING PROCESS

The BIA considered a range of possible alternatives in the EIS to meet the purpose and need for the Proposed Actions, including a non-casino alternative, reduced development configuration, and development of an alternative site. Alternatives, other than the No Action Alternative, were screened based on four criteria: 1) extent to which they meet the purpose and need for the Proposed Actions, 2) feasibility, 3) ability to reduce environmental impacts, and 4) ability to contribute to a reasonable range of alternatives. Alternatives considered but rejected from detailed analysis are described in the Appendix B of the Final EIS, and include: non-gaming development for each of the alternative locations within the Tribe's traditional territory, gaming development alternatives that do not include approval of a gaming management agreement by the NIGC, a future expansion alternative, development of a casino resort on the Tejon Industrial Complex Site, and development of a casino resort on the Taft Highway Site.

2.2 REASONABLE ALTERNATIVES CONSIDERED IN DETAIL

The Draft EIS and Final EIS evaluated the following alternatives and the No Action Alternative in detail. Additional details on these alternatives are located in the Final EIS, Section 2.0.

2.2.1 Alternative A1 – Proposed Project on Mettler Site

Alternative A1, which is the Tribe's Proposed Project and the BIA's Preferred Alternative, consists of the following components: (1) the transfer of the Mettler Site from fee into federal trust status for the benefit of the Tribe; (2) issuance of a Secretarial Determination by the Secretary; (3) the approval of the proposed management contract by the Chairperson of the NIGC; and (4) subsequent development of the Mettler Site with a variety of uses including a casino resort, parking, and other supporting facilities including a fire and sheriff station, water infrastructure, and wastewater treatment and disposal facilities. Components of Alternative A1 are described below.

Proposed Development: Alternative A1 consists of the construction of an approximately 715,800-sf casino resort, an RV park, joint fire/sheriff station, and associated facilities on the Mettler Site. The gaming component of the resort would consist of electronic gaming devices and table games within an approximately 166,500-sf gaming floor area. The hotel tower would be approximately 11 stories, or 134 feet high, and contain 400 hotel rooms. Proposed restaurant facilities include a buffet, café, food court, and other specialty restaurants and bars. Alternative A1 also includes the construction of an approximately 38,000-sf multi-purpose event center and approximately 53,000 sf of convention space. The event center would include an entertainment venue and associated supporting facilities to host shows and midweek entertainment, including concerts and stage performances. The convention space would include a divisible banquet room and meeting rooms for business events and conferences. These events would occur periodically, not daily. The RV Park would be located on 22 acres of the Mettler Site and consist of 220 spaces. The 10,000-sf joint fire/sheriff station would be located on 4 acres of land in the southwest corner of the property and would be staffed and operated by the County in accordance with the intergovernmental agreement executed in July of 2019. Approximately 4,500 surface parking spaces would be located contiguous to the casino resort and other facilities in the southern portion of the Mettler Site.

Agreements with Local Agencies: The Tribe entered into the following agreements with local agencies:

Kern County – Tribal Intergovernmental Agreement. The Tribe and Kern County executed an intergovernmental agreement (IGA) on July 24, 2019 (Appendix D of Final EIS). The primary purpose of the IGA is to provide a funding mechanism for the Tribe to compensate the County for law enforcement, fire protection, emergency services, to provide reasonable compensation for programs designed to treat problem gambling, to mitigate any effect to public safety attributable to the Proposed Project, and to mitigate all other impacts of the Proposed Project on the County. The funding mechanisms incorporated into the IGA include, but are not limited to, general fund payments, capital maintenance payments, and occupied room fee payments. Per the IGA, the Tribe would also provide the County proof of a reasonable effort to encourage all contractors of the Proposed Project to hire at least 50 percent of their workers from local communities in the County.

The Tribe is committed to strong public health and safety standards in both building and operation of the Proposed Project. Thus, Tribe has agreed to incorporate County inspection and enforcement mechanisms for the public health and safety standards noted in IGA Section 6(c) (Appendix D of Final EIS).

Arvin-Edison Water Storage District – Tribal Water Agreement. The Tribe and the Arvin-Edison Water Storage District (AEWSD) executed an agreement (Water Agreement; Appendix W of Final EIS), the purpose of which is to: (i) to effectively and responsibly manage the AEWSD's water resources, and (ii) to assist Tribe in maintaining the "neutral to positive" groundwater levels in the vicinity of the Mettler Site. Pursuant to the Water Agreement, surface water available to the Mettler Site for agriculture use under the Contract for Agricultural Water Service up to the amount of 734 Acre Feet per year (AFY) would be assigned to other landowners within the AEWSD that are eligible to receive surface water service from the AEWSD. Eligibility would be based on such factors as the AEWSD deems relevant in its sole discretion, including without limitation, whether the land to which the water to be transferred is reliant solely on groundwater, and whether the proximity of such land to the Mettler Site would further the purpose of the Water Agreement.

Water Supply: The on-site water supply would be provided by the two proposed on-site groundwater wells. Groundwater would be treated on-site through filtration, disinfection, and/or reverse osmosis for potable use depending on the purification needs. Use of recycled water would reduce the average water demand. Fire flows would be provided for the fire hydrants and sprinkler systems as specified in the International Fire Code, National Fire Protection Association Code 13, and County fire codes. Fire flow water would be supplied from a non-potable distribution system and would use an on-site storage tank and booster pump.

Wastewater Treatment and Reuse: An on-site wastewater treatment plant (WWTP) is proposed for wastewater treatment, reclamation, and reuse. The on-site WWTP would be sized to treat peak flow. An on-site gravity sewer collection system would flow into the WWTP. The WWTP would use either a membrane bioreactor (MBR) system or a package sequencing batch reactor (SBR). An MBR would not require any additional treatment beyond disinfection, whereas an SBR could require a supplemental filtration system. Biological solids or sludge would be stored on-site for periodic disposal to an approved landfill. The sludge accumulated would require a single truck disposal every two weeks. A detailed description of the WWTP and associated infrastructure is presented in Appendix G of the Final EIS.

All water used for reclamation/recharge would meet the equivalent of State standards governing the use of recycled water as described in Title 22 of the California Code of Regulations. Title 22 specifies redundancy and reliability features that must be incorporated into the reclamation plant. Under the current version of the Title 22 Water Recycling Criteria, the highest level of treatment is referred to as "Disinfected Tertiary Recycled Water." The proposed WWTP would produce effluent meeting the criteria for this highest level of recycled water. Reclaimed water from the on-site WWTP may be utilized for toilet flushing at the casino resort, landscape irrigation, crop irrigation, and/or groundwater recharge. To use recycled water for "in-building" purposes, the plumbing system within the building would have recycled water lines plumbed separately from the potable water system in the building with no cross connections. The dual plumbing systems would be distinctly marked and color coded. Treated effluent that is not used as reclaimed water would be

discharged to on-site ponds that would hold excess treated effluent and allow it to infiltrate into the soil. Final siting and design of the percolation ponds would ensure that percolation rates would meet current County standards.

Grading and Drainage: Construction would involve grading and excavation for building pads and parking lots. Approximately 75 acres of impervious surfaces would be created during construction of Alternative A1. It is anticipated that a net of approximately 485,000 cubic yards of fill would be necessary to develop the on-site components of Alternative A1. Approximately 80,000 cubic yards of cut soil would be available from the excavation of the proposed detention basins to be used as fill. Additional fill soil could be excavated from other areas of the Mettler Site that are not currently planned for immediate development (*i.e.*, the northwest portion of the site), and any remaining soil needs would be addressed with the importation of suitable fill material from within the region from either construction sites with excess fill material or from qualified suppliers. Any imported fill material would be screened by a qualified engineer prior to its use on the Mettler Site to ensure that it is of adequate quality, including testing to ensure the fill is not contaminated.

A storm drain system would be required to convey the on-site runoff from the developed areas of the site to the proposed on-site basin for storage and percolation. Parking lots would have a series of drain inlets and vegetated bioswales that would be connected to the storm drain conveyance system. Runoff from buildings would be collected via roof leaders directly connected to storm drain conveyance pipes. The site would be graded to allow stormwater runoff from the proposed improvements to drain via gravity. Under Alternative A1, the Mettler Site would require a stormwater detention basin with a capacity of approximately 32 AF. The basin would retain the 10-year, 5-day storm event and have a minimum of one foot of freeboard. The basin would occupy approximately six acres of the water retention and wastewater reclamation area. Structures and access driveways associated with Alternative A1 would be raised approximately 2.5 feet above the existing ground level in order to be a minimum of 1 foot above the base flood elevation.

Public Services and Utilities: Pursuant to the IGA described above, the Tribe would develop, build, and furnish a new fire and sheriff joint substation for lease by the Kern County Fire Department (KCFD) and Kern County Sheriff's Department (KCSD). The substation would provide fire protection, law enforcement, and emergency medical response services to the Mettler Site and surrounding areas in the County. The KCSD would have the authority to enforce non-gaming state criminal laws on the proposed trust lands pursuant to Public Law 23-280. The Tribe would employ security personnel to patrol the facilities to reduce and prevent criminal and civil incidents. Additionally, surveillance equipment would be installed in the casino resort and parking areas, and tribal security personnel would work cooperatively with the KCSD to provide general law enforcement services. Electrical service to the Mettler Site is currently provided by Pacific Gas and Electric Company (PG&E). No existing natural gas service lines connect to the site. Southern California Gas (SoCalGas) and other private providers currently supply natural gas services to customers in the vicinity of the Mettler Site, and service may be extended to the site.

Best Management Practices: Construction and operation of Alternative A1 would incorporate a variety of industry standard best management practices (BMPs) that would avoid or minimize potential adverse effects resulting from the development of Alternative A1. These are listed in Section 2.2.2.9 of the Final EIS.

2.2.2 Alternative A2 – Reduced Casino Resort Alternative

Alternative A2 includes the same components as Alternative A1, however, the size of the casino, restaurants, hotel, entertainment and retail, meeting rooms, pool, and parking facilities are reduced under Alternative A2 compared to Alternative A1. No RV parking would be constructed under Alternative A2. The IGA and Water Agreement apply to Alternative A2 and the Tribe has additionally committed to public health and safety standards noted in the IGA for casino development on the Mettler Site. Alternative A2 would be served by on-site water supply facilities, fire flow system, and wastewater reclamation facilities similar to those described for Alternative A1. Construction and operation of Alternative A2 would incorporate a variety of industry standard BMPs, which are listed in Section 2.2.2.9 of the Final EIS.

Under Alternative A2, approximately 58 acres of impervious surfaces would be created on the site for development. It is anticipated that approximately 362,000 cubic yards of fill would be necessary to construct Alternative A2. Approximately 79,000 cubic yards of cut soil would be available from excavation of the detention basins to be used as fill. As with Alternative A1, Additional fill soil could be excavated from other areas of the Mettler Site that are not currently planned for immediate development (*i.e.*, the northwest portion of the site), and any remaining soil needs would be addressed with the importation of suitable fill material from within the region from either construction sites with excess fill material or from qualified suppliers. Any imported fill material would be screened by a qualified engineer prior to its use on the Mettler Site to ensure adequate quality, including testing to ensure the fill is not contaminated.

Alternative A2 would feature a storm drain system similar to that of Alternative A1. Under Alternative A2, the Mettler Site would require a stormwater detention basin with a capacity of approximately 31 AF. The basin would be sized to retain a 10-year, 5-day storm event and its banks would be raised approximately 2.5 feet above the existing ground level in order to be a minimum of 1 foot above the base flood elevation.

2.2.3 Alternative A3 – Organic Farming Alternative

Alternative A3 consists of the transfer of the Mettler Site from fee to trust status, which would convert the Mettler Site from conventional agriculture to an organic farm. No casino resort or associated facilities would be developed as a part of Alternative A3. The existing residence in the central-eastern portion of the site would remain in place and be used for storage. The existing agricultural practices on the Mettler Site would be altered to follow U.S. Department of Agriculture (USDA) organic farming principles and regulations found in 7 C.F.R. § 205. No road improvements would occur. Alternative A3 would be served by the same public service and energy facilities and providers as are currently provided to the Mettler Site. Under Alternative A3, irrigation water for agricultural use would continue to be provided to the Mettler Site by the surface water contract with the Arvin-Edison Water Storage District and existing on-site wells. No additional wastewater treatments facilities would be required, and no additional impervious surfaces would be created on the site. Operation of Alternative A3 would not require BMPs more than those already utilized by the conventional farming at the site.

2.2.4 Alternative B – Casino Resort on the Maricopa Highway Site

Alternative B includes the same federal actions as Alternative A1 but specific to the Maricopa Highway Site instead of the Mettler Site. The Tribe would develop a similar casino resort as under Alternative A1. The size of the casino, restaurants, hotel, entertainment and retail, pool, and parking facilities are the same under Alternative B as under Alternative A1. RV parking under Alternative B, however, would be 50 spaces rather than the 220 spaces under Alternative A1. Alternative B would be served by on-site water supply facilities, fire flow system, and wastewater reclamation facilities similar to those described for Alternative A1. Construction and operation of Alternative B would incorporate a variety of industry standard BMPs, which are listed in Section 2.3.2.6 of the Final EIS.

The IGA does not apply to Alternative B. If Alternative B is implemented, the Tribe expects to negotiate a different intergovernmental agreement with Kern County similar to that described for Alternatives A1 and A2. Regardless of the language included within any potential IGA for Alternative B, the Tribe has agreed to incorporate the public health and safety standards noted in IGA Section 6(c). The Water Agreement also does not apply to Alternative B, because the Maricopa Highway Site is not in the Arvin-Edison Water Storage District.

Under Alternative B, approximately 49 acres of impervious surfaces would be created on the site for development. It is anticipated that 126,000 cubic yards of fill would be necessary to construct Alternative B. Approximately 119,000 cubic yards of cut soil would be available from excavation of the detention basin. Additional fill soil could be excavated from other areas of the Maricopa Highway Site that are not currently planned for immediate development (*i.e.*, the southwest portion of the site), and any remaining soil needs would be addressed with the importation of suitable fill material from within the region from either construction sites with excess fill material or from qualified suppliers. Any imported fill material would be screened by a qualified engineer prior to its use on the Maricopa Highway Site to ensure that it is of adequate quality, including testing to ensure the fill is not contaminated.

Alternative B would feature a storm drain system similar to that of Alternative A1. The site would be graded to allow stormwater runoff from the proposed improvements to drain via gravity. Parking lots would have a series of drain inlets and vegetated bioswales that would be connected to the storm drain conveyance system, and runoff from buildings would be collected via roof leaders directly connected to storm drain conveyance pipes. Under Alternative B, the Maricopa Highway Site would require a stormwater detention basin with a capacity of approximately 15 AF, and the basin would be sized to retain a 10-year, 5-day storm event.

2.2.5 Alternative C – No Action

Under the No Action Alternative, none of the four development alternatives (Alternatives A1, A2, A3, or B) considered within the EIS would be implemented. The No Action Alternative assumes that the existing uses on the Mettler Site and Maricopa Highway Site would not change as there are no development plans for the Mettler and Maricopa Highway Sites.

3.0 PREFERRED ALTERNATIVE

For the reasons discussed herein and in the Final EIS, the Department has determined that Alternative A1 is the Department's Preferred Alternative because it best meets the purpose and need for the Proposed Actions. Of the alternatives evaluated within the EIS, Alternative A1 would best meet the purposes and needs by promoting the long-term economic viability, self-sufficiency, self-determination, and self-governance of the Tribe.

The casino resort described under Alternative A1 would provide the Tribe with the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for the tribal government. Under such conditions, the Tribe would be better able to establish, fund, and maintain governmental programs to meet the needs of the Tribe, as well as reestablish a land base for the Tribe, as described in **Section 1.3.1** of this ROD. The development of Alternative A1 would meet the purpose and need for the Proposed Actions better than the other development alternatives due to the reduced revenues and beneficial effects to the Tribe that would be expected from the operation of Alternatives A2, A3, B, and C (described in detail in Section 7.0 of this ROD). While Alternative A1 would have greater environmental impacts than the No Action Alternative, that alternative does not meet the purpose and need for the Proposed Actions, and the environmental impacts of the Preferred Alternative are adequately addressed by the mitigation measures adopted in this ROD.

4.0 ENVIRONMENTALLY PREFERRED ALTERNATIVE(S)

Among all of the alternatives, the No Action Alternative (Alternative C) would result in the fewest environmental impacts. Under the No Action Alternative, the BIA would not transfer the Mettler Site into trust for the Tribe, and none of the development alternatives would be implemented. Under the No Action Alternative, there would be no change to existing uses on the Mettler and Maricopa Highway Sites. Development of the Mettler and Maricopa Highway Sites are not reasonably foreseeable under Alternative C. The Mettler Site would remain in its agricultural/rural-residential state and the Maricopa Highway Site would remain in its agricultural state for the foreseeable future. The No Action Alternative would not meet the purpose and need for the Proposed Actions. Specifically, it would not attract and maintain the same type of long-term, sustainable revenue stream, which would limit the Tribe's self-sufficiency, self-determination, and economic development. The No Action alternative would also likely result in substantially fewer economic benefits to the County.

Among the development alternatives, Alternative A3 would result in the fewest environmental impacts. This is because the entire site would be converted from conventional agriculture to an organic farm and no new structures or facilities would be developed as a part of Alternative A3. Therefore, Alternative A3 would avoid most of the environmental effects associated with the construction and operation of Alternatives A1, A2, and B, and have significantly fewer environmental effects, aside from water use. Alternative A3 would significantly reduce economic output for the Tribe and generate negligible tax revenues for the State and County. Further, Alternative A3 would not be the most effective means of attracting and maintaining a long-term, sustainable revenue stream.

5.0 ENVIRONMENTAL IMPACTS AND PUBLIC COMMENTS

5.1 ENVIRONMENTAL IMPACTS IDENTIFIED IN FINAL EIS

A number of specific issues were raised during the EIS scoping process and public and agency comments on the Draft EIS. Each of the alternatives considered in the Final EIS was evaluated relative to these and other issues. The categories of the most substantive issues raised include:

- Geology and Soils
- Water Resources
- Air Quality
- Biological Resources
- Cultural and Paleontological Resources
- Socioeconomic Conditions
- Transportation/Circulation
- Land Use
- Public Services
- Noise
- Hazardous Materials
- Aesthetics
- Indirect and Growth-Inducing Effects

The evaluation of project-related impacts included consultation with entities that have jurisdiction or special expertise to ensure that the impact assessments for the Final EIS were accomplished using accepted industry standard practice, procedures, and the most currently available data and models for each of the issues evaluated in the Final EIS. Alternative courses of action and mitigation measures were developed in response to environmental concerns and issues. Section 3.0 of the Final EIS describes environmental impacts of Alternatives A through C in detail. The environmental impacts of the Preferred Alternative (Alternative A1) are described below.

5.1.1 Geology and Soils (Final EIS § 3.2)

Topography – The Mettler Site is generally flat and does not contain any distinctive topographical features. On-site grading would raise the development above flood elevations and facilitate proper drainage. Construction of Alternative A1 would require approximately 485,000 cubic yards of fill to raise the building pads above the base flood elevation. Approximately 80,000 cubic yards of fill would likely be available from the excavation of the proposed stormwater drainage basins located in the development area. Any additional fill soil required to fulfill soil needs would be acquired from off-site. Development of Alternative A1 would result in a minimal impact on topography; therefore, no mitigation is recommended. Impacts to topography would be less than significant.

Soils/Geology – Alternative A1 could potentially impact soils due to erosion during construction, operation, and maintenance activities, including clearing, grading, trenching, and backfilling. However, the soils on the Mettler Site have a low erosion potential based on soil properties and the flatness of the site. Alternative A1 would be constructed in accordance with the National Pollutant Discharge Elimination System (NPDES) general construction permit. As part of the NPDES permit compliance, a Stormwater Pollution Prevention Plan (SWPPP) would be prepared and implemented

for erosion prevention, sediment control, and control of other potential pollutants to prevent discharge into Waters of the U.S. This has been included as mitigation A and B in **Section 6.1** below and 1-A and 1-B in Section 4.0 of the Final EIS. With mitigation, Alternative A1 would not significantly affect soils or create erosion or sedimentation issues on the Mettler Site. Impacts to soils and geology would be less than significant.

Seismicity – Although the Mettler Site is not in an Earthquake Hazard Zone, there are at least 20 nearby historical faults. Therefore, development on the Mettler Site is subject to building restrictions. Alternative A1 would be constructed to standards no less stringent than the CBC (California Code of Regulations, Title 24), particularly those pertaining to earthquake design, in order to safeguard against major structural failures and loss of life. Impacts related to seismic hazards would be less than significant.

Mineral Resources – Given that there are no known or recorded mineral resources within the Mettler Site, construction and operation of Alternative A1 would not adversely affect known or recorded mineral resources. Impacts to mineral resources would be less than significant.

Cumulative Impacts: Geology and Soils – Cumulative effects associated with geology and soil resources could occur as a result of future development in combination with Alternative A1. Topographic changes may be cumulatively significant if the topography contributes significantly to environmental quality with respect to habitat, public safety, or other values. However, no significant changes to topography are proposed under Alternative A1. Soil loss could be cumulatively considerable even if the developments alone would not result in significant loss of topsoil, but taken together with all other developments may result in significant depletion of available soils. Local permitting requirements for construction would address regional geotechnical and topographic conflicts, seismic hazards, and resource extraction availability. Approved developments would be required to follow applicable permitting procedures. In addition, Alternative A1 and all other developments that disturb one acre or more, including the potential future developments for the Mettler Site, must comply with the requirements of the NPDES Construction General Permit. Cumulative impacts to soils and geology would be less than significant.

5.1.2 Water Resources (Final EIS § 3.3)

Flooding – The Mettler Site is located within the 100-year floodplain; however, no base flood elevations have been determined. Pursuant to Executive Order (EO) No. 11988, a flood impact analysis was prepared for the alternative sites. This flood impact analysis determined that flood water depths would increase at maximum 0.41 feet. On-site, the highest elevation increase estimated to be 2.6 feet, and resulted in a flood water depth of 3.3 feet in total. Alternative A1 would not cause an increase of 1.0 foot when compared to the existing conditions on neighboring properties. Therefore, Alternative A1 would not cause a substantial increase in flood elevations in the surrounding environment.

In order to minimize potential harm to or within the floodplain and be in compliance with EO 11988, Alternative A1's structures, including the water and wastewater treatment facilities, would be raised approximately 2.5 feet above the existing ground level (1 foot above the base flood elevation). Access routes from the on-site fire and sheriff station to the casino resort would remain

above the base flood elevation during emergency situations. Furthermore, all aboveground fuel storage tanks would meet National Fire Protection Association standards and be above the floodplain to prevent accident release. The raising of the casino resort and access aisles would slow down the flood flow on the south side of the structures and road, and would, thus, increase the floodplain storage at the Mettler Site by approximately 1.58 AF. To avoid potential flood impacts, Alternative A1 would include a stormwater drainage basin that is sized to retain potential flood waters displaced by the proposed development. Retaining walls around the casino resort would also help to isolate and keep it above the base flood elevations while the on-site water and wastewater treatment facilities would be enclosed by a 2 to 4-foot flood control levee. Furthermore, the wastewater treatment plant would have flood safety features to prevent accidental wastewater release via infiltration of flood water into the WWTP system, such as flood-activated float switches to override/disable pump operation. During a wet weather event, treated wastewater would be directed to the percolation ponds for groundwater recharge because there would be capacity for treated effluent during storm events. The actual rainfall during a storm event within the percolation pond area would be captured and collected in the ponds. By designing the percolation ponds with greater than 1 foot of freeboard, there would be adequate capacity for all expected storm events. Thus, the operation of on-site wastewater treatment facilities would not significantly impact flooding. Impacts from flooding would be less than significant.

Construction – Construction activities under Alternative A1 would include ground-disturbing activities such as grading and excavation that could lead to erosion of topsoil. Erosion from construction could increase sediment discharge to surface waters during storm events thereby degrading downstream water quality. Construction activities would also include the routine use of potentially hazardous construction materials. Discharges of pollutants to surface waters from construction activities and accidents (*e.g.* spills) are a potentially significant impact. To prevent potential impacts to surface water, erosion control measures would be employed in compliance with the Phase I NPDES Construction General Permit for construction activities. A SWPPP would be developed prior to any ground disturbance and would include BMPs to reduce potential surface water contamination during storm events. After implementation of mitigation measures discussed in **Sections 6.1** below and Section 4.0 of the Final EIS, impacts from construction on surface water quality would be less than significant.

Stormwater Runoff – Alternative A1 would both alter the existing drainage pattern of the Mettler Site and increase current stormwater runoff rates during storm events because of the approximate 75 acres increase in on-site impervious surfaces. Furthermore, stormwater runoff from the Mettler Site has the potential to significantly impact surface water quality if not treated properly prior to discharge. However, the project design for Alternative A1 includes various features to improve stormwater quality (Section 2.0 of the Final EIS) that would ensure protection of surface water quality. With regard to the increase in surface water runoff, a stormwater detention basin sized to retain a 10-year, 5-day storm event and have a minimum of 1 foot of freeboard is included in the project design. The stormwater detention basin would require approximately 32 AF of storage and occupy approximately six acres of the designated water retention and wastewater reclamation area under Alternative A1. In addition to the stormwater detention basin, parking lots would have a series of drain inlets and vegetated bioswales, and runoff from buildings would be collected via roof leaders. The parking lots and buildings drainage systems would be connected to the storm drain conveyance system with conveyance pipes sized to convey 10-year, 5-day storm event flow. The

conveyance pipes would be routed to one of the two detention basins. Finally, fill would be incorporated into the proposed improvements to allow stormwater runoff to drain via gravity.

Accordingly, impacts to stormwater runoff or surface water quality would be less than significant.

Groundwater Supply – Groundwater would be used for drinking water and general commercial purposes within the proposed casino resort, emergency supplies, and fire protection, which reclaimed water could be used for some of these purposes.

Alternative A1 would increase the amount of groundwater extraction at the Mettler Site because water currently provided by Arvin-Edison Water Storage District (AEWSD) cannot be used for non-agricultural uses. However, the Tribe and the AEWSD executed an agreement wherein surface water available to the Mettler Site for agriculture use under Contract for Agricultural Water Service up to the amount of 734 AFY would be assigned to other landowners within the AEWSD that are eligible to receive surface water service from the AEWSD. For the purposes of determining the net groundwater use of Alternative A1, a “credit” (95 percent of metered discharge to the percolation ponds) would be given to account for the amount of water treated at the proposed WWTP and discharged into the proposed on-site percolation ponds for groundwater recharge. Therefore, implementation of the Water Agreement would ensure that impacts to the groundwater basin from Alternative A1 is neutral to positive. No mitigation is required. Impacts to groundwater would be less than significant.

Groundwater Recharge – The conversion of agricultural land to commercial uses would introduce areas of impermeable surfaces, including the casino resort and paved parking lots. The introduction of these surfaces can reduce groundwater recharge in areas where surface percolation accounts for a large percentage of natural recharge. However, as described above, the development of detention ponds for capturing stormwater runoff on-site would allow collected stormwater to percolate into the groundwater table. On-site treated effluent percolation ponds would also contribute to groundwater recharge, and the percolation pond area would be sized to accept peak sewer flow rate. Furthermore, testing would be performed before construction of the percolation ponds to ensure that the infiltration rates meet County standards of no faster than 1 minute per inch (mpi) nor slower than 60 mpi. Therefore, the introduction of impermeable surfaces on the Mettler Site under Alternative A1 would not have a significant adverse impact on groundwater recharge. No mitigation is required. Impacts to groundwater recharge would be less than significant.

Neighboring Groundwater Wells – The existing Mettler Community Water District groundwater wells are approximately 3,000 feet away from the proposed well sites on the Mettler Site and have well depths in excess of 300 feet. With current groundwater level at maximum depth of approximately 400 feet, the effect of the new groundwater wells for Alternative A1 on the existing neighboring wells would be insignificant and no adverse impact would occur. With implementation of mitigation measures discussed in **Sections 6.2** below and Section 4.0 of the Final EIS, the potential adverse effects would be further reduced. Impacts to neighboring groundwater wells would be less than significant.

Groundwater Quality – The construction of Alternative A1 would include the routine use of potentially hazardous construction materials that could enter the stormwater if spilled, and then

percolate to shallow groundwater. This could cause a potentially significant impact. However, after implementation of mitigation measures discussed in **Sections 6.1** below and Section 4.0 of the Final EIS, these potential impacts to groundwater quality from construction would be less than significant.

During the operation of Alternative A1, runoff from the impervious surfaces on the Mettler Site, could potentially flush impervious surface accumulate, such as trash, debris, oil, sediment, and grease, into the stormwater runoff. Additionally, fertilizers used in landscaped areas could also enter stormwater if over applied. However, several project design features, including stormwater detention basins to remove suspended solids and vegetated swales that provide filtration for stormwater via capturing sediment and pollutants, would ensure adequately filtration before the stormwater percolates to the groundwater table. Thus, the impacts to groundwater quality from stormwater runoff would be less than significant.

In addition to the above-mentioned operation issue, effluent from the wastewater treatment facilities could cause contamination of the groundwater and thus influence groundwater quality for on-site and off-site supplies when discharged to the on-site percolation ponds if not treated sufficiently. This would be a significant impact. However, after implementation of the mitigation measures discussed in **Sections 6.2** below and Section 4.0 of the Final EIS, the potential adverse effects would be reduced to less than significant. Therefore, discharge of treated effluent would not adversely impact groundwater quality and potable water would not be exposed to treated effluent in the percolation ponds during transmission. Additionally, percolation through the soil would provide additional filtration. Impacts to groundwater quality from treated effluent would be less than significant.

Cumulative Impacts: Surface Water and Flooding – Cumulative effects to water resources may occur as the result of potential future buildout of the Mettler Site and regional development projects. Examples of potential effects include increased sedimentation, pollution, and stormwater flows. Changes in runoff characteristics due to the increase in impervious surfaces could increase drainage volumes, increase stream velocities, increase peak discharges, shorten the time to peak flows, and lessen groundwater contributions to stream base-flows during non-precipitation periods. Construction and implementation of the other proposed development projects may affect water quality. However, Alternative A1 would include erosion control measures in compliance with the NPDES permit program, and the stormwater detention basin would retain the overall required volume, including for potential future development. The federal and state water resources regulations would require that other cumulative projects would have similar precautionary features incorporated into their design. Therefore, implementation of Alternative A1 in combination with other cumulative development would not result in significant cumulative effects to surface water and flooding. Cumulative impacts from surface water and flooding would be less than significant.

Cumulative Impacts: Surface Water Quality – Concurrent construction of Alternative A1 and the other cumulative projects could result in cumulative effects to water quality. Construction activities could result in erosion and sediment discharge to surface waters, and construction equipment could leak potential hazardous materials into the environment. To mitigate potential adverse effects, approved developments would be required to implement erosion control measures and construction BMPs via a site-specific SWPPP in compliance with the State of California General Permit for

Discharges of Storm Water Associated with Construction Activity or compliance with USEPA stormwater regulations. With the implementation of Mitigation Measures specified in **Section 6.1** and Section 4.0 of the Final EIS, Alternative A1 in combination with other development projects in the region would not result in adverse cumulative effects to surface water quality. Cumulative impacts to surface water quality would be less than significant.

Cumulative Impacts: Groundwater Supply – Buildout of Alternative A1 with other cumulative projects could result in cumulative effects to groundwater if the total water demand of approved projects exceeds the recharge of the groundwater basin. Future demands on the Kern County Subbasin of the San Joaquin Valley Groundwater Basin, the County's primary water source, from cumulative development would be controlled by County land use authorities, Senate Bill 1168, which requires local agencies to create groundwater management plans, and Assembly Bill 1739, which allows the state to intervene if local groups do not adequately manage groundwater resources. Based on the short-term availability of groundwater for existing uses and planned development and the requirement for future groundwater management activities, cumulative impacts to groundwater would not be substantial. Cumulative impacts to groundwater supply would be less than significant.

Cumulative Impacts: Groundwater Quality – Wastewater generated by Alternative A1 would be treated at an on-site wastewater treatment plant (WWTP), and the WWTP would have sufficient capacity to meet the wastewater demands of Alternative A1, including the potential future development. To meet the USEPA criteria, the WWTP would provide tertiary-treated water for reuse or percolation. Reclaimed water from the on-site WWTP would be utilized for casino resort toilet flushing and landscape irrigation. Remaining treated effluent would be discharged to the on-site percolation ponds. Discharge of treated effluent would not adversely impact groundwater quality due to the high level of treatment and percolation through soils would act as additional filtration. Implementation of Mitigation Measures specified in **Section 6.1** and **6.2** and in Section 4.0 of the Final EIS would prevent groundwater pollution during construction and reduce potential impacts to groundwater quality from construction to a less-than-significant level. Therefore, Alternative A1 would not result in significant adverse cumulative effects to groundwater quality. Cumulative impacts to groundwater quality would be less than significant.

5.1.3 Air Quality (Final EIS § 3.4)

Construction Emissions – Effects on air quality during construction were evaluated by estimating the amount of criteria pollutants that would be emitted over the duration of the construction period for each phase of construction that is applicable. Implementation of construction BMPs is expected to control the production of fugitive dust (PM10 and PM2.5) and to reduce emissions of criteria pollutants and DPM. Emissions of individual criteria pollutants from the construction of Alternative A1 would not exceed applicable de minimis levels; therefore, Alternative A1 would not result in significant adverse effects associated with the regional air quality environment. No mitigation is warranted. Impacts to air quality from construction emissions would be less than significant.

Operational Emissions – Buildout of Alternative A1 would result in the generation of mobile emissions as well as area and energy criteria pollutant emissions from the combustion of natural gas from equipment on the Mettler Site. Emissions estimates assumed the implementation of the BMPs

described in Section 2.0 of the Final EIS, but emissions of ROG and NO_x from the operation of Alternative A1 would exceed applicable thresholds. This would be a significant adverse impact. Implementation of mitigation measures discussed in **Sections 6.3** below and Section 4.0 of the Final EIS would require the purchase of credits to fully offset ROG and NO_x emissions. After mitigation, impacts to the regional air quality levels would be less than significant.

Emissions of individual criteria pollutants from stationary sources would exceed the Tribal NSR threshold of 2 tons per year (tpy) for ROG and 5 tpy for NO_x; therefore, a Tribal NSR permit would be required. The Tribe is therefore required to apply for and obtain a Tribal NSR permit in accordance with the USEPA guidelines and Tribal NSR regulations. Because project-related direct and indirect emissions occur in a nonattainment area and project-related operational emissions would exceed levels for the ozone precursors ROG and NO_x, a general conformity determination for ozone is required and has been completed.

Cumulative Impacts: Operation Emissions/General Conformity Review – Operation of Alternative A1 would result in the generation of mobile emissions from patron, employee, delivery vehicles, and stationary source emissions from the combustion of natural gas in boilers and other equipment. In the cumulative year 2040, operational emissions are expected to decrease due to improved fuel efficiency technology and stricter federal and state regulations.

Past, present, and future development projects contribute to a regional air quality conditions on a cumulative basis; therefore, by its very nature, air pollution is largely a cumulative impact. If individual emissions from a project contribute toward exceedance of the NAAQS, then the cumulative impact on air quality would be significant. In developing attainment designations for criteria pollutants, the USEPA considers the regions past, present, and future emission levels. The Mettler Site and the near vicinity is in nonattainment for ozone and PM_{2.5}. Because project emissions are above the thresholds for these pollutants, Alternative A1 has the potential to contribute towards significant cumulative impacts to air quality. Furthermore, Alternative A1 has the potential to induce growth within the Mettler Site that would result in additional emissions. The cumulative air quality effects of induced growth within the site in combination with emissions resulting from Alternative A1 is addressed within the Final General Conformity Determination. With implementation of the mitigation measures discussed in **Sections 6.3** below and Section 4.0 of the Final EIS, impacts to cumulative air quality would be less than significant.

Cumulative Impacts: Carbon Monoxide Hot Spot Analysis – Hot Spot Analysis is conducted on intersections that, after mitigation, would have a level of service (LOS) of D, E, or F (40 C.F.R. § 93.123). After the implementation of recommended mitigation for the project alternatives, no intersection would have an LOS or an increase in delay in the cumulative year 2040 that would warrant a Hot Spot Analysis. No significant cumulative impacts would occur, and no further analysis is needed.

Cumulative Impacts: Climate Change – Development of Alternative A1 would result in an increase in greenhouse gas (GHG) emissions related to construction, mobile sources, stationary sources, area sources, and indirect sources related to electrical power generation. Total GHG emissions are estimated to be approximately 118,000 metric tons (MT) of CO₂e per year for Alternative A1, which the GHG emissions resulting from Alternative A1 is primarily indirect. BMPs have been

provided in Section 2.0 of the Final EIS to reduce project related GHG emissions. Operational BMPs would reduce indirect GHG emissions from a number of sources, including electricity use, water and wastewater transport, and waste transport (*e.g.* installation of energy efficient lighting). Operational BMPs would also reduce indirect mobile GHG emissions by requiring adequate ingress and egress to minimize vehicle idling and preferential parking for vanpools and carpools to reduce project-related trips.

Of the approximately 126 strategies and measures identified in the State Climate Change Scoping Plan required by AB 32 that would achieve a state-wide reduction in GHG emissions, only three would apply to Alternative A1. Alternative A1 would comply with applicable emission reduction strategies of the State. Therefore, with the implementation of BMPs, Alternative A1 would not result in a significant adverse cumulative impact associated with climate change. Cumulative impacts to climate change would be less than significant.

The effect of climate change on the alternatives is also considered in this EIS. Average temperatures in the County could increase. This would result in projected extreme heat days, increased wildfire risk, and increased chances of extreme weather conditions. The intensity of these effects is uncertain and will depend on future GHG emissions worldwide. However, the characteristics of Alternative A1 are not unique or especially vulnerable to the impacts from climate change.

5.1.4 Biological Resources (Final EIS § 3.5)

Habitats – No U.S. Fish and Wildlife Services (USFWS) designated critical habitat occurs within or near the Mettler Site, and the development of Alternative A1 would only directly affect habitat types within the Mettler Site that are not sensitive. A portion of the drainage ditch along the western perimeter would also be impacted, but this ditch has low habitat value and does not meet the criteria to be considered as U.S. Army Corps of Engineers (USACE) jurisdictional waters. The Mettler Site does not provide habitat connectivity, corridors, or nursery habitat. The stormwater facilities under Alternative A1 would minimize indirect effects to habitat by ensuring that the stormwater runoff generated from parking lots and rooftops is captured and infiltrated into native soils in percolation basins. Effluent produced by the proposed WWTP would be tertiary treated before discharge. Impacts to habitat would be less than significant.

Special-Status Species – Three federally listed wildlife species have the potential to occur on the Mettler Site: San Joaquin Kit Fox, blunt-nosed leopard lizard, and Tipton kangaroo rat. The only state special-status species with the potential to occur on-site is the burrowing owl. In the event that any of these species exist on the Mettler Site, development could result in take of that species. With implementation of mitigation measures specified in **Section 6.4** and Section 4.0 of the Final EIS, impacts to special status species would be less than significant.

Migratory Birds and Other Birds of Prey – Alternative A1 could adversely affect active migratory bird nests if vegetation removal and noise-producing activities associated with construction were to occur during the nesting season. Increased lighting could increase the collisions of birds with structures and cause a disorientation effect on avian species. With implementation of mitigation

measures specified in **Section 6.4** and Section 4.0 of the Final EIS, impacts to migratory birds and other birds of prey would be less than significant.

Wetlands and Waters of the U.S. – On-site aquatic drainage ditches and agricultural ponds do not meet standards of Waters of the U.S., and, therefore, do not require protecting or permitting if they are altered or removed. With mitigation measures specified in **Section 6.4** and Section 4.0 of the Final EIS, impacts to wetlands and waters of the U.S. would be less than significant.

Cumulative Impacts: Habitats – The Mettler Site does not contain designated critical habitat. Cumulative habitat disturbance from other projects in the vicinity would occur primarily in areas that are not sensitive biological communities. Cumulative impacts to habitats would be less than significant.

Cumulative Impacts: Federally Listed Species – Federally listed wildlife species have minimal potential to occur on the Mettler Site. Mitigation measures specified in **Section 6.4** and Section 4.0 of the Final EIS would avoid or minimize impacts to federally listed species. Similarly, all other projects in the region are required to comply with the ESA by avoiding or minimizing effects to protected species. With implementation of mitigation measures specified in **Section 6.4** and Section 4.0 of the Final EIS, cumulative impacts to federally listed species would be less than significant.

Cumulative Impacts: Migratory Birds and Other Birds of Prey – Cumulative disturbance and nighttime lighting due to Alternative A1 could incrementally affect migratory birds. Mitigation measures specified in **Section 6.4** and Section 4.0 of the Final EIS would avoid or minimize impacts to migratory bird species. Additionally, BMPs provided in Section 2.0 of the Final EIS would minimize significant effects to migratory birds. The development of other reasonably foreseeable projects in the area would also be subject to the Migratory Bird Treaty Act. With implementation of mitigation measures specified in **Section 6.4** and Section 4.0 of the Final EIS, cumulative impacts to nesting and migratory birds would be less than significant.

Cumulative Impacts: Wetlands and Waters of the U.S. – Wetlands and Waters of the U.S. must either be avoided or mitigated via the Section 404 permitting process under the Clean Water Act. This is the case for the project alternatives and all other cumulative projects in the vicinity. Indirect effects to wetlands and waterways therefore would be avoided, or project features would be implemented to minimize impacts and provide buffers to wetlands, control stormwater and wastewater discharges, and protect the quality of runoff water through conditions of the NPDES permit. With mitigation measures specified in **Section 6.4** of this ROD and Section 4.0 of the Final EIS, cumulative impacts to wetlands and Waters of the U.S. would be less than significant.

5.1.5 Cultural and Paleontological Resources (Final EIS § 3.6)

Buried Resources and Paleontological Resources – No known historic properties or paleontological resources have been identified within the Mettler Site, and the State Historic Preservation Officer has concurred that no National Register of Historic Properties-eligible cultural resources are on-site. Under Alternative A1, the potential exists for previously unknown archaeological or paleontological resources to be encountered during construction activities. With implementation of mitigation :

measures described in **Section 6.5** of this ROD and Section 4.0 of the Final EIS, impacts to cultural resources would be less than significant.

Cumulative Impacts – Under Alternative A1, the potential exists for previously unknown archaeological or paleontological resources to be encountered during construction activities. With implementation of mitigation measures described in **Section 6.5** of this ROD and Section 4.0 of the Final EIS, impacts to cultural resources would be less than significant. Other approved projects would be required to follow federal, state, and local regulations regarding cultural resources and inadvertent discoveries of cultural resource, requiring mitigation or avoidance of impacts to cultural resources. Cumulative impacts to cultural and paleontological resources would be less than significant.

5.1.6 Socioeconomic Conditions and Environmental Justice (Final EIS § 3.7)

Economic Effects – Construction of Alternative A1 and A2 would generate substantial output to a variety of businesses in the County in the form of jobs, purchases of goods and services, and through positive fiscal effects. Output received by area businesses would in turn increase their spending and labor demand, thereby further stimulating the local economy. This would be considered a beneficial impact.

Substitution Effects – The substitution effect is dependent on many factors, such as specific location and other variables. The substitution effects would be greater for those gaming facilities that are closest to the proposed gaming project and most similar in terms of the types of customers that would visit the venues. Estimated substitution effects are anticipated to diminish after the first year of operation of Alternative A1 and would not cause significant substitution effects. While Alternative A1 would compete with other casinos, competition alone does not constitute an impact, and therefore Alternative A1 would have less-than-significant gaming market substitution effects. Furthermore, Alternative A1 rather would attract additional patrons to the local area and would not overly compete with the local businesses. Therefore, Alternative A1 is anticipated to have a positive impact on local businesses.

Fiscal Effects – Alternative A1 would result in a variety of fiscal impacts. The Tribe would not pay property taxes on the Mettler Site. Alternative A1 would also increase demand for public services, resulting in increased costs for local governments to provide these services. Tax revenues would be generated for the County from activities including secondary economic activity generated by Alternative A1. The taxes on secondary economic activity include corporate profits tax, income tax, sales tax, excise tax, property tax, and personal non-taxes, such as motor vehicle licensing fees, fishing/hunting license fees, other fees, and fines. Overall, Alternative A1 would result in a beneficial impact to the local economy in the County and State.

Employment – Construction and operation of Alternative A1 would generate substantial temporary and ongoing employment opportunities and wages that would be primarily filled by the available labor force in the region. The County is anticipated to be able to accommodate the increased demand for labor during the operation of Alternative A1. This would result in employment and wages for persons previously unemployed and would contribute to the alleviation of poverty among

lower income households. Therefore, Alternative A1 would result in a significant beneficial effect to employment.

Housing – It is possible that some new employees would move to the County, but most job relocation is not likely to require employees to relocate their housing. Furthermore, there are more than enough vacant homes to support potential housing impacts under Alternative A1. Impacts to the housing market would be less than significant.

Social Effects – Problem gambling prevalence is not anticipated to increase as a result of the proposed casino-resort given the availability of casino gaming already present throughout the area and State and other readily accessible forms of gambling. Consequently, the potential impacts to problem gambling as a result of Alternative A1 would be less than significant. Despite this, the IGA provides for a recurring payment towards a gambling treatment program, and BMPs in Section 2.0 of the Final EIS would further reduce the likelihood of problem gambling at the casino resort.

Under Alternative A1, criminal incidents would increase in the vicinity of the Mettler Site, which would be expected with a large development of any type. Specifically, police calls for service in the County for Alternative A1 would marginally increase, but such an increase constitutes a less-than-significant effect on law enforcement services and crime. Additionally, the gains in tax revenues that would accrue to the County as a result of increased economic activity generated by Alternative A1 would likely offset any increase in expenditures for the provision of law enforcement. Also, the implementation of the IGA would further reduce the effects of Alternative A1 on law enforcement services and crime. Impacts from social effects would be less than significant.

Community Effects – Employees that relocate to the project area in order to accept a position at the proposed casino resort may increase the number of kindergarten through 12th grade students enrolled in the area. However, it is expected that these effects would be negligible. Additionally, given that any anticipated new students would be distributed across all grade levels, any new students that may enroll in area school districts as a result of the project would be considered a nominal impact. Furthermore, the schools would likely collect additional tax revenue from the families of new students and would use these taxes to hire additional teachers to meet additional demand if necessary. Impacts to schools would be less than significant.

Effects to area libraries and parks could occur if the employees or patrons of Alternative A1 significantly increase the demand on these resources. However, it is expected that these effects would be negligible. Additionally, due to the location of Alternative A1, it is not anticipated that patrons would frequent local libraries or parks. Impacts to libraries and parks would be less than significant.

Effects to the Tejon Indian Tribe – Alternative A1 would benefit the Tribe in several ways. It would generate new income to fund the operation of the Tribal government. This income would have a beneficial effect by funding programs that serve Tribal members. Furthermore, it would support tribal self-sufficiency and self-determination, and Tribal members would have access to new jobs that are associated with Alternative A1. The employment generated would not only allow tribal members to enjoy a better standard of living, but it would also provide an opportunity for

tribal members to reduce or end their dependence on government funding. Therefore, Alternative A1 would have a positive impact on the Tribe.

Environmental Justice – The Mettler Site has seven census tracts that contain a substantial minority community, but no low-income communities. The project would inherently impact members of the Tribe, and the Tribe is considered a minority community that would be affected by the alternatives. Effects to the Tribe are positive in nature, and the effects to other minority communities would also be positive due to the increased economic development and opportunity for employment. Other effects on minority communities, such as traffic and air quality, would be neutral after the implementation of mitigation measures specified in **Section 6.0** of this ROD and Section 4.0 of the Final EIS. Impacts to minority or low-income communities would be less than significant.

Cumulative Impacts – Alternative A1 would introduce new economic activity in the County and in the City of Bakersfield and would beneficially affect the region on several different socioeconomic levels. When considered in the context of the General Plan for the City of Bakersfield, Alternative A1 may contribute towards cumulative socioeconomic effects including impacts to the local labor market, housing availability, increased costs due to problem gambling, and impacts to local government. However, these cumulative effects would not be significant due to the existing economic and housing capacity in the region. Planning documents for the County and the City of Bakersfield will continue to designate land uses for businesses, industry, and housing as well as plan public services for anticipated growth in the region. Therefore, Alternative A1 would not contribute to significant adverse cumulative socioeconomic effects. Cumulative socioeconomic impacts would not be significant.

5.1.7 Transportation/Circulation (Final EIS § 3.8)

Construction Traffic – Impacts related to construction traffic would be temporary in nature and would cease upon completion of the project. All construction traffic would utilize I-5, SR-99, and SR-166 as a regional route to access S. Sabodan Street. With SR-99 and SR-166 are currently operating well above the acceptable LOS, the short-term addition of minimal construction traffic would not result in significant adverse impacts. I-5 is also primarily operating well above the acceptable LOS, and construction traffic would avoid interaction with the segment of I-5 between SR-99 and S. Wheeler Ridge Road. This would result in no adverse impact to this road segment. South Sabodan Street is the only road that provides access to the Mettler Highway Site. Major improvements to this roadway are included in the project plans, and, therefore, the addition of traffic associated with construction of Alternative A1 would not result in significant adverse impacts. With implementation of the BMPs described in Section 2.2.2 of the Final EIS, impacts to transportation/circulation would be less than significant.

Operation Traffic – The Mettler Site is well connected (accessed) from both I-5 and SR-99 with little to no local traffic, and most of the traffic to the site is regional in nature. With implementation of mitigation measures specified in **Section 6.7** of this ROD and Section 4.0 of the Final EIS, impacts to the operation of site access facilities would be less than significant.

Under Alternative A1, all intersections and roadway segments would operate at an acceptable LOS of D or better in year 2023 with implementation of the mitigation measures specified in **Section 6.6**

of this ROD and Section 4.0 of the Final EIS. Therefore, Alternative A1 would have no significant adverse impacts on traffic. Furthermore, Alternative A1 would not result in a decrease in speed of 1 mph on the freeway mainline. Therefore, impacts to on-ramps or off-ramps would be less than significant in opening year 2023.

Road Conditions – Operation of Alternative A1 would not generate a large volume of truck traffic that would increase the rate of roadway deterioration. Furthermore, trucks and other vehicles driving to and from the Mettler Site would contribute to County roadway maintenance funds when purchasing gasoline within the County, similar to other developments in the region. As needed, the County would perform maintenance activities on roadways affected by trips to and from the Mettler Site as is typical for all roadways within the County. Therefore, the need for ongoing roadway maintenance would not be considered a significant impact that would warrant mitigation.

Transit, Bicycle, and Pedestrian Facilities – Alternative A1 would have no impact on transit, bicycle, or pedestrian facilities because there are not currently any pedestrian or bicycle facilities in the vicinity of the Mettler Site. Additionally, there are no plans regarding the alteration of the current local transit services.

Cumulative Year 2040 – Under Alternative A1, all intersections and segments would operate at an acceptable LOS of D or better in year 2040 with implementation of the mitigation measures specified in **Section 6.7** of this ROD and Section 4.0 of the Final EIS. Cumulative impacts on traffic would be less than significant.

5.1.8 Land Use (Final EIS § 3.9)

Land Use Plan – The County General Plan designates the Mettler Site as limited agriculture. Although the development proposed under Alternative A1 would not be consistent with the land use designation of the Mettler Site, it is generally compatible with the surrounding land uses along the I-5 corridor. The area around the Mettler Site includes rest stops along I-5, the Outlets at Tejon, and the proposed Grapevine Specific and Community Plan. Recent development patterns show a regional shift to a more commercially and residentially developed area, particularly along I-5 and SR-99. Thus, the inconsistency of Alternative A with existing zoning would not result in significant adverse land use effects. This impact is considered less than significant. The Mettler Site is located within the Edwards Air Force Base area of influence. However, the proposed developments under Alternative A1 would not exceed 500 feet in height; therefore, a military review is not required because the developments would not create significant military mission impacts due to height (Kern County, 2017), and no impact would occur. Furthermore, the Mettler Site is not within any Natural Community Conservation Plans or any Habitat Conservation Plans; therefore, no impact would occur. Impacts to land use would be less than significant.

Land Use Compatibility – Alternative A1 would result in approximately 320.04 acres of land being transferred from fee to federal trust, thereby removing the property from County land use jurisdiction. Furthermore, Alternative A1 would include development that would replace existing agricultural land use and would differ from adjacent land uses as the property is currently zoned for agriculture. However, Alternative A1 would be implemented in a manner consistent with most of the policies of the County General Plan. Furthermore, it would not physically disrupt neighboring

land uses, would not prohibit access to neighboring parcels, and would not otherwise significantly conflict with neighboring land uses. However, agricultural operations on adjacent properties to the east, west, and south of the Mettler Site could result in land use compatibility impacts with Alternative A1, such as odor, dust, and noise from the operation of farm equipment and the use of pesticides. However, periodic odor, dust, and noise represent a potentially minor annoyance for on-site customers. Therefore, this impact would be less than significant.

Agriculture – Alternative A1 would result in the direct conversion of approximately 100 acres of farmland on the Mettler Site. In accordance with the Farmland Protection Policy Act (FPPA), a Farmland Conversion Impact Rating (FCIR) form was completed for Alternative A1 and submitted to the Natural Resources Conservation Service (NRCS) on May 10, 2019. The proposed converted farmland received a combined land evaluation and site assessment score of 189, indicating the potential for adverse effects to farmland resources and a need to consider alternative sites. Per FPPA guidelines, if a site receives an FCIR combined score of 160 or more, alternative sites should be considered. Although the proposed conversion exceeds an FCIR score of 160, the score of 189 is less than the other alternatives considered. Furthermore, the area of conversion is relatively small, approximately 0.004 percent of the farmland in the County, and the County General Plan has no specific policies against the conversion of farmland. Therefore, Alternative A1 is consistent with FPPA. Impacts to agricultural resources would be less than significant.

Cumulative Impacts – Future planned development projects within the County and the City of Bakersfield would be consistent with general plans, applicable specific plans, zoning ordinances, and redevelopment plans. This would, thus, prevent disorderly growth or incompatible land uses. While Alternative A1 would not be subject to local land use policies after it is acquired in trust, the development would occur in a manner that is generally consistent with County building codes, and it would not disrupt neighboring land uses, prohibit access to neighboring parcels, or otherwise conflict with neighboring land uses. Cumulative impacts to land use would be less than significant.

Although the FPPA is intended to minimize the impact federal programs have on the unnecessary and irreversible conversion of farmland to non-agricultural uses, the Mettler Site is not under Williamson Act contracts. Furthermore, while its FCIR score is higher than the FPPA threshold, it was determined that the Mettler Site FCIR had fewer total points than other considered alternatives. Cumulative impacts to agricultural lands would be less than significant.

5.1.9 Public Services (Final EIS § 3.10)

Water Supply and Wastewater Service – Alternative A1 would include the development of an on-site water supply system using on-site groundwater wells. Furthermore, recycled water from the proposed on-site WWTP would be used for indoor non-potable uses and for landscape irrigation, thus, reducing potable water demand (Appendix G of the Final EIS). No municipal water or wastewater systems would be affected by Alternative A1. Impacts to water supply and wastewater service would be less than significant.

Solid Waste Service – Construction of Alternative A1 would result in a temporary increase in solid waste generation. Construction waste that is not recycled would be collected by Mountainside Disposal, or a similar company, and disposed of at the Bena Landfill or other permitted landfills

that accept construction and demolition material. This impact would be temporary and not significant given that the landfill has an adequate capacity to accommodate the temporary increase in waste generated by the construction of Alternative A1. Furthermore, BMPs presented in Section 2.0 of the Final EIS would further reduce the amount of construction and demolition materials disposed of at the landfill. Impacts to solid waste service would be less than significant.

Waste generated under Alternative A1 during operations would be appropriately hauled to facilities. It is estimated that Alternative A1 would generate approximately 3.4 tons per day or 1,241 tpy of solid waste. Receptacles for trash and recycling would be placed strategically throughout the casino resort and associated facilities to discourage littering. Landscaping and maintenance staff would also pick up trash at the property. Waste that cannot be recycled would be disposed of at the Bena Landfill or another permitted facility. The Bena Landfill has sufficient capacity to maintain operations through 2046. The solid waste streams for Alternative A1 would represent approximately 0.076 percent of the daily and annual capacity of the Bena Landfill. In addition, the on-site WWTP facility would produce approximately 100 to 150 gpd of biosolids (sludge) in addition to solids (e.g., debris). This quantity of biosolids would equate to a single disposal truck trip every two weeks. Both the biosolids and solids would be transported to the Bena Landfill for disposal. Finally, the treatment of groundwater to meet potable standards would produce brine waste from the reverse osmosis treatment process. Approximately 2,800 gpd of brine would be produced by operation of Alternative A1. The brine waste produced would be evaporated on-site and/or hauled to the Joint Water Pollution Control Plant in Carson, California. No impact would occur because brine waste would be properly disposed of. Implementation of BMPs presented in Section 2.0 of the Final EIS would further reduce the amount of solid waste disposed of in landfills. Impacts to waste services would be less than significant.

Law Enforcement – While there is no definitive link between casinos and crime, it is anticipated that the increased number of people that Alternative A1 would bring to the Mettler Site has the potential to result in an increase in the number of service calls to local law enforcement. An increase in service demands to the California Highway Patrol may result due to increased traffic.

The IGA between the Tribe and County include provisions for law enforcement services including an on-site fire/sheriff station. The BMPs described for law enforcement services in Section 2.0 of the Final EIS would ensure further protection on-site for the Proposed Project. Furthermore, operation of Alternative A1 would directly contribute approximately \$5.4 million to the State government on an annual basis and indirect and induced effects from ongoing operations from Alternative A1 would generate an estimated \$12.1 million in tax revenue to State government. Impacts to law enforcement would be less than significant.

Fire Protection and Emergency Medical Services – Construction could introduce potential sources of fire to the Mettler Site. This risk would be similar to those found at other construction sites. The BMPs presented in Section 2.0 of the Final EIS would ensure impacts are less than significant.

During operations, the Proposed Project would create additional risks from fires and add to firefighting responsibilities in the area. However, Alternative A1 would include an on-site fire station that would meet the needs of the Mettler Site as well as the surrounding area. In addition, timely detection of fires by employees, early intervention and firebreaks created by impervious

surfaces (e.g., parking lots) would reduce the risk of fires. Finally, the casino resort structure would be constructed to meet CBCs as well as County fire codes, and adequate fire flows would be provided. Due to these features and the on-site fire station, impacts to public fire protection services would be less than significant.

Due to the number of patrons and employees at the proposed casino resort facility, demands on emergency services would be expected to increase. Per the IGA, first responder and ambulance services from Hall Ambulance Service, Inc. would serve the Proposed Project. Furthermore, there are two medical centers in the vicinity of the Mettler Site that provide 24-hour emergency services. Impacts on emergency medical services would be less than significant.

Energy – Construction on the Mettler Site could damage underground utilities and lead to outages and/or serious injury. This would result in an adverse effect. With implementation of BMPs presented in Section 2.0 of the Final EIS, impacts to energy would be less than significant.

During the operation of the facilities, energy usage would be less than significant as all buildings would be consistent with CBCs, specifically the California Energy Code. Pacific Gas & Electric (PG&E) serves the Mettler Site for electricity services. The SoCalGas serves for natural gas (if Alternative A1 requires natural gas). The mitigation measures specified in **Section 6.7** in this ROD and Section 4.0 of the Final EIS would ensure that no significant financial impacts would occur as a result of the relocation of existing PG&E facilities or any connection fees occurred by SoCalGas to accommodate the operation of Alternative A1. Impacts to energy usage would be less than significant.

Schools, Libraries, and Parks – The majority of employees for Alternative A1 are anticipated to come from the local labor market. Employees that relocate to the project area to accept a position at the proposed casino resort may increase the number of K - 12 grade students enrolled in local school districts by approximately 138 to 203 new students. However, these effects would be negligible, and the schools would collect additional funding from the State for each student. Additionally, given that any new students would be distributed across all grade levels, students that may enroll as a result would have a nominal impact on the school district. Therefore, increased enrollment would have a negligible effect on education services at existing levels. Similarly, the parks and libraries in the region are adequate to accommodate the nominal increase in population caused by employees relocating to the region. Impacts to school districts, libraries, and parks would be less than significant.

Cumulative Impacts – Alternative A1 would receive domestic water supply from the development of on-site groundwater wells and an on-site wastewater utility for treatment of all wastewater generated. Therefore, no cumulative adverse effect on municipal water supply or wastewater systems would occur. Cumulative impacts to the municipal water and wastewater system would be less than significant.

Projected solid waste generation for Alternative A1 would not significantly decrease the life expectancy of the disposal site and landfills in addition to cumulative growth in the region. Furthermore, brine waste produced from groundwater treatment on the Mettler Site would be limited in quantity, and the brine would be properly disposed of. Furthermore, cumulative projects

in the area are unlikely to produce significant quantities of brine waste. Therefore, no significant cumulative impact would occur as a result brine waste or solid waste. Impacts from brine waste or solid waste would be less than significant.

Per the IGA, a new fire and sheriff station would be adequate to serve the Mettler Site as well as the surrounding areas. The station would be adequately staffed to serve the region. Furthermore, emergency medical and emergency medical transportation costs are paid primarily by the individual requiring service. Accordingly, cumulative impacts on emergency medical services or public law enforcement and fire services would be less than significant.

The Tribe would be responsible for paying development or user fees to receive additional electrical and natural gas services for future development. As such, the Tribe would pay for upgrades needed to avoid affecting the service of existing customers and any infrastructure necessary to provide service for Alternative A1. Cumulative impacts A to energy and telecommunications providers would be less than significant.

Alternative A1 could cause a small population increase in the County that would add users of schools, libraries, and parks, and this would add to the new demands created by other cumulative projects. However, the IGA would compensate local governments for any impacts, and, thus, schools, libraries, and parks. Therefore, cumulative impacts on schools, libraries, and parks would be less than significant.

5.1.10 Noise (Final EIS § 3.11)

Construction Noise – Grading and construction activities associated with Alternative A1 would be intermittent and temporary in nature. Due to sparse trees and man-made and geographical barriers, an attenuation factor of 6 dBA Leq per doubling of distance was used in the analysis. The maximum noise level during construction without impact equipment (pile drivers) is approximately 89 dBA Leq at 100 feet. The noise level at the nearest sensitive noise receptors are approximately 70.4 dBA Leq, which is less than the FHWA threshold of 72 dBA Leq. BMPs provided in Section 2.0 of the Final EIS would reduce further the potential for stationary construction noise effects. Construction-related material haul trips and worker trips have the potential to raise ambient noise levels along local routes. Construction traffic and haul trips would access the Mettler Site via SR-166 to S. Sabodan Street. Although construction trips would generally occur outside of the peak hour, the worst-case scenario assumes that all construction trips occur during the AM peak traffic hour. Construction trips would increase traffic volumes on roads near sensitive receptors by approximately 1,188 vehicles during the AM peak hour. This would result in an increase in the ambient noise level at residential receptors of approximately 0.10 dBA Leq, and the existing ambient noise level in the vicinity of sensitive noise receptors is approximately 51.4 dBA Leq at the Mettler Site. The ambient noise level due to the increase in vehicles would be approximately 51.5 dBA Leq, which is less than the FHWA noise thresholds for residential of 72 dBA Leq. Therefore, impacts from increased construction traffic would be less than significant.

Vibration impacts from construction generally occur within 500 feet of a project site, and the most vibration-prone construction methods (such as pile driving) are not anticipated to be necessary for any alternative. The nearest sensitive receptor, a residence, at the Mettler Site is located

approximately 850 feet from the construction site. Impacts from vibration would be less than significant.

Operational Noise – During operations under Alternative A1, it is not anticipated that average vehicle speeds or the mix of trucks in the traffic would change in the vicinity of the Mettler Site, but traffic volumes from project patrons and employees would increase for the following roads:

- **State Route 99**: The existing ambient noise level in the vicinity of SR-99 was measured at 51.4 dBA Leq. Alternative A1 would not double the existing traffic volume on SR-99, but would result in a 0.015 dBA Leq increase in the ambient noise level. The ambient noise level would increase to a maximum of 51.42 dBA Leq, an imperceptible increase that is less than the NAC of 67 dBA Leq for residential sensitive receptors.
- **State Route 166**: Due to the smaller traffic volume as compared to SR-99, the ambient noise level would be negligible compared to SR-99.
- **S. Sabodan Street**: S. Sabodan Street has an ambient noise level of 48.4 dBA. Due to the lower traffic volume compared to SR-99, the ambient noise would be negligible compared to SR-99.

Impacts on ambient noise in relation to traffic increases would be less than significant.

Commercial uses on the Mettler Site could generate noise due to the operation of roof-mounted HVAC equipment in addition to noise from loading docks and surface parking lots. However, given the distance to the nearest sensitive noise receptor, a residence located approximately 850 feet away and the ambient noise associated with the Mettler Site, 63.5 dBA (Table 3.11-2), noise from roof-mounted HVAC equipment and the proposed loading docks would not be audible. Therefore, impacts from commercial uses on ambient noise would be less than significant.

Under Alternative A1, paved surface parking lot noise increases would be mainly due to slow moving and idling vehicles, opening and closing doors, and patron conversation, but is generally dominated by slow moving vehicles. Therefore, the ambient noise level in parking structures and parking lots is approximately 60 dBA, which is less than the NAC of 67 dBA. Impacts from parking structure and lots on ambient noise would be less than significant.

Cumulative Impacts – Noise and vibration from HVAC systems, parking structures and lots, and deliveries would be similar as in the buildout year, but cumulative year 2040 baseline traffic volumes and project traffic volumes would increase. Under Alternative A1, the baseline traffic and project would have approximately the same increase between the buildout year (2023) and the cumulative year (2040). Since the increase in ambient noise level is a ratio of the increase in project traffic and existing 2040 traffic, the ambient traffic noise levels would not increase beyond the noise threshold of 67 dBA. Cumulative impacts from Traffic-related noise would be less than significant in the buildout year and, therefore, would be less than significant in the cumulative year 2040.

5.1.11 Hazardous Materials (Final EIS § 3.12)

Construction – Undiscovered contaminated soil could be present on the Mettler Site, but this is not anticipated because there are no records of hazardous material incidents at the site. The Mettler Site

has a long history of agricultural use and there could be pesticide residues in the soil, such as organochlorinated pesticides. However, there is no indication of improper use of these agricultural chemicals. In the unlikely case that construction personnel do encounter contaminated soil of any type prior to or during earth-moving activities, a significant hazardous material impact would exist. However, the BMPs specified in Section 2.0 of the Final EIS would minimize the possible hazards associated with existing contamination, including organochlorinated pesticides if present. With these BMPs, impacts from undiscovered contaminated soil would be less than significant.

C. immitis, which causes Valley Fever, could inhabit the Mettler Site and pose a significant adverse effect when construction personnel disturb the soil. Furthermore, wind could transport *C. immitis* spores to off-site areas and expose nearby people and animals. If spore inhalation occurred, it could lead to an infection. However, because the Mettler Site is actively used for agricultural purposes, the probability of *C. immitis* on the site is reduced due to the decreased likelihood of encountering *C. immitis* on disturbed soils. Additionally, *C. immitis* spores could also potentially be introduced from offsite sources if offsite fill is utilized for construction. With implementation of mitigation measures specified in **Section 6.8** of this ROD and Section 4.0 of the Final EIS, in addition to the Air Quality BMPs in Section 2.0 of the Final EIS, impacts from disturbed soil would be less than significant.

During construction operations, the existing farming complex buildings would be demolished, and construction workers could be exposed to hazardous materials typical during construction if they are present (e.g., lead paint). Additionally, the small quantity of hazardous materials used during construction may cause significant effects if leaked or spilled. Following BMPs in Section 2.0 of the Final EIS would reduce or eliminate the risk (e.g., inhaling asbestos particles) associated with demolition activities for construction personnel in addition to the potential risks posed from leaking hazardous materials. Impacts from hazardous materials during construction would be less than significant.

Operation – During operation under Alternative A1 the potential of *C. immitis* both off-site and on-site poses a possible risk to facility workers and patrons since landscape maintenance or earth-disrupting agricultural activities (e.g., tilling) from the surrounding agricultural lands could cause *C. immitis* spores to become airborne. However, the risk for *C. immitis* is reduced in areas with disturbed soil, such as actively cultivated areas. Additionally, the soil disrupted from landscape maintenance would be small once plants are established. Consequently, *C. immitis* does not pose a significant risk to the facility employees or patrons. Impacts from disturbed soil would be less than significant.

Diesel fuel storage tanks would be needed for emergency generators at the Proposed Project. The transport of diesel fuel for these would be infrequent. Furthermore, the storage tanks would have secondary containment systems, comply with National Fire Protection Association standards for aboveground storage tanks (including for hazards, such as flooding), and would not pose unusual storage, handling, or disposal issues. Materials would be stored, handled, and disposed of according to federal and manufacturer's guidelines. Impacts from fuel storage tanks would be less than significant.

Small quantities of hazardous materials will be utilized during the operation and maintenance of the casino resort and other project facilities. The presence of these hazardous materials could pose a risk to employees and casino resort patrons if not transported, stored, or applied appropriately. However, no significant adverse effects would occur for several reasons. All hazardous materials and waste produced (typical for commercial facilities) would be stored, handled, and disposed of according to federal and manufacturer's guidelines. For the WWTP and hotel pool, the chemicals would be stored within secure building and only qualified personnel would handle these chemicals. Furthermore, the quantities of these chemicals would be relatively small, and with appropriate management—such as following manufacturer's guidelines—no significant adverse effects would result from storage and use. Therefore, impacts from waste produced or hazardous materials used would be less than significant.

Cumulative Impacts – The current existing conditions in addition to the construction and operation of the facilities under Alternative A1 would not result in significant adverse effects provided that the BMPs and mitigations measures specified are implemented. However, the potential future development on the Mettler Site and other cumulative projects in the area could lead to cumulative hazardous material effects. Potential future development would not require any unusual hazardous material, and the manufacturer's guidelines along with proper regulations would be followed for each hazardous material. These factors also apply to other cumulative projects in the area. Therefore, no significant adverse cumulative effects would result from current or potential hazardous materials under Alternative A1. Cumulative impacts from hazardous materials would be less than significant.

5.1.12 Aesthetics (Final EIS § 3.13)

During construction activities, heavy construction equipment, materials, and work crews would be readily visible to the neighboring town of Mettler as well as from vehicles traveling along SR-99. Aesthetic impacts from construction would be temporary in nature. There are no scenic resources within the site and vicinity, therefore, construction would not obstruct views of scenic resources. Consequently, impacts to visual resources during construction would be less than significant.

No designated aesthetic resources are present in the vicinity of the Mettler Site. Alternative A1 would transform the current agricultural property to a commercial one in appearance. Alternative A1 would not be visually incompatible with other urban development currently existing in the town of Mettler as well as along the SR-99 and I-5 corridors, including the Outlets at Tejon located approximately 5.5 miles to the south.

Alternative A1 would result in a visually cohesive development that may be considered more aesthetically pleasing than other regional commercial strip developments. Though the proposed development would alter the colors, lines, and texture of the agricultural appearance of the Mettler Site, the changes would not be out of character with typical roadside development adjacent to SR-99. Commercial development occurs along both SR 99 and I-5 in the region, and Alternative A1 would be consistent with other commercial developments along the highway corridors.

Alternative A1 would introduce new sources of light into the existing setting. Light spillover into the surrounding areas and increases in regional ambient illumination could result in potentially

significant effects if it were to cause traffic safety issues or create a nuisance to nearby residents. Alternative A1 would have exterior lighting integrated into the overall design. Lighting would be strategically positioned to minimize any direct lines of sight or glare to the public. Exterior signage would enhance the building architecture and the natural characteristics of the site by incorporating natural materials in combination with architectural trim. Illuminated signs would be designed to blend with the light levels of the building and landscape lighting in both illumination levels and color characteristics. Parking lot lighting would consist of pole-mounted lights with cut-off lenses and downcast illumination.

The use of glass panels and reflective ornamental detailing in the project design, including the proposed hotel, could increase the glare to adjacent residences and travelers on SR-99. Through the use of low-reflecting glass, downcast and directed lighting, and strategically positioned lighting fixtures, the impacts of off-site lighting would be minimized. With BMPs provided in Section 2.0 of the Final EIS, consistent with the International Dark-Sky Association's Model Lighting Ordinance (2011) and County Zoning Ordinance Chapter 19.81 Outdoor Lighting – Dark Skies, Alternative A1 would not result in significant adverse effects associated with light emissions and glare.

Because of these factors, no scenic resources would be affected. Additionally, BMPs are included in Section 2.0 to further reduce any minor aesthetic impacts that might occur. Impacts to scenic and aesthetic resources would be less than significant.

Cumulative Impacts: Aesthetics – All cumulative development, including potential future development of the Mettler Site, would be consistent with local land uses and regulations. Cumulative effects would include a shift from agriculture to views of developed areas as well as a minor increase in the density of urban uses within the County. Alternative A1 would be visually compatible with the urban land uses in the project vicinity and would be generally consistent with local policies related to design and landscaping. Furthermore, with the proposed Grapevine Specific and Community Plan, it is anticipated that the vicinity will become more urban and, thus, future development would be even more visually compatible with nearby land uses. With the implementation of BMPs specified in Section 2.0 of the Final EIS, cumulative impacts to aesthetic resources would be less than significant.

5.1.13 Indirect and Growth-Inducing Effects (Final EIS § 3.14)

Indirect Effects from Off-Site Mitigation Improvements – Implementation of Alternative A1 on the Mettler Site would require construction of traffic mitigation and gas, electrical, and other utility improvements off-site. The construction of traffic mitigation and utility improvements would require grading and the introduction of fill material. These activities would have potential significant effects to geology and soils, water resources, air quality, biological resources, cultural resources, public services, and hazardous materials. A SWPPP would be developed that would include soil erosion and sediment control practices to reduce the amount of exposed soil, prevent runoff from flowing across disturbed areas, slow runoff from the site, and remove sediment from the runoff. Mitigation for these activities is provided in the relevant subsections of **Section 6.0** of this ROD and Section 4.0 of the Final EIS.

Growth-Inducing Effects – Alternative A1 would result in employment opportunities, including direct, indirect, and induced opportunities. Construction-related employment opportunities would be temporary in nature and would not result in the permanent relocation of employees to the County. The potential for commercial growth resulting from the development of Alternative A1 would result from fiscal output generated throughout the County from direct, indirect, and induced economic activity. Indirect and induced output could stimulate further commercial growth; however, such demand would be diffused and distributed among a variety of different sectors and businesses in the County. There are estimated to be more than enough vacant homes to support potential impacts to the regional labor market under Alternative A1. As such, significant regional commercial growth inducing impacts would not be anticipated to occur under Alternative A1.

Potential future development at the Mettler Site, as described in **Section 1.2** of this ROD, could result in indirect growth-inducing effects. Due to a lack of resources and governmental funding, the Tribe's only existing plans at the time are the development of the casino resort and associated facilities. In the coming decades, the Tribe envisions that the Mettler Site will include a mix of potential land uses after the gaming facility has been operating and generating net revenue sufficient for the provision of such governmental services. The Tribe's goals have been used for the purposes of the analysis in Section 3.14.2 of the Final EIS. The analysis found that with the implementation of mitigation included in **Section 6.0** below and Section 4.0 of the Final EIS, no significant impacts would occur.

5.2 COMMENTS ON THE FINAL EIS AND RESPONSES

During the 30-day waiting period following EPA's NOA of the Final EIS on October 23, 2020, the BIA received several comment letters from agencies and interested parties. The Supplemental Response to Comments document, which is included **Attachment 2** to this ROD, includes the comment letters received and specific responses thereto. The BIA reviewed and considered these comments in finalizing this ROD.

6.0 MITIGATION MEASURES

All practicable means to avoid or minimize significant environmental impacts from the Preferred Alternative have been identified and adopted. The following mitigation measures and related enforcement and monitoring programs have been adopted as a part of this decision. Where applicable, mitigation measures will be monitored and enforced pursuant to federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as this decision. Specific mitigation measures adopted pursuant to this decision are set forth below and included within the Mitigation Monitoring and Enforcement Plan (MMEP) (*see* Attachment 3 of this ROD).

6.1 GEOLOGY AND SOILS

The following mitigation measures shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

- A. The project shall comply with the NPDES Construction General Permit from the USEPA for construction site runoff during the construction phase in compliance with the Clean Water

Act (CWA) (33 U.S.C. § 1251 *et seq.*). A SWPPP shall be prepared, implemented, and maintained throughout the construction phase of the development, consistent with Construction General Permit requirements. The SWPPP shall detail the BMPs to be implemented during construction and post-construction operation of the selected project alternative to reduce impacts related to soil erosion and water quality. The SWPPP BMPs shall include, but are not limited to, the following.

1. Existing vegetation shall be retained where practicable. To the extent feasible, grading activities shall be limited to the immediate area required for construction.
2. Temporary erosion control measures (such as silt fences, fiber rolls, vegetated swales, a velocity dissipation structure, staked straw bales, temporary re-vegetation, rock bag dams, erosion control blankets, and sediment traps) shall be employed for disturbed areas.
3. To the maximum extent feasible, no disturbed surfaces shall be left without erosion control measures in place.
4. Construction activities shall be scheduled to minimize land disturbance during peak runoff periods. Soil conservation practices shall be completed during the fall or late winter to reduce erosion during spring runoff.
5. Creating construction zones and grading only one area or part of a construction zone at a time shall minimize exposed areas. If practicable during the wet season, grading on a particular zone shall be delayed until protective cover is restored on the previously graded zone.
6. Disturbed areas shall be re-vegetated following construction activities.
7. Construction area entrances and exits shall be stabilized with large-diameter rock.
8. Sediment shall be retained on-site by a system of sediment basins, traps, or other appropriate measures.
9. Petroleum products shall be stored, handled, used, and disposed of properly in accordance with provisions of the CWA.
10. Construction materials, including topsoil and chemicals, shall be stored, covered, and isolated to prevent runoff losses and contamination of surface and groundwater.
11. Fuel and vehicle maintenance areas shall be established away from all drainage courses and designed to control runoff.
12. Sanitary facilities shall be provided for construction workers.
13. Disposal facilities shall be provided for soil wastes, including excess asphalt during construction and demolition.

14. Other potential BMPs include use of wheel wash or rumble strips and sweeping of paved surfaces to remove any and all tracked soil.
- B. Contractors involved in the project shall be trained on the potential environmental damage resulting from soil erosion prior to construction in a pre-construction meeting. Copies of the SWPPP shall be made available at that time. Construction bid packages, contracts, plans, and specifications shall contain language that requires adherence to the SWPPP.

6.2 WATER RESOURCES

The following measures shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

- A. Wastewater shall be fully treated to at least a tertiary level using membrane bioreactor (MBR) system or a package sequencing batch reactor (SBR) technology.
- B. The on-site WWTP shall be staffed with operators who are qualified to operate the plant safely, effectively, and in compliance with all permit requirements and regulations. The operators shall have qualifications similar to those required by the Operator Certification Program for municipal WWTPs.
- C. Water shall be treated on-site to USEPA standards prior to reuse or discharge into percolation ponds. Percolation ponds and reuse facilities shall be closely monitored by a responsible engineer. Periodic monitoring of the wastewater facility shall ensure the wastewater system is operating safely and efficiently.
- D. Groundwater sampling and analysis shall be performed regularly, and all drinking water shall be treated to SDWA standards.
- E. Prior to construction of the on-site wells, the USEPA shall be consulted in the early stages of establishing the well system. Furthermore, baseline monitoring of the groundwater shall be submitted to the USEPA prior to public water usage.
- F. The on-site wells shall be positioned as to avoid to the maximum extent possible adverse effects on the established wells and surface water features within a one-mile radius of the Mettler Site while optimizing groundwater usage on-site, such as avoiding the percolation pond's cone of influence. A groundwater study shall be conducted in order to achieve this objective.
- G. To avoid potential adverse influences on the on-site potable water supply, potable water transmission pipes shall not be located within the percolation pond's cone of influence.

6.3 AIR QUALITY OPERATION

The following mitigation measures shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

The Tribe shall purchase 111.83 tons of NO_x emission reduction credits (ERC) and 18.48 tons of ROG ERCs, as specified in the Final General Conformity Determination included in Appendix Z of the Final EIS. Because the air quality effects are associated with operation of the facility and not with construction of the facility, real, surplus, permanent, quantifiable, and enforceable ERCs shall be purchased prior to the opening day of the facility. ERCs shall be purchased in accordance with the 40 C.F.R. Part 93, Subpart B, conformity regulations. With the purchase of ERCs, the project would conform to the applicable State Implementation Plan (SIP) and result in a less than adverse effect to regional air quality. As an alternative to or in combination with purchasing the above ERCs, the Tribe has the option to enter into a Voluntary Emission Reduction Agreement (VERA) with the San Joaquin Valley Air Pollutions Control District (SJVAPCD). The VERA would allow the Tribe to fund air quality projects that quantifiably and permanently offset project operational emissions.

B. Prior to operation of the potential future development on the Mettler Site (as described in Table 3.14-2 of the Final EIS), the Tribe shall purchase 11.42 tons of NO_x ERCs and 10.03 tons of ROG ERCs, as specified in the Final General Conformity Determination included in Appendix Z of the Final EIS. Because the air quality effects are associated with operation of the facility and not with construction of the facility, real, surplus, permanent, quantifiable, and enforceable, ERCs would be purchased prior to the opening day of the facility. ERCs shall be purchased in accordance with the 40 C.F.R. 9 Part 3, Subpart B, conformity regulations. With the purchase of ERCs, the project would conform to the applicable SIP and result in a less-than-adverse effect to regional air quality. As an alternative to or in combination with purchasing the above ERCs, the Tribe has the option to enter into a VERA with the SJVAPCD. The VERA would allow the Tribe to fund air quality projects that quantifiably and permanently offset project operational emissions.

6.4 BIOLOGICAL RESOURCES

The following mitigation measures shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

6.4.1 Federally Listed and Other Sensitive Species

San Joaquin Kit Fox (Vulpes macrotis mutica)

- A. Potential dens shall be visibly marked by a qualified biologist into an exclusion zone with a 100-foot buffer. No staging of materials or equipment, construction personnel, or other construction activity shall occur within the setback areas. The avoidance buffer shall be maintained until either the completion of construction, or the proper destruction of the den as described below. The USFWS guidelines for avoidance and minimization shall be followed.
- B. A qualified biologist shall conduct a pre-construction survey to assess potential presence of this species two calendar weeks to 30 calendar days prior to commencement of ground disturbance. A report summarizing the findings of the survey shall be sent to the USFWS within five days of completion of any pre-construction surveys. If the construction activities stop on the site for a period of five days or more, then an additional pre-construction survey

shall be conducted no more than 48 hours prior to the start of construction. If no San Joaquin kit foxes or potential dens are found during the pre-construction survey, then no further action is required regarding this species.

- C. If any San Joaquin kit fox potential dens are identified on the Mettler Site during the pre-construction survey or during construction activities (potential dens are defined as burrows at least 4 inches in diameter which open up within 2 feet), the USFWS shall be notified immediately and no construction activity shall occur within 100 feet of the potential den. An exclusionary zone shall be implemented as described in Measure A.

Potential den entrances shall be monitored with trail cameras for three consecutive days or dusted for three consecutive days to register track of any San Joaquin kit fox present. If no activity is identified, potential dens may be destroyed by careful excavation followed by immediate filling and compacting of the soil. If activity is identified, a buffer zone of 250 feet shall be maintained around the den until the biologist determines that the den has been vacated. The den would be considered vacant when three days of den entrance dusting or trail camera monitoring results in no sign of the species, at which point only a 100-foot buffer becomes necessary. Should destruction of such a vacated natal den be necessary, USFWS shall be contacted, and the appropriate take permit issued. Where San Joaquin kit foxes are identified, the provisions of the USFWS's published *Standardized Recommendations for Protection of the San Joaquin Kit Fox Prior to or During Ground Disturbance* (2010) shall apply for den destruction and on-going operational recommendations.

- D. A qualified biologist shall conduct habitat sensitivity training related to San Joaquin kit fox for project contractors and shall monitor construction during initial grading activities within the Mettler Site. Under this program, workers shall be informed about the presence of the species and their habitat, and that unlawful take of the animal or destruction of its habitat is not permitted. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about: (1) the life history of the San Joaquin kit fox; (2) the importance of habitat requirements for the species; (3) sensitive areas including those identified on-site, and (4) the importance of maintaining the required setbacks and detailing the limits of the construction area. Documentation of this training shall be maintained on the site.
- E. The standards of the USFWS publication include provisions for educating construction workers regarding the San Joaquin kit fox, keeping heavy equipment operating at safe speeds, and checking construction pipes for species occupation during construction and similar activities.

Blunt-Nosed Leopard Lizard (*Gambelia sila*)

- F. A pre-construction survey for the blunt-nosed leopard lizard shall be performed by a qualified biologist within the 30 days prior to construction activities to establish the presence of species on-site. The survey shall occur during the months of April through October to avoid surveying during peak hibernation months when the species is inactive. Should blunt-

nosed leopard lizards be observed, the USFWS shall be contacted to determine appropriate removal or avoidance measures. The survey methods shall be consistent with the Approved Survey Methodology for the blunt-nosed leopard lizard by the CDFW.

- G. Access gates shall remain closed during periods of inactivity and have at least a 6-inch curtain in contact with the soil surface anchored by hay bales and sandbags. A designated individual shall check for blunt-nosed leopard lizards under vehicles and equipment such as stored pipes before the start of the workday. If the species is discovered, the vehicle or equipment shall not be moved until the animal has exited on its own. Pipes and other den-like structures should be capped at both ends until just before use to prevent potentially occurring blunt-nosed leopard lizards from being trapped.
- H. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about blunt-nosed leopard lizards, including life history information, habitat requirements, and appropriate response to potential observations. The qualified biologist shall monitor construction during initial grading activities. Documentation of this training shall be maintained on-site.
- I. Should blunt-nosed leopard lizards or other federally listed species be detected within the construction footprint at any point during construction or monitoring, grading activities shall halt, and the USFWS shall be consulted. No grading activities shall commence until USFWS authorizes the re-initiation of grading activities.

***Tipton Kangaroo Rat (*Dipodomys nitratoides nitratoides*) and Giant Kangaroo Rat (*Dipodomys ingens*;
Alternative B only):***

- J. A pre-construction survey for Tipton/giant kangaroo rat presence shall be conducted between two weeks and 30 calendar days before the start of ground-disturbing activities. A qualified biologist shall survey for Tipton/giant kangaroo rat signs, such as scat, burrows, tail drag marks, and tracks. If a confirmed observation of a Tipton/giant kangaroo rat occurs, the USFWS shall be contacted to determine if relocation procedures are necessary. The presence of a Tipton/giant kangaroo rat shall be assumed if positive signs for any Tipton/giant kangaroo rat are observed due to the difficulty of species-level identification without live trapping.
- K. Should an active burrow be observed on-site, a 50-foot buffer shall be marked around the burrow entrance by the qualified biologist with high-visibility fencing. Should the active burrow be within the project footprint, the USFWS shall be contacted to determine the appropriate removal or avoidance measures.
- L. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about Tipton/giant kangaroo rats including life history information, habitat requirements, and appropriate response to potential observations. The qualified biologist shall monitor construction during initial grading activities. Documentation of this training shall be maintained on-site.

Burrowing Owl (*Athene cunicularia*)

- M. A qualified biologist shall conduct a pre-construction survey for burrowing owls within the 30 days prior to construction activities to establish the status of this species on the site. If ground-disturbing activities are delayed or suspended for more than 30 days after the pre-construction survey, the site shall be resurveyed. If burrowing owls are detected on or within approximately 500 feet of the site, a qualified biologist shall be consulted to develop measures to avoid "take" of this species prior to the initiation of any construction activities. Burrows observed on-site shall additionally be treated as potential burrowing owl dens and handled as outlined in the mitigation measures for burrowing owls. These measures include establishing appropriate buffers, and may require additional monitoring by a qualified biologist before destruction if burrowing owls are observed during pre-construction surveys.
- N. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about: (1) the life history of the burrowing owl; (2) the importance of habitat requirements; (3) sensitive areas including those identified on-site, and (4) the importance of maintaining the required setbacks and detailing the limits of the construction area. Documentation of this training shall be maintained on-site.

Migratory Birds

- O. Should ground-disturbing activities occur during the general nesting season (February 1 to September 15), a pre-construction nesting bird survey shall be conducted by a qualified biologist no more than 14 days prior to the start of ground-disturbing activities. Areas within 500 feet of ground-disturbing activities shall be surveyed for active nests.
- P. Should an active nest be identified, an avoidance buffer shall be established based on the needs of the species identified and pursuant to consultation with CDFW and/or USFWS if necessary prior to initiation of ground-disturbing activities. Avoidance buffers may vary in size depending on habitat characteristics, project-related activities, and disturbance levels. Avoidance buffers shall remain in place until the end of the general nesting season or upon determination by a qualified biologist that young have fledged or the nest has failed.

6.5 CULTURAL AND PALEONTOLOGICAL RESOURCES

The following mitigation measures shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

- A. A qualified professional archaeologist shall complete pre-construction surveys of the off-site impact areas, documenting and assessing any resources encountered. If the find is determined to be significant by the archaeologist, then an appropriate course of action shall be implemented prior to construction in the vicinity of the find. Possible actions may include recordation, archaeological testing/data recovery, development of a Treatment Plan, or other measures. All significant archaeological materials recovered shall be subject to scientific analysis, professional curation as appropriate, and documentation prepared by the archaeologist according to current professional standards.

- B. In the event of inadvertent discovery of prehistoric or historic archaeological resources during construction-related earth-moving activities, all work within 50 feet of the find shall cease until a professional archaeologist meeting the qualifications of the Secretary (36 C.F.R. Part 61) can assess the significance of the find. The BIA and the Tribe shall be notified immediately, and all such finds shall be subject to procedures for post-review discoveries without prior planning pursuant to 36 C.F.R. § 800.13. If the find is determined to be significant by the archaeologist, BIA, and/or Tribe, then the process in Mitigation Measure A shall be followed.
- C. In the event of inadvertent discovery of paleontological resources during construction earth-moving activities, all work within 50 feet of the find shall cease until a qualified professional paleontologist can assess the significance of the find; the BIA shall also be notified. All such finds shall be subject to Section 101 (b)(4) of NEPA (40 C.F.R. §§ 1500-1508). If the find is determined to be significant by the paleontologist, then representatives of the BIA shall meet with the paleontologist to determine the appropriate course of action, including the development of an Evaluation Report and/or Mitigation Plan, if necessary. All significant paleontological materials recovered shall be subject to scientific analysis, professional curation, and a report prepared by the professional paleontologist according to current professional standards.
- D. If human remains are discovered during ground-disturbing activities on Tribal lands, all work within 100 feet of the find shall cease immediately and the Tribe, BIA, and County Coroner shall be notified immediately. No further disturbance shall occur until the Tribe, BIA, and County Coroner have made the necessary findings as to the origin and disposition of the remains. If the remains are determined to be of Native American origin, the provisions of Native American Graves Protection and Repatriation Act shall be applied.

6.6 TRANSPORTATION/CIRCULATION

While the timing for the off-site roadway improvements is not within the jurisdiction or the Tribe's control, the Tribe shall make good faith efforts to assist with implementation of the opening year improvements prior to opening day. The Tribe shall make fair share contributions to the traffic mitigation measures identified below prior roadway project construction as calculated in Section 19.3 in Appendix F of the Final EIS. Funding shall be for design standards consistent with those required for similar facilities in the region.

The following mitigation measures shall be implemented for the Preferred Alternative in Opening Year 2023 in accordance with federal regulatory requirements.

- A. **Stevens Drive/Maricopa Highway Intersection:** Install a traffic signal and provide an exclusive WB left-turn lane on Maricopa Highway at Stevens Drive, or install a roundabout, based on the recommendations of an ICE study, with an associated fair share contribution of 100 percent for Alternatives A1 and A2.
- B. **Maricopa Highway/S. Sabodan Street:** Install a traffic signal with an associated fair-share contribution of 100 percent for Alternatives A1 and A2 and the following geometry.

SB – Construct the north leg of the intersection and provide one left-turn lane and one right-turn lane in the SB direction and one NB lane.

WB – One left-turn lane, one thru lane, and one right-turn lane.

EB – One left-turn lane, one thru lane, and one shared thru/right lane. **NB** – One left-turn lane and one shared thru/right lane.

Alternatively, install a roundabout, based on the recommendations of an ICE study.

The following mitigation measures shall be implemented for the Preferred Alternative in Cumulative Year 2040 in accordance with federal regulatory requirements.

- C. **Maricopa Highway/I-5 SB Ramps Intersection:** Contribute a fair share of 14 percent for Alternative A1 and 13 percent for Alternative A2 towards providing an exclusive WB left-turn lane on Maricopa Highway and installing a traffic signal or a roundabout with or without a loop ramp, based on the recommendations of an ICE study.
- D. **Maricopa Highway/I-5 NB Ramps Intersection:** Contribute a fair share of 26 percent for Alternative A1 and 24 percent for Alternative A2 towards providing an exclusive EB left-turn lane on Maricopa Highway and installing a traffic signal or a roundabout with or without a loop ramp, based on the recommendations of an ICE study.
- E. **SR-166 to NB I-5 Ramp Merge:** Contribute a fair share of 52 percent for Alternative A1 and 48 percent for Alternative A2 towards providing a 1,000-foot auxiliary lane on I-5 NB mainline at the merge.

6.7 PUBLIC SERVICES

The following mitigation measure shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

The Tribe shall be responsible for a fair share of costs associated with any relocation of existing SoCalGas and PG&E facilities to accommodate the proposed development and traffic improvements. Appropriate funds shall be made available to conduct any necessary relocation and to construct any system upgrades required by the project.

6.8 HAZARDOUS MATERIALS

The following mitigation measures shall be implemented for the Preferred Alternative in accordance with federal regulatory requirements.

- A. Workers and supervisors should be trained in Valley Fever locations, symptoms, and methods to minimize the risks of contracting Valley Fever before commencing work. This includes a “Valley Fever Training Handout,” and a set schedule of educational sessions. The following documentation shall be assembled and retained by the Tribe.

1. A sign-in sheet of training participants, including names, signatures, and dates.
 2. A written flier or brochure that includes educational information on the health effects of exposure to Valley Fever.
 3. Training on methods that may be able to prevent Valley Fever Infection.
 4. A demonstration to employees on how to use personal protective equipment, such as respiratory masks, in order to reduce potential exposure to *C. immitis* spores. This protective equipment should be readily available for employees to use during work hours. Proof of this training can consist of printed materials, DVD, photographs, and/or digital media files.
- B. The Tribe shall develop a Valley Fever Dust Management Plan that addresses possible *C. immitis* spores and mitigations for potential infections from *C. immitis* spores. The plan should encompass a program to assess the possible exposure to *C. immitis* spores from construction activities and to outline appropriate safety precautions that would be implemented, as appropriate, to reduce the risk of exposure to spores from *C. immitis*. The plan shall include the following.
1. When performing soil-disturbing related tasks, workers should be positioned upwind or crosswind when possible.
 2. Heavy equipment, vehicles and machinery with factory enclosed cabs should be furnished with high efficiency particulate air (HEPA) filters when able and the windows should be closed. Furthermore, proof of workers being trained on the proper use of applicable heavy equipment cabs shall be retained (*e.g.*, turning on the air conditioner before using equipment).
 3. Communication methods within enclosed cabs should be provided, such as two-way radios.
 4. When dust exposure is unavoidable, workers should wear approved respiration protection that covers the nose and mouth. The particulate filters should be rated at N95, N99, N100, or HEPA.
 5. Separate, clean dining areas with hand-washing stations shall be provided for employees.
 6. Equipment inspection stations shall be installed at access/egress points. At these stations, construction vehicles and equipment shall be inspected and cleaned of excess soil material as needed before being removed from the site.
 7. Workers should be trained on how to recognize Valley Fever symptoms and report symptoms surmised as being Valley Fever to a supervisor when encountered.

8. A medical professional shall be consulted in order to develop a medical protocol for evaluating employees with suspected Valley Fever.
9. An information handout concerning Valley Fever shall be disseminated to the public within a 3-mile radius of the project and no less than 30 days before the commencement of construction activities. The handout shall address the following topics about Valley Fever: potential sources and causes, common symptoms, options or remedies available if an individual should experience symptoms, and the locations of where tests are available for verifying Valley Fever.

7.0 DECISION TO IMPLEMENT THE PROPOSED ACTIONS / PREFERRED ALTERNATIVE

With this ROD, the Department announces that it will implement Alternative A1 as the Preferred Alternative. Of the alternatives evaluated in the EIS, Alternative A1 would best meet the purpose and need by promoting the long-term economic vitality and self-sufficiency, self-determination, and self-governance of the Tribe. The construction of Alternative A1 would provide the Tribe the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for its government. This would enable the tribal government to establish, fund and maintain programs vital to tribal members, as well as provide greater opportunities for employment and economic growth.

The development of Alternative A1 would meet the purpose and need of the Proposed Actions better than the other development alternatives due to the reduced revenues that would be expected from the operation of Alternatives A2, A3, and C, and the reduced area for the RV park and potential future developments under Alternative B (as described in Section 2.6.2 of the Final EIS). While Alternative A1 would have greater environmental impacts than the No Action Alternative, that alternative does not meet the purpose and need for the Proposed Action, and the BMPs and mitigation measures adopted in this ROD adequately address the environmental impacts of the Preferred Alternative. Accordingly, the Department will implement the Proposed Actions subject to implementation of the applicable BMPs and mitigation measures listed in **Section 6.0** of this ROD.

7.1 THE PREFERRED ALTERNATIVE RESULTS IN SUBSTANTIAL BENEFICIAL IMPACTS

The Preferred Alternative is reasonably expected to result in beneficial effects for the Tribe and its members, as well as residents of Kern County. Key beneficial effects include:

- Establishment of a land base for the Tribe to establish a viable business enterprise. Revenues from the operation of the casino would provide funding for a variety of health, housing, education, social, cultural, and other programs and services for tribal members, and provide employment opportunities for its members. Further, while the remainder of the Mettler Site would remain in agricultural production for the foreseeable future, in the coming decades the Tribe's vision is to utilize the remaining acreage to deliver governmental services to its members such as housing, health care, and wellness. The Tribe would determine, in accordance with applicable law, what developments are needed to facilitate the provision of governmental services to its members.

- Revenue generated from the development will also provide capital for other development improvement opportunities, and will allow the Tribe to achieve tribal self-sufficiency, self-determination, self-governance, and a strong, stable tribal government.
- Generation of approximately 2,356 full and part-time employment positions during the construction period. Direct wages are estimated to total approximately \$104.8 million. Indirect and induced wages are estimated to total \$32.6 million and \$24 million, respectively.
- Ongoing operations would directly contribute to local governments on an annual basis approximately \$944,000. Substantial annual and one-time payments to Kern County through the 2019 intergovernmental agreement (IGA).
- Neutral to Positive groundwater effects in the vicinity of the Mettler Site through the 2020 agreement between Tribe and the Arvin-Edison Water Storage District (AEWSD).

7.2 REDUCED CASINO RESORT ALTERNATIVE RESTRICTS BENEFICIAL EFFECTS

The Reduced Intensity Alternative (Alternative A2) would generate less revenue than the Preferred Alternative. As a result, this Alternative would restrict the Tribe's ability to meet its needs and to foster tribal economic development, self-determination, and self-governance.

7.3 ORGANIC FARMING ALTERNATIVE RESTRICTS BENEFICIAL EFFECTS TO THE TRIBE AND SURROUNDING COMMUNITY

The organic farming alternative on the Mettler Site (Alternative A3) would produce 51 full-time employees compared to approximately 3,000 full-time employees under the Preferred Alternative. Additionally, Alternative A3 would generate negligible economic output for businesses in the region as well as negligible tax revenues for the State and County. As a result, it would restrict the Tribe's ability to meet its needs and to foster tribal economic development, self-determination, and self-governance.

7.4 CASINO RESORT ON THE MARICOPA HIGHWAY SITE ALTERNATIVE RESTRICTS BENEFICIAL EFFECTS

A casino resort on the Maricopa Highway Site alternative (Alternative B) would result in an increase in employment and economic growth and the demand for goods and services to the same extent as the Preferred Alternative. However, Alternative B restricts beneficial effects in the following ways:

Suitability for Tribal Land Base and Social Impacts: The 118-acre Maricopa Highway Site is marginally adequate for fulfilling tribal needs in the short term. For example, the non-gaming "amenities" under Alternative B would occupy a smaller footprint than those under the Preferred Alternative simply because the Maricopa Highway Site is not large enough to accommodate the Preferred Alternative improvements. In the longer-term, the 320.04-acre Mettler Site is far superior to the 118-acre Maricopa Highway Site for purposes of meeting Tribal needs. Although the Maricopa Highway Site is large enough for the development of a resort hotel and casino and related

infrastructure, it would severely limit the Tribe's ability to provide future governmental services on its land base such as housing, health care, and wellness.

Water: The impacts to groundwater under Alternative B would be greater than those for the Preferred Alternative. Consequently, Alternative B would be markedly inferior to the Preferred Alternative when analyzed in terms of net impacts to groundwater. The Tribe has entered into the Water Agreement with the AEWSD. The Water Agreement allows amendment of the Tribe's surface water contracts by facilitating the transfer of some of its surface water rights to groundwater rights. Under this agreement the Preferred Alternative would result in a net neutral or positive addition to groundwater supply, and in all circumstances would result in a less than significant effect on groundwater. However, the Water Agreement applies specifically to the Mettler Site and not the Maricopa Highway Site, because the Maricopa Highway Site falls within a different water district. Even if a similar agreement could be made with respect to the Maricopa Highway Site, the mitigating effects of such an arrangement may not be as positive as those under the Water Agreement because the Maricopa Highway Site is smaller than the Mettler Site, and, thus, has less surface water available to recharge the groundwater aquifer. Specifically, the Mettler Site and Maricopa Highway Sites are approximately 320.04 acres and 118 acres, respectively.

County Opposition to Alternative B: Communications with the County (*see* Appendix AB of the Final EIS) state that the County is opposed. The County cites two primary reasons for its opposition. First, the Mettler Site is currently zoned Limited Agriculture (A-1) whereas the Maricopa Highway Site is zoned Exclusive Agriculture (A). The Maricopa Highway Site is within the boundaries of Agricultural Preserve No. 12. The County is opposed to development of the Maricopa Highway Site because it would take productive irrigated farmland zoned Exclusive Agriculture (A) permanently out of production. Second, the Mettler Site alternatives include the development of a new fire and sheriff joint substation. This facility would be centrally located for purposes of providing service in an area comprised roughly of I-5 (near the Mettler Site), SR-99 and the Grapevine that is currently underserved by existing facilities. The area around the Maricopa Highway Site is not currently underserved to the same degree.

Economics – Development Costs: The Tribe and its development partner have incurred substantial costs associated with the acquisition and ownership of the Mettler Site. These costs include the payment of the purchase price, option payments, real estate commissions, property taxes, and interest expenses. In the event that neither the Preferred Alternative nor A2 is pursued, the Tribe believes that it would likely be able to recoup less than half the costs expended on the Mettler Site. In addition, the Tribe would have to expend an additional substantial amount to purchase the Maricopa Highway Site.

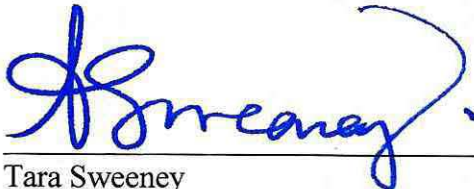
Economics – Schedule Delay: As stated in the Final EIS, the opening year for all project alternatives is assumed to be 2023. As a practical matter, the opening dates of Alternative B would likely be anywhere from a few months to a year or two later than a potential opening of the Preferred Alternative. This is because of the following factors: 1) the Tribe's ownership of the Mettler Site is more advanced than it is for the Maricopa Highway Site, 2) the existence of the Water Agreement with AEWSD, and 3) the Tribe's discussions and consultations with the County are more advanced with respect to the Mettler Site. A delay in the development and operation of the casino resort would cause an undue financial burden to the Tribe.

7.5 NO ACTION ALTERNATIVE FAILS TO MEET PURPOSE AND NEED

The No Action Alternative (Alternative C) would not meet the stated purpose and need. Specifically, it would not provide a more stable income source that will enable the tribal government to provide essential social, housing, educational, health, and welfare programs. Therefore, the No Action Alternative would not promote the economic development, self-determination, or self-governance of the Tribe.

8.0 SIGNATURE

By my signature, I indicate my decision to implement Alternative A1 as the Preferred Alternative and implement the Proposed Action of issuing a Secretarial Determination pursuant to Section 20 of the Indian Gaming Regulatory Act. A decision whether to implement the Proposed Action of acquiring the Proposed Site in trust pursuant to the Indian Reorganization Act will be made at a later date.



Tara Sweeney
Assistant Secretary – Indian Affairs

JAN 08 2021

Date

ATTACHMENTS

ATTACHMENT 1

Final EIS Notices

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Final Environmental Impact Statement and Final Conformity Determination for the Tejon Indian Tribe's Proposed Fee-to-Trust Acquisition and Casino Resort Project, Kern County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Availability.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA), as lead agency, with the Tejon Indian Tribe (Tribe), Kern County (County), National Indian Gaming Commission (NIGC), and the U.S. Environmental Protection Agency (EPA) serving as cooperating agencies, intends to file a Final Environmental Impact Statement (FEIS) with the EPA in connection with the Tribe's application for acquisition in trust by the United States of approximately 306 acres for gaming and other purposes to be located west of the Town of Mettler, Kern County, California. In addition, in accordance with Section 176 of the Clean Air Act 42 U.S.C. 7506, and the EPA general conformity regulations 40 CFR part 93, subpart B, a Final Conformity Determination (FCD) has been prepared for the proposed project. The FCD is included in Appendix Z of the FEIS.

DATES: The Record of Decision for the proposed action will be issued on or after 30 days from the date the EPA publishes its Notice of Availability in the Federal Register. Any comments on the FEIS must arrive on or before that date.

ADDRESSES: You may submit written comments:

- By mail or hand-delivery to: Amy Dutschke, Regional Director, Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way, Sacramento, CA 95825. Please include your name, return address, and "FEIS Comments, Tejon Indian Tribe Casino Project" on the first page of your written comments.
- By email to: Chad Broussard, Environmental Protection Specialist, Bureau of Indian Affairs, at chad.broussard@bia.gov, using "FEIS Comments, Tejon Indian Tribe Casino Project" as the subject of your email.

FOR FURTHER INFORMATION CONTACT: Chad Broussard, Environmental Protection Specialist, Bureau of Indian Affairs, Pacific Regional Office, telephone: (916) 978-6165; e-mail: chad.broussard@bia.gov. The FEIS is available at www.tejoneis.com.

SUPPLEMENTARY INFORMATION: The BIA published the Notice of Availability for the Draft EIS in the Federal Register and the Bakersfield Californian on June 12, 2020. The BIA held a virtual public hearing on July 8, 2020.

Background: The Tribe's proposed project consists of the following components: 1) the Department's transfer of the approximately 306-acre fee property into trust status; 2) issuance of

a determination by the Secretary of the Interior pursuant to the Indian Gaming Regulatory Act 25 USC 2701 et seq.; 3) the approval of a management contract by the Chairman of the National Indian Gaming Commission under 25 USC 2711; and 4) the Tribe's proposed development of the trust parcel and the off-site improvement areas. The proposed casino resort would include a hotel, convention center, multipurpose event space, several restaurant facilities, parking facilities, a recreational vehicle (RV) park, fire, and sheriff stations and associated facilities.

The following alternatives are considered in the FEIS: (1) Proposed Project; (2) Reduced Intensity Hotel and Casino; (3) Organic Farm; (4) Alternate Site for the Proposed Project; and (5) No Action Alternative. Environmental issues addressed in the FEIS include geology and soils, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomic conditions (including environmental justice), transportation and circulation, land use, public services, noise, hazardous materials, aesthetics, cumulative effects, and indirect and growth inducing effects. In accordance with Section 176 of the Clean Air Act 42 U.S.C. 7506, and the EPA general conformity regulations 40 CFR part 93, subpart B, a Final Conformity Determination (FCD) has been prepared for the proposed project. The Clean Air Act requires Federal agencies to ensure that their actions conform to applicable implementation plans for achieving and maintaining the National Ambient Air Quality Standards for criteria air pollutants. The BIA has prepared an FCD for the proposed action/project described above. The FCD is included in Appendix Z of the FEIS.

Locations where the FEIS is Available for Review: The FEIS is available for review at www.tejoneis.com. Contact information is listed in the FOR FURTHER INFORMATION CONTACT section of this notice.

Public Comment Availability: Comments, including names and addresses of respondents, will be available for public review at the BIA address shown in the ADDRESSES section, during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Before including your address, telephone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment - including your personal identifying information - may be made publicly available at any time. While you can ask in your comment that your personal identifying information be withheld from public review, the BIA cannot guarantee that this will occur.

Authority: This notice is published pursuant to Sec. 1503.1 of the Council of Environmental Quality Regulations (40 CFR parts 1500 through 1508) and Sec. 46.305 of the Department of the Interior Regulations (43 CFR part 46), implementing the procedural requirements of the NEPA of 1969, as amended (42 USC 4371, et seq.), and is in the exercise of authority delegated to the Assistant Secretary – Indian Affairs by 209 DM 8. This notice is also published in accordance with 40 CFR 93.155, which provides reporting requirements for conformity determinations.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,

Information Collection Clearance Officer, U.S. Fish and Wildlife Service.

[FR Doc. 2020-23498 Filed 10-22-20; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX20EG33DW20300; OMB Control Number 1028-0111]

Agency Information Collection Activities; The National Map Corps (TNMCorps)—Volunteered Geographic Information Project

AGENCY: Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before December 22, 2020.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to gs-info_collections@usgs.gov. Please reference OMB Control Number 1028-0111 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Erin Korris by email at ekorris@usgs.gov, or by telephone at 303-202-4503.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below.

We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The National Map Corps (TNMCorps) is the name of the U.S. Geological Survey (USGS) National Geospatial Program (NGP) project that encourages citizen participation in volunteer map data collection activities. TNMCorps uses crowdsourcing—new technologies and internet services to georeference structure points and share this information with others on map-based internet platforms—to produce volunteered geographic information (VGI). People participating in the crowd sourcing are considered part of the TNMCorps. In general, the National Structures Dataset (NSD) has been populated with the best available national data. This data has been exposed for initial improvement by TNMCorps volunteers via the online Map Editor (the instrument). In addition, the data goes through a tiered-editing process, which includes Peer Review and Advanced Editors. At each stage the data is passed through an automatic “magic filter” to look for data issues before being submitted into the NSD. In addition data goes through sampling for quality assurance procedures.

Data within the NSD is available to the USGS; as well as to the public, at no cost via The National Map and US Topo.

Data quality studies in 2012, 2014, and 2018 showed that the volunteers' actions were accurate and exceeded USGS quality standards. Volunteer-

collected data showed an improvement in both location and attribute accuracy for existing data points. Completeness, or the extent to which all appropriate features were identified and recorded, was also improved.

Title of Collection: The National Map Corps—Volunteered Geographic Information Project.

OMB Control Number: 1028-0111.

Form Number: None.

Type of Review: Renewal of a currently approved collection.

Respondents/Affected Public: General public.

Total Estimated Number of Annual Respondents: 665.

Total Estimated Number of Annual Responses: 100,000.

Estimated Completion Time per Response: 12 minutes on average.

Total Estimated Number of Annual Burden Hours: 20,000.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: There are no “non-hour cost” burdens associated with this IC.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

David Brostuen,

Acting Director, National Geospatial Technical Operations Center USGS.

[FR Doc. 2020-23459 Filed 10-22-20; 8:45 am]

BILLING CODE 4338-11-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/
A0A501010.999900253G]

Final Environmental Impact Statement and Final Conformity Determination for the Tejon Indian Tribe's Proposed Fee-to-Trust Acquisition and Casino Resort Project, Kern County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA), as lead agency, with the Tejon Indian Tribe (Tribe), Kern County (County), National Indian Gaming Commission (NIGC), and the U.S. Environmental Protection Agency (EPA) serving as cooperating agencies, intends to file a Final Environmental Impact Statement (FEIS) with the EPA in connection with

the Tribe's application for transfer into trust by the United States of approximately 306 acres for gaming and other purposes to be located west of the Town of Mettler, Kern County, California.

DATES: The Record of Decision for the proposed action will be issued on or after 30 days from the date the EPA publishes its Notice of Availability in the **Federal Register**. The BIA must receive any comments on the FEIS before that date.

ADDRESSES: You may submit written comments:

- *By mail to:* Amy Dutschke, Regional Director, Bureau of Indian Affairs, Pacific Region, 2800 Cottage Way, Sacramento, CA 95825. Please include your name, return address, and "FEIS Comments, Tejon Indian Tribe Casino Project" on the first page of your written comments.

- *By email to:* Chad Broussard, Environmental Protection Specialist, Bureau of Indian Affairs, at chad.broussard@bia.gov, using "FEIS Comments, Tejon Indian Tribe Casino Project" as the subject of your email.

FOR FURTHER INFORMATION CONTACT: Chad Broussard, Environmental Protection Specialist, Bureau of Indian Affairs, Pacific Regional Office, telephone: (916) 978-6165; email: chad.broussard@bia.gov. Information is also available at www.tejoneis.com.

SUPPLEMENTARY INFORMATION: The BIA published the Notice of Availability for the Draft EIS in the **Federal Register** and the Bakersfield Californian on June 12, 2020 (85 FR 35948). The BIA held a virtual public hearing on July 8, 2020.

Background: The Proposed Project consists of the following components: (1) The Department of the Interior's (Department) transfer of approximately 306 acres from fee to trust status pursuant to Section 5 of the Indian Reorganization Act (25 U.S.C. 5108); (2) issuance of a determination by the Secretary of the Interior pursuant to Section 20 of the Indian Gaming Regulatory Act determining whether a gaming facility on the project site would be in the best interest of the Tribe and its members and not detrimental to the surrounding community (25 U.S.C. 2719(b)(1)(A)); (3) the approval of a management contract by the Chairman of the National Indian Gaming Commission pursuant to 25 U.S.C. 2711; and (4) the development of the trust parcel with a casino, hotel, convention center, multipurpose event space, several restaurant facilities, parking facilities, a recreational vehicle (RV) park, fire and sheriff stations, and associated facilities.

The following alternatives are considered in the FEIS: (1) Proposed Project; (2) Reduced Intensity Hotel and Casino; (3) Organic Farm; (4) Alternate Site for the Proposed Project; and (5) No Action Alternative. The BIA has selected Alternative A1, the Proposed Project, as the Preferred Alternative as discussed in the FEIS.

Environmental issues addressed in the FEIS include geology and soils, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomic conditions (including environmental justice), transportation and circulation, land use, public services, noise, hazardous materials, aesthetics, cumulative effects, and indirect and growth inducing effects.

The information and analysis contained in the FEIS, as well as its evaluation and assessment of the Preferred Alternative, will assist the Department in its review of the issues presented in the Tribe's application. Selection of the Preferred Alternative does not indicate the Department's final decision because the Department must complete its review process. The Department's review process consists of (1) issuing the notice of availability of the FEIS; (2) issuing a Record of Decision no sooner than 30 days following publication of a Notice of Availability of the FEIS by the EPA in the **Federal Register**; (3) issuing a Secretarial Determination pursuant to Section 20 of the Indian Gaming Regulatory Act that determines whether the Tribe's gaming facility would be in the best interest of the Tribe and its members and is not detrimental to the surrounding community, 25 U.S.C. 2719(b)(1)(A); (4) requesting the Governor of California's concurrence with the Secretarial Determination; and (5) issuing a final decision on the transfer of the proposed site from fee to trust status pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. 5108. The National Indian Gaming Commission will separately consider the Tribe's application for a management contract pursuant to 25 CFR part 533.

In accordance with Section 176 of the Clean Air Act (42 U.S.C. 7506), and the EPA general conformity regulations 40 CFR part 93, subpart B, a Final Conformity Determination (FCD) has been prepared for the proposed project. The Clean Air Act requires Federal agencies to ensure that their actions conform to applicable implementation plans for achieving and maintaining the National Ambient Air Quality Standards for criteria air pollutants. The BIA has prepared an FCD for the proposed

action/project described above. The FCD is included in Appendix Z of the FEIS.

Locations where the FEIS is Available for Review: The FEIS is available for review at www.tejoneis.com. Contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Public Comment Availability: Comments, including names and addresses of respondents, will be available for public review. Before including your address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment that your personal identifying information be withheld from public review, the BIA cannot guarantee that this will occur.

Authority: This notice is published pursuant to Sec. 1503.1 of the Council of Environmental Quality Regulations (40 CFR parts 1500 through 1508) and Sec. 46.305 of the Department of the Interior Regulations (43 CFR part 46), implementing the procedural requirements of the NEPA of 1969, as amended (42 U.S.C. 4371, *et seq.*), and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM 8. This notice is also published in accordance with 40 CFR 93.155, which provides reporting requirements for conformity determinations.

Tara Sweeney,

Assistant Secretary – Indian Affairs.

[FR Doc. 2020-23497 Filed 10-22-20; 8:45 am]

BILLING CODE 4337-15-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/
A0A501010.999900253G]

Final Environmental Impact Statement for the Little River Band Trust Acquisition and Casino Project, Township of Fruitport, Muskegon County, Michigan

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA) as lead agency, with the Township of Fruitport, County of Muskegon, Little River Band of Ottawa Indians (Tribe), and Federal Highway Administration serving as cooperating agencies, intends

Finally, the alternative methodology must be approved by EPA prior to the manufacturer using it to generate credits. As part of the review process defined by regulation, the alternative methodology submitted to EPA for consideration must be made available for public comment.⁴ EPA will consider public comments as part of its final decision to approve or deny the request for off-cycle credits.

II. Off-Cycle Credit Applications

Using the alternative methodology approach discussed above, Volkswagen is applying for credits for model years 2016, 2017, 2018 and 2019 model years for off-cycle credits using the alternative demonstration methodology pathway for high-efficiency alternators. Automotive alternators convert mechanical energy from a combustion engine into electrical energy that can be used to power a vehicle's electrical systems. Alternators inherently place a load on the engine, which results in increased fuel consumption and CO₂ emissions. High efficiency alternators use new technologies to reduce the overall load on the engine yet continue to meet the electrical demands of the vehicle systems, resulting in lower fuel consumption and lower CO₂ emissions. Some comments on EPA's proposed rule for GHG standards for the 2016–2025 model years suggested that EPA provide a credit for high-efficiency alternators on the pre-defined list in the regulations. While EPA agreed that high-efficiency alternators can reduce electrical load and reduce fuel consumption, and that these impacts are not seen on the emission test procedures because accessories that use electricity are turned off, EPA noted the difficulty in defining a one-size-fits-all credit due to lack of data. Since then, however a methodology has been developed that scales credits based on the efficiency of the alternator; alternators with efficiency (as measured using an accepted industry standard procedure) above a baseline value could get credits. EPA has previously approved credits for high-efficiency alternators using this methodology for Ford Motor Company, General Motors Corporation, Fiat Chrysler Automobiles, Hyundai, Kia, and Toyota Motor Company. Details of the testing and analysis can be found in the manufacturer's applications.

III. EPA Decision Process

EPA has reviewed the applications for completeness and is now making the applications available for public review and comment as required by the

regulations. The off-cycle credit applications submitted by the manufacturer (with confidential business information redacted) have been placed in the public docket (see **ADDRESSES** section above) and on EPA's website at <https://www.epa.gov/vehicle-and-engine-certification/compliance-information-light-duty-greenhouse-gas-ghg-standards>. EPA is providing a 30-day comment period on the applications for off-cycle credits described in this notice, as specified by the regulations. The manufacturers may submit a written rebuttal of comments for EPA's consideration, or may revise an application in response to comments. After reviewing any public comments and any rebuttal of comments submitted by manufacturers, EPA will make a final decision regarding the credit requests. EPA will make its decision available to the public by placing a decision document (or multiple decision documents) in the docket and on EPA's website at the same manufacturer-specific pages shown above. While the broad methodologies used by these manufacturers could potentially be used for other vehicles and by other manufacturers, the vehicle specific data needed to demonstrate the off-cycle emissions reductions would likely be different. In such cases, a new application would be required, including an opportunity for public comment.

Dated: October 19, 2020.

Byron Bunker,

Director, Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation.

[FR Doc. 2020–23464 Filed 10–22–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9053–5]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS) Filed October 9, 2020 10 a.m. EST Through October 19, 2020 10 a.m. EST Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://>

cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.

- EIS No. 20200206, Draft Supplement, NRCS, MO, East Locust Creek Watershed Revised Plan, Comment Period Ends: 12/07/2020, Contact: Chris Hamilton 573–876–9416.
- EIS No. 20200207, Final, BIA, CA, Tejon Trust Acquisition and Casino Project, Review Period Ends: 11/23/2020, Contact: Chad Broussard 916–978–6165.
- EIS No. 20200208, Final, BLM, WY, Final Resource Management Plan Amendments/Environmental Impact Statement Wyoming Pipeline Corridor Initiative, Review Period Ends: 11/23/2020, Contact: Heather Schultz 307–775–6084.

Dated: October 19, 2020.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2020–23482 Filed 10–22–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0750; FRL–10015–60]

Pesticide Registration Review; Proposed Interim Decision for Paraquat

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed interim registration review decision and opens a 60-day public comment period on the proposed interim decision for paraquat.

DATES: Comments must be received on or before December 22, 2020.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number for the specific pesticide of interest provided in the Table in Unit IV, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

⁴ See 40 CFR 86.1869–12(d)(2).

ATTACHMENT 2

Supplemental Response to Final EIS Comments

ATTACHMENT 2

SUPPLEMENTAL RESPONSE TO FINAL EIS COMMENTS

1.0 INTRODUCTION

This attachment to the Record of Decision (ROD) for the Tejon Indian Tribe (Tribe) Trust Acquisition and Casino Project (Proposed Project) contains responses to the comments that were received on the Final Environmental Impact Statement (Final EIS) following its publication. The BIA published a Notice of Availability (NOA) of the Final EIS in the *Federal Register* on October 23, 2020 (85 Fed. Reg. 67561). The five letters received by the Bureau of Indian Affairs (BIA) after the publication of the NOA have been considered during the decision-making process for the Proposed Actions. The five letters are listed in **Table 1** and copies of the comment letters are provided in **Exhibit A** of this document. Specific responses to each of the five comment letters are provided in **Section 2.0** of this document.

TABLE 1
INDEX OF COMMENT LETTERS ON FINAL EIS

COMMENT LETTER NO.	NAME	AGENCY/ORGANIZATION
1	Karen Vitulano	US Environmental Protection Agency
2	Cheryl Schmit	Stand Up for California!
3	Leo J. Sisco	Santa Rosa Rancheria Tachi Yokut Tribe
4	María Martinez	NA
5	Octavio Escobedo	Tejon Indian Tribe

2.0 RESPONSES TO SPECIFIC COMMENTS ON THE FINAL EIS

Each of the bracketed comments within the five comment letters contained in **Exhibit A** of this document are responded to below. Individual comments within the letters have been bracketed in the letter margin and numbered (e.g., 1-01) for ease of reference. If a specific comment raises an issue that has previously been responded to within the Final EIS, the appropriate section or response within the Final EIS is referenced. Additionally, once an issue has been addressed in a response to a comment, subsequent responses to similar comments reference the initial response.

COMMENT LETTER 1: US ENVIRONMENTAL PROTECTION AGENCY

Response to Comment 1-01

This comment has been previously responded to in the Final EIS, Volume II, Appendix V, Section 3.1 Response to Comment 3-14. The use of Tier 3 engines for all large construction equipment except scrapers is not a mitigation measure, but will be incorporated into project design plans and construction contracts as a best management practice to be followed during construction. (See Final EIS, Volume I, Section 2.2.2.9). As described in FEIS Response to Comment 3-14, the Proposed Project as proposed with the implementation of best management practices would not exceed *de minimis* levels. Therefore, requiring the use of Tier 4 engines is not needed to reduce potential impacts during construction to a less-than-significant level. Further, changes to the Proposed Project that could increase the total emissions to or above the applicable *de minimis* levels may constitute substantial changes in the Proposed Actions and may require preparation of a supplemental EIS and conformity determination before approval, in accordance with National Environmental Policy Act (NEPA), 40 C.F.R. § 1502.9(c). The Proposed Actions are subject to all implementing regulations for NEPA; therefore, no additional commitment to these regulations is required in the ROD.

Response to Comment 1-02

This comment concerning the use of the 100-year storm event as a planning basis has been previously responded to in the Final EIS, Volume II, Appendix V, Section 3.1 Response to Comment 8-17. Please also see **Response to Comment 2-02** below, which is relevant to this comment. Concerning the reference to “permit requirements and regulations” for the operation of the proposed onsite wastewater treatment plant (WWTP) in Mitigation Measure 2-B, the Tribe may develop regulations for developments on lands under its jurisdiction. If issued, regulations or permits for the operation of the proposed WWTP would ensure that the WWTP is staffed with, and operated by qualified personnel. Additionally, the WWTP will be operated such that any discharges are in compliance with the federal Clean Water Act as enforced by the United State Environmental Protection Agency (USEPA) on tribal lands. Further, the Intergovernmental Agreement (IGA) between the Tribe and Kern County includes provisions requiring the proposed gaming facility and fire/sheriff joint substation be constructed in compliance with the California Building Code and the California Public Safety Code applicable to the County, as set forth in the California Code of Regulations, Titles 19 and 24, as amended. This includes, but is not limited to, codes for building, electrical, energy, mechanical, plumbing, fire and safety. As stated in Final EIS, Volume I, Section 2.2.2.5, reclaimed water from the on-site WWTP may be utilized for toilet flushing at the casino resort; therefore, there may be some operational requirements at the WWTP that would be needed to fulfill the stipulations in the IGA.

COMMENT LETTER 2: STAND UP FOR CALIFORNIA!

Response to Comment 2-01

As described in the Final EIS, Volume II, Appendix V, Section 3.0, revisions were made in the Final EIS to improve language, enhance data, and provide clarification based on the comments received on the Draft EIS. The changes made to the Draft EIS are consistent with 40 C.F.R. § 1503.4, which states that “An agency preparing a final environmental impact statement ... may respond by: (1) Modifying alternatives including the proposed action; (2) Developing and evaluating alternatives not previously given serious consideration by the agency; (3) Supplementing, improving, or modifying its analyses; (4) Making factual corrections; or (5) Explaining why the comments do not warrant further agency response, recognizing that agencies are not required to respond to each comment.”

The commenter is correct in noting that the Final EIS included revisions to several EIS sections and technical studies. However, revisions to these components of the Final EIS meet the regulatory requirements allowing for supplementing, improving, or modifying previous analyses. Each of these analyses were previously included in the Draft EIS, and inclusion of clarifications and refinements to such analyses in the Final EIS in no way implies that the Draft EIS failed to provide meaningful analysis.

Additionally, the implementing regulations for NEPA, 40 C.F.R. § 1502.9(c) provide guidance on circumstances under which a lead agency should prepare a supplement to a Draft EIS. These regulations provide that a supplement to a Draft EIS should be prepared if the “agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” While the Final EIS has been revised in response to comments received on the Draft EIS, the new information presented has not resulted in substantial changes in the EIS’s conclusions regarding the environmental impacts of the Proposed Actions and no new significant impacts have been determined in the Final EIS.

Therefore, the Final EIS was prepared in accordance with the requirements of 40 C.F.R. § 1502.9, and circulation of a supplemental Draft EIS is not required. Additionally, the appropriate 30-day waiting period was provided following publication of Final EIS, as required by 40 C.F.R. § 1506.11.

Response to Comment 2-02

This comment was addressed in Final EIS, Volume II, Appendix V, Section 3.1 Response to Comments 8-17 and 9-21. As described therein, there are a number of reasons why the Updated Preliminary Grading, Drainage, and Flood Impact Analysis (Final EIS, Volume II, Appendix H) evaluated the Mettler Site used a 100-year storm event for hydrologic modelling and analyses. These reasons include:

- The use of the 100-year storm event for hydrologic analysis is standard practice in civil engineering and is noted as the Capital Storm Design Discharge (CSDD) in the Kern County Standards for Drainage. The mitigation measures for the protection of life and property, and the maintenance of emergency vehicle access are based on the CSDD for the area per Section 401-

1.03 of the Kern County Standards of Drainage. Additionally, “Flood Flow” is considered to be the CSDD per Kern County Standards of Drainage Section 402-1.15.

- The 100-year flood is also noted as the “Base Flood” by the Kern County Standards for Floodplain Management in Section 17.48.050.8 and is used consistently across the required standards of design.
- The regulations to which Draft EIS Comment 9-21 referred is 44 C.F.R. Part 9. These regulations apply only to those actions undertaken by Federal Emergency Management Agency (FEMA). In this case, FEMA is not the agency that will undertake an action. Rather, the BIA is the lead agency with respect to the Proposed Actions.

It is also important to note that, as described in Final EIS, Volume II, Appendix V, Section 3.1, Response to Comments 8-17, 9-25, 9-27, 9-28, 9-30, and 9-35, a more detailed grading, drainage and flood impact analysis would be performed during the final design stage of the Proposed Project and prior to construction. Among other things, such analysis would include a complete topographical survey of the Mettler Site (*see* Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-30), the results of percolation tests (*see* Final EIS, Volume II, Appendix V, Section 3.1, Response to Comments 3-09 and 3-11), and provide flexibility for additional consultation with Kern County prior to construction. Performing a detailed topographical survey at the EIS stage is unwarranted because, among other things, detailed design elements are either not yet known, or are subject to refinement.

For these reasons, the preparation of a more detailed and final grading, drainage, and flood impact analysis (which, at the discretion of the Tribe, could include an analysis of a 500-year flooding event) is not warranted in connection with the EIS process.

Response to Comment 2-03

As described in Final EIS, Volume I, Section 3.3.2.2, the eight feet of subsidence cited by the commenter occurred between 1926 and 1970 (over 50 years ago). Since that time, the issue of ground subsidence has been extensively studied by the Kern Groundwater Authority, and monitoring plans and policies have been put in place to minimize future subsidence. This effort is reflected in the Kern Groundwater Authority Groundwater Sustainability Plan (GSP) and supporting management area plans, which show the rate of subsidence being reduced in many areas compared to historic data and even identifying uplift (opposite of subsidence) in the Central Subbasin between 1994 and 2018.¹ Section 3.2.5 of the GSP states “While it is generally acknowledged that subsidence exists in portions of the Subbasin, there are generally no significant impacts to infrastructure within the Subbasin.” Section 3 of the GSP addresses sustainable management, and details protocols to avoid and mitigate potential impacts that may be caused by land subsidence. Section 3.3.3 and Figure 3-6 of the GSP describe monitoring sites that will track future land subsidence. “Areas of Interest” are listed on Figure 3-6 and are numbered in order of priority based, in part, on areas of the Kern County Subbasin where significant amount of subsidence was reported in monitoring data. Neither alternative site is located within an “Area of Interest” (AOI) depicted on Figure 3-6 of the GSP, although the closest (eastern) boundary of AOI 4 is located approximately eight miles west of the Mettler Site. Final EIS, Volume II, Appendix V, Response to Comments 9-25, is correct that it

¹ Source: Kern Groundwater Authority Groundwater Sustainability Plan, dated January 2020. *Available at:* 1. Accessed December 9, 2020.

would be speculative to adjust the FEMA maps for potential ground subsidence at this time because the level of effectiveness of the management and protocols outlined in the GSP at the Mettler Site, while anticipated to be positive, is speculative.

Further, for non-coastal areas and locations not adjacent to river levees, like the Mettler Site, the appropriate metric for estimating flood effects is a change in “slope” (e.g., the effects of subsidence of site locations relative to upstream and downstream). The flood modelling included in Final EIS, Volume II, Appendix H relies upon FEMA maps and elevation data, including change in slope, that is current as of the date that the underlying elevation data was measured. Thus, by definition the reports reflect historic changes in elevations through the measurement date (*see* Final EIS, Appendix V, Response to Comment 9-30). While a more detailed topographical survey of the Mettler Site and vicinity would provide more precise and more current elevation data, the difference in time from when the previous elevation data was measured would not result in substantial changes in the analysis (*i.e.* the Mettler Site would still be within a floodplain and the buildings and infrastructure associated with the Proposed Project would still need to be raised approximately 2.5 feet as described in the Final EIS).

Furthermore, as stated in Final EIS, Volume I, Section 2.6.2, the agreement between the Tribe and Arvin-Edison Water Storage District (AEWSD) (Water Agreement), which can be found in Final EIS, Volume II, Appendix W, “would assist the Tribe in maintaining neutral to positive groundwater levels in the vicinity of the Mettler Site.” Thus, since subsidence has historically been caused by a depletion of groundwater, the implementation of the Water Agreement would among other things address the potential for future ground subsidence in the vicinity of the Mettler Site.

Response to Comment 2-04

Please see **Response to Comments 2-02** and **2-03** regarding why a more detailed topographical survey is not warranted in connection with the preparation of the EIS. The BIA assumes that the commenter is referring to 40 C.F.R. § 1502.21 (Incomplete or unavailable information) rather than 40 C.F.R. § 1502.22 (cost-benefit analysis). In this case, the disclosures required under 40 C.F.R. § 1502.21 are not warranted, as an assessment of impacts regarding flooding was appropriately conducted using standard engineering methodology and publicly available topographic mapping of the Mettler Site. The Final EIS appropriately discloses that the Mettler Site is within the 100-year floodplain and the estimated flood water depths that could occur during a 100-year storm event. The Final EIS also evaluates potential impacts given that the development would be raised approximately 2.5 feet above the existing ground level. A more detailed topographic survey of the Mettler Site would not alter this evaluation or change the conclusions of the Final EIS.

Response to Comment 2-05

Refer to **Response to Comment 02-01**. The Final EIS was prepared in accordance with the requirements of 40 C.F.R. § 1502.9, and the appropriate 30-day waiting period was provided following publication of Final EIS, as required by 40 C.F.R. § 1506.11.

Response to Comment 2-06

This comment has been previously responded to in the Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-07. As described therein, a reasonable range of alternatives was evaluated and analyzed in the Final EIS, and pursuant to 40 C.F.R. § 1502.14(c), Final EIS, Volume I, Section 2.5 and Volume II, Appendix B, provided a discussion of alternatives that were considered but eliminated from further study and the reasons for them having been eliminated.

Additionally, the commenter incorrectly applies the statutory requirements of IGRA regarding the Secretarial Determination (25 U.S.C. § 2719(b)(1)(A)(1)) and the BIA's selection of a reasonable range of alternatives. As described in Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-06, the EIS will provide the Secretary of the Interior (Secretary) with information on the potential physical environmental effects of the proposed federal actions which must be considered under the Department of the Interior's (Department) trust land acquisition regulations at 25 C.F.R. Part 151, and its Secretarial Determination regulations at 25 C.F.R. Part 292, Subsection C. Consideration of the Secretary's analysis of the regulatory requirements of 25 C.F.R. Parts 151 and 292 are outside the scope of the EIS, but may be addressed in the Record of Decision (ROD).

Response to Comment 2-07

The scoping stage of the EIS process did address the process for evaluating alternatives. Please see the Notice of Intent dated August 13, 2015 and the February 2019 Scoping Report, Sections 2.3, 2.4, and 2.5. No comments were received during the scoping period specifically regarding the consideration of an alternative outside of Kern County. The Draft EIS and Final EIS further elaborated on the screening process. As described in Draft EIS Section 2.5 and Appendix B, alternatives eliminated from consideration were screened based on criteria that included the extent to which they meet the purpose and need for the Proposed Actions. As described in Final EIS, Volume I, Section 1.2, "The purpose of the Proposed Actions is to facilitate tribal self-sufficiency, self-determination, and economic development." Please see Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-07, for more information on the range of alternatives.

Response to Comment 02-08

The issue of the Tribe having a legal right to the Tule River Reservation has been previously addressed in FEIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-08. As described therein, the Tribe's fee-to-trust application filed pursuant to 25 C.F.R. Part 151 addressed the Tribe's history with the 1851 Tejon Treaty Area; therefore, additional discussion is not required. Furthermore, the Tribe and Tule River Tribe are independent, federally recognized tribes. Therefore, an alternative for the Tribe to operate a gaming facility within the Tule River Reservation is not a viable option.

Response to Comment 2-09

This comment has been previously responded to in the Final EIS, Volume II, Appendix V, Section 3.1, Response to Comments 9-16 and 9-20. As described therein, neither the Mettler and Maricopa Highways sites are located within an Earthquake Fault Zone, and the Seismic Hazards Mapping Act only requires a

geotechnical report to be prepared if the project is located within an earthquake fault zone. Further, as specified in Final EIS, Volume I, Section 3.2.3, buildings would be built to standards at or better than the California Building Code (CBC). These minimum building requirements would include features to protect against the adverse effects of seismic activity similar to any construction that would occur within the County.

Response to Comment 2-10

The commenter references the agreement formed between the Tribe and AEWS, which can be found in Final EIS, Volume II, Appendix W. The commenter is correct that some terms of the Water Agreement would require coordination between AEWS and other local landowners. Specifically, the Water Agreement states: “The Parties [Tribe and AEWS] shall coordinate on assignments from time to time of the surface water available to Water User [Tribe] under the CAWS [Contract for Agricultural Water Service recorded in the Official Records of Kern County as Document No. 0201051529] to other landowners within the District that are eligible to receive surface water service from the District.” Given the demand for and value of surface water in the region and the presence of existing groundwater banks, due to the deficit of groundwater supply to demand discussed in Final EIS, Volume I, Section 3.3.2.2, it is reasonable to assume that such arrangements would be forthcoming. The commenter does not state which “highly technical assumptions” it is referring to, or how such assumptions would affect the implementation of the Water Agreement.

Regarding 1, 2, 3 trichloropropane (TCP), TCP is an organochlorinated compound, the risks of which were addressed in the Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 1-07. As described therein, groundwater testing would be conducted prior to the final design of the project to ensure that appropriate water quality standards are met. Furthermore, as described in Final EIS, Volume I, Section 4.0, mitigation measures would ensure that drinking water and wastewater are monitored for potential contaminants, including USEPA listed “forever chemicals.”

Response to Comment 2-11

The commenter’s claim that “The revised Transportation Impact Analysis does not address impacts to I-5” is incorrect. As described in Final EIS, Volume I, Section 3.8, the analysis of transportation impacts included the evaluation of impacts to intersections, roadways, freeway ramps, and freeways. As shown in Final EIS, Volume I, Table 3.8-2, the study area used in the transportation analysis included several intersections with Interstate 5 (I-5) and freeway mainline segments of I-5. Impacts to these I-5 facilities were fully evaluated in Final EIS, Volume I, Section 3.8.3. Based on existing traffic volumes and projected trip generation presented in the Refined TIA (Final EIS, Volume I, Appendix F), the Proposed Project would only contribute a small percentage of trips (approximately 5 percent) to I-5 south of the Mettler Site. This small increase in trips would not significantly affect existing I-5 traffic safety issues.

Response to Comment 2-12

The assertion that the Final EIS does not address public health risks related to hazardous agricultural chemicals is not correct. This issue was previously addressed in the Final EIS, Volume II, Appendix V, Section 3.1, Response to Comments 1-07, 9-94, 9-114, and 15-02. Furthermore, hazardous materials,

including hazardous agricultural chemicals, are examined and analyzed in Final EIS, Volume I, Section 3.12. The analysis concluded that with the proposed project design, including Best Management Practice (BMP) K8 (described in Final EIS, Volume I, Section 2.0), the risk associated with agricultural hazardous materials is less than significant.

COMMENT LETTER 3: SANTA ROSA RANCHERIA TACHI YOKUT TRIBE

Response to Comment 3-01

Refer to **Response to Comment 03-02** through **03-16** below. A reasonable range of alternatives was evaluated and analyzed in the Final EIS. These alternatives are summarized in the Final EIS, Volume I, Section 2.0. Regarding process, the timing of the steps for this EIS is consistent with NEPA guidelines. A summary of the NEPA process to date can be found on the website for the EIS.² It should also be noted that scoping occurred well before the start of the COVID-19 pandemic, with the Scoping Report released in February 2019.

Response to Comment 3-02

As described in Final EIS, Volume I, Section 2.1, a reasonable range of alternatives was selected based on consideration of the purpose and need of the Proposed Actions and opportunities for potentially reducing environmental effects. The range of alternatives includes three alternatives on the Mettler Site (Alternatives A1, A2, and A3), one alternative on the Maricopa Highway Site (Alternative B), and the No Action Alternative (Alternative C).

The commenter's claim that Alternative A3 "would result in no changes to the use of the site" is unsupported and directly contradicted by the Final EIS. As described in FEIS, Volume I, Section 2.2.4, Alternative A3 (Organic Farming Alternative) consists of the transfer of the Mettler Site from fee to trust status, and the conversion the Mettler Site from conventional agriculture to an organic farm. As described in Final EIS, Volume I, Section 2.4, the BIA would not acquire land in trust for the Tribe under Alternative C (the No Action Alternative), and there would be no change to existing uses on the Mettler and Maricopa Highway sites.

Additionally, as described in Final EIS, Volume I, Section 2.6, Alternative A3 would avoid most of the environmental effects associated with the development and construction of Alternatives A1 and A2, and, thus, have significantly fewer environmental effects, aside from water use. Alternative C would avoid the environmental effects associated with the development of Alternatives A1, A2 and B. However, it should be noted that Alternative A3 would utilize fewer hazardous materials than Alternative C. Therefore, the Alternative A3 was appropriately included in the Final EIS as a distinct alternative.

Response to Comment 3-03

Refer to **Response to Comment 3-02** above regarding Alternative A3.

² Available online at: <https://www.tejoneis.com/>. Accessed December 7, 2020.

As described in the Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-07, a reasonable range of alternatives was evaluated and analyzed in the Draft EIS. Pursuant to 40 C.F.R. § 1502.14(c), Draft EIS Section 2.5 and Appendix B provided a discussion of alternatives that were considered but eliminated from further study and the reasons for them having been eliminated. Regarding why the range of alternatives did not include projects involving activities such as energy development, tourism and lodging, or retail development, it should be noted that Alternatives A1, A2, and B do include a hotel component. In addition, it should be noted that, at least insofar as the fossil fuel development is concerned, U.S. oil and gas exploration has faced economic challenges during the last several years,³ California production volumes have been declining, and production and development in California face increased scrutiny.⁴ For example, since at least 2013, Kern County has been involved in the preparation of an environmental impact report related to oil and gas permitting activities. As of December 2020, a Draft Supplemental Recirculated Environmental Impact Report was in process, due in part to litigation.⁵ Regarding the viability of a pure retail alternative, it should be noted that the recently approved Grapevine Specific Community Plan includes approximately 1.2 million square feet of new retail space⁶ and other commercial uses. This development would be located approximately seven miles south of the project alternatives on I-5⁷ and would compete with a hypothetical retail-focused alternative at the project sites. For these reasons, the EIS does analyze a reasonable range of alternatives pursuant to 40 C.F.R. § 1502.14(c). Analyzing an additional non-gaming alternative would not meaningfully add to the range of alternatives.

Response to Comment 3-04

Refer to Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-07, regarding the consideration of a reasonable range of alternatives. The commenter is incorrect that Alternative A1 (gaming) and Alternative A2 (reduced intensity gaming) are not meaningfully different alternatives. While these alternatives share some level of similarity, the most obvious being that they occupy the same physical site and that the commercial use would be similar, the differences between Alternatives A1 and A2 are substantial. Alternative A2 is approximately 23 percent smaller in overall square footage compared to Alternative A1, and, unlike Alternative A1, no RV park would be constructed as part of Alternative A2. Because of differences in building footprint and other characteristics, the environmental impacts for these alternatives are different in most areas of environmental study, including impacts to geology and soils, water resources, air quality, biological resources, transportation, public services, noise,

³ Source: Reuters news article dated October 2, 2019. Available online at: <https://www.reuters.com/article/us-usa-oil-kemp/u-s-oil-drilling-slowdown-hits-wider-economy-kemp-idUSKBN1WH1QP>. Accessed December 9, 2020.

⁴ Source: *Energy News Network* article dated December 6, 2019. Available online at: <https://energynews.us/2019/12/06/us/battle-lines-are-drawn-over-oil-drilling-in-california/>. Accessed December 9, 2020.

⁵ Source: *Notice of Preparation of a Draft Supplemental Recirculated Environmental Impact Report*, dated April 29, 2020. Accessed online at: https://psbweb.co.kern.ca.us/planning/pdfs/notices/oil_gas_sreir_nop.pdf. Accessed December 9, 2020.

⁶ Source: *Grapevine Specific Community Plan – Draft Environmental Impact Report*, Chapter 3 (Project Description) Table 3-7. Available online at: https://psbweb.co.kern.ca.us/UtilityPages/Planning/EIRS/grapevine_scp/DEIR/Grapevine-03-Project%20Description_Circ.pdf. Accessed December 9, 2020.

⁷ Source: Final EIS, Appendix E, Figure 3.9-1.

aesthetics, and indirect and growth-inducing effects. Additionally, the comparison of alternatives, found in Final EIS, Volume I, Section 2.6.2, provides a detailed summary of the different environmental and economic consequences of each alternative. Therefore, a reasonable range of alternatives was appropriately evaluated and analyzed in the EIS, pursuant to 40 C.F.R. § 1502.14(c).

The commenter's claim that approval of the Proposed Actions could result in the end of "tribal exclusivity" in California is speculative. Furthermore, implantation of a gaming alternative would not represent a "broken promise" but would instead be fully consistent with Proposition 5 and 1A.

Response to Comment 3-05

This issue of the economic benefits to the Tribe from the implementation of the project alternatives has been thoroughly analyzed in Final EIS, Volume I, Section 3.7, and in the Economic and Community Impact Analysis (Final EIS, Volume II, Appendix I). For example, as stated in Final EIS, Section 3.7.4.1, operation of Alternative A1 would be expected to generate approximately \$378.2 million of direct output during its first full year of operations. Direct output is approximately synonymous with project revenue. The Tribe would be the beneficiary of a portion of this revenue. The amount of revenue that would ultimately flow to the Tribe is not specified in the EIS for several reasons. First, it would depend on a number of assumptions, including the operating expenses of the project alternatives and the amount of debt, and, thus, debt service, that would be incurred. Second, such a "pro forma" of complete financial performance and related assumptions is confidential and is typically withheld from the public under Exemption 4 of the Freedom of Information Act regulations at 43 C.F.R. §§ 2.23 and 2.24. Finally, although the exact amount of tribal benefit cannot be estimated directly from the information in the EIS, the EIS does include the necessary information to compare the project alternative to each other. For example, the direct economic impacts of Alternative A1 and Alternative A2 on an annual basis are estimated at \$378.2 million and \$347.4 million, respectively. Thus, assuming that the ratio of operating expenses and debt service are the same, the economic impacts of Alternative A2 (including its benefits to the Tribe) would be \$347.4 million divided by \$378.2 million or approximately 92 percent of the benefits under Alternative A1. Please refer to **Response to Comment 3-05**, below, regarding the potential effects of the Coronavirus Disease 2019 (COVID-19) pandemic.

The Final EIS does include an analysis of economic impacts from Alternative A3, the organic farm alternative. Please see Final EIS, Volume I, Section 3.7.4.1 (page 3-55).

The Final EIS does analyze the economic benefit that could be expected from construction of the casino resort at the Maricopa Highway Site (Alternative B). As stated in Final EIS, Volume I, Section 2.3, the design and layout of Alternative B is similar to that of Alternative A1. Also, although the Maricopa Highway Site is different in many respects from the Mettler Site (*i.e.*, different acreage, different physical environmental impacts, etc.), it is in the same general vicinity as the Mettler Site and has similar access to major roadways. For these reasons, Final EIS, Volume I, Section 3.7.4.2, states that the economic impacts of Alternative B operations would be similar to those of Alternative A1. Thus, Final EIS, Volume I, Section 3.7, did not restate the detailed Alternative A1 economic impacts in Section 3.7.4.2 because to do so would have been redundant.

There is no quantitative analysis of the economic effects of Alternative C, the No Action Alternative, because there would be no change in land use and the land would not be taken into trust. Consequently, there would be no economic impacts.

Response to Comment 3-06

Potential effects of the COVID-19 pandemic on the economic prospects of the project alternatives and public health was extensively addressed in Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-03. As described therein, the project alternatives are not anticipated to commence operations until 2023. Despite the uncertainty of the course of the COVID-19 pandemic, it is likely that the pandemic will be substantially over prior to then. In the event that the pandemic is then still ongoing, the Tribe would implement policies and procedures similar to those introduced by existing tribal casinos that have reopened. Please see Final EIS, Volume I, Section 2.2.2.9, BMP K7, regarding these policies and procedures.

Regarding the continued relevance of the economic analysis presented in Final EIS, Volume I, Section 3.7, and Final EIS, Volume II, Appendix I, please also see Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-03. As described therein, the Proposed Project would most likely only become operational once the COVID-19 pandemic has completely or substantially subsided. Consequently, it would be speculative and unwarranted to adjust the revenue forecasts included in Appendix I. Also, although the commenter is correct that unemployment rates have increased substantially due to COVID-19 and the resulting recession, employment has more recently begun to improve. For example, as described in Final EIS, Volume I, Section 3.7, the U.S. unemployment rate went from 4.3 percent in 2017 to 10.2 percent in July of 2020. The U.S. unemployment rate had declined to 6.7 percent as of November 2020.⁸ For these reasons, a supplement to the Final EIS or additional revisions are not warranted.

Response to Comment 3-07

Refer to **Response to Comment 02-09**. The Final EIS adequately examined the existing seismic conditions and the potential for seismic risk in Final EIS, Volume I, Section 3.2. As specified in Final EIS, Section 3.2.3, buildings would be built to standards at or better than the CBC. Final EIS, Appendix K specifies that “[t]he CBC establishes minimum building requirements to protect public health, safety, and general welfare ensures safety standards.” The commenter does not provide reasoning or evidence for why use of the State approved standards for seismic risk would be inadequate.

Additionally, as specified in Final EIS, Volume I, Sections 3.2.2.2 and 3.2.2.3, neither the Mettler Site nor the Maricopa Highways Site are located within an Earthquake Fault Zone, and the Seismic Hazards Mapping Act only requires a geotechnical report to be prepared if the project is located within an earthquake fault zone. Therefore, no revisions to the Final EIS are warranted.

⁸ Source: Bureau of Labor Statistics (BLS) news release dated December 4, 2020, available online at: <https://www.bls.gov/news.release/pdf/empsit.pdf>. Accessed December 5, 2020.

Response to Comment 3-08

The issue concerning Executive Order 11988 was previously addressed in the Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-24.

Response to Comment 3-09

The commenter is incorrect in stating that the Final EIS did not identify surveyors or the survey methods. This issue was addressed thoroughly in Final EIS, Volume II, Appendix V, Section 3.1, Response to Comment 9-42. Furthermore, as discussed in Final EIS, Volume II, Appendix L, Section 3.2, biological site assessments were completed by qualified biologists on both the Mettler and the Maricopa Highway sites in October of 2018. Detailed results of biological surveys and methodology were included as Final EIS, Volume II, Appendix L and Appendix O.

The commenter questions whether aquatic habitats on the Mettler Site or Maricopa Highway Site are subject to the Clean Water Act. The jurisdictional status of these features was discussed in the Final EIS, Volume II, Appendix V, Response to Comment 9-42. It is additionally noted that potential indirect impacts to water quality from construction activities would be subject to the installation of stormwater pollutant management measures throughout construction, such as straw wattles along the top of the drainage, in order to comply with the necessary Stormwater Pollution Prevention Plan. These measures are described in Final EIS, Volume I, Section 3.3, and would not result in conversion of habitat or modification of aquatic habitat. During operation, runoff would be collected and percolated into the ground and would not be discharged into other surface waters.

Alternative C, as the No Action Alternative, would result in no development on the Mettler or Maricopa Highway sites and would therefore not impact potential waters of the U.S.

The commenter states that Tecuya Creek occurs less than 500 feet from the site and should be evaluated for impacts. A portion of Tecuya Creek runs parallel to the western boundary of the Mettler Site, approximately 500 feet from the Mettler Site across an existing off-site agricultural field. Tecuya Creek is discussed in Final EIS, Volume I, Section 3.3.2.1, as the nearest surface waterbody to the Mettler Site. Tecuya Creek is additionally discussed in Final EIS, Volume I, Section 3.3.3.1. As stated in the Final EIS, “The segment of the stream in the vicinity of both sites passes through agricultural fields and is heavily channelized. Tecuya Creek terminates approximately 2.4 miles northwest of the sites near the southern boundary of the now-dry historical Kern Lake bed.” Under development alternatives on the Mettler Site, project activities would be restricted to the Mettler Site and would not result in modifications to Tecuya Creek. Additionally, development on the Mettler Site, as stated above, would not alter the drainages on the site. Potential runoff from the Mettler Site would not flow directly into Tecuya Creek. Runoff during construction on the Mettler Site would be addressed by the Stormwater Pollution Prevention Plan and would require the installation of appropriate stormwater pollutant management features to prevent impaired water from flowing off-site, where it would percolate into the ground. Runoff following construction would be treated via the on-site bioretention pond and would not discharge water into Tecuya Creek. Because development on the Mettler Site would not result in direct or indirect impacts to Tecuya Creek, no further analysis or consultation with U.S. Army Corps of Engineers (USACE) is warranted.

At its closest point, Tecuya Creek is approximately 3,000 feet (0.6 miles) from the Maricopa Highway Site. This feature is separated from the Maricopa Highway Site by I-5 and several agricultural fields. The Maricopa Highway Site does not contain drainage features that would result in on-site runoff draining into Tecuya Creek. Under development alternatives on the Maricopa Highway Site, project activities would be restricted to the Maricopa Highway Site and would not result in impacts to Tecuya Creek. Therefore, an assessment of impacts or a formal evaluation of Tecuya Creek and consultation with USACE is not necessary.

Response to Comment 3-10

The BIA acknowledges and respects that traditional tribal knowledge is a valuable source of information when ascertaining the location of potential cultural resources, and has taken into consideration the information received during the consultation process and from public comments. As specified in Final EIS, Volume I, Section 3.6.2.1, the Kern Valley Indian Community, and the Kitanemuk and Yowlumne Tejon Indians both informed the BIA that they believe the project sites have the potential to contain sensitive cultural resources. The Kern Valley Indian Community suggested that construction should be monitored. To the BIA's knowledge, similar comments were not stated during the July 8, 2020, public hearing (please see FEIS, Volume II, Appendix V, Attachment B for the full public hearing transcript). While these concerns were raised, neither the Kern Valley Indian Community nor the Kitanemuk and Yowlumne Tejon provided details regarding the potential existence of tribal cultural or archeological resources on the alternative sites that might affect the Final EIS analysis. Also, it is correct that confidential information was provided to the BIA regarding cultural resources, but this information did not provide specific location information of cultural resources, and the other information is not available for public view because of its confidentiality. Please see Final EIS, Volume II, Appendix V, Response to Comment 9-58, regarding confidential information. As described in Final EIS, Volume I, Section 3.6, fields surveys and record searches for both the Mettler and Maricopa Highway sites found no evidence of cultural resources onsite. Additionally, there are no significant natural occurring water resources in the immediate vicinity of the project site, and prehistoric Kern Lake, an area known to have been extensively used by Native American populations, is approximately four miles to the north (Final EIS, Volume II, Appendix Q). Based on these results and the tribal consultation information, the Final EIS determined that the sites have a low probability of onsite cultural resources and recommended mitigation for the treatment of unanticipated archaeological discoveries that may occur during construction.

Response to Comment 3-11

As specified in Final EIS, Volume I, Section 4.0, Mitigation Measures 5-A through 5-D, if archeological or paleontological resource are discovered during earth-moving activities, then the resources and the project site would be subject to specific procedures. Mitigation Measures 5-A. through 5-D describe the applicable regulations, which include 36 C.F.R. § 61, 36 C.F.R. § 800.13, Section 101 (b)(4) of NEPA (40 C.F.R. § 1500-1508), and the Native American Graves Protection and Repatriation Act. These mitigation measures would ensure that archeological or paleontological resources discovered would be properly addressed. Should the resource be tribal cultural in nature, then the BIA may inform the NAHC, if warranted.

Response to Comment 3-12

The Proposed Project would use hazardous chemicals in similar amounts as other commercial, hotel, and wastewater treatment facilities, which would be “relatively small” compared to more industrial uses where large amounts of hazardous chemicals are generated and disposed. The potential risks of hazardous materials were examined and analyzed in Final EIS, Volume I, Section 3.12. As described therein, all applicable regulations and guidelines, including the Resource Conservation and Recovery Act (RCRA), would be adhered to ensure proper use, storage, transportation, and disposal. Diesel fuel storage tanks would have secondary containment systems, comply with National Fire Protection Association standards for aboveground storage tanks (including for hazards, such as flooding), and would not pose unusual storage, handling, or disposal issues. Chemicals used at the on-site WWTP and hotel pool would be stored within a secure building and only qualified personnel would handle these chemicals. Furthermore, BMPs specified in FEIS, Volume I, Section 2.0, would also ensure the proper storage and usage of hazardous materials onsite during construction. Based on these factors, the Final EIS determined that the risk posed by onsite hazardous materials would constitute a less-than-significant effect.

Response to Comment 3-13

This NEPA related issue has been previously responded to in Final EIS, Volume II, Section 3.1, Response to Comment 9-102. As specified therein, the NEPA issues specified in the comment were addressed in Draft EIS Section 3.0. This remains the same for the Final EIS. Therefore, no revisions are warranted.

Response to Comment 3-14

On June 30, 2020, the Department determined that the Tribe was under federal jurisdiction in 1934.⁹ Accordingly, the Secretary is authorized to acquire land in trust for the Tribe. Nonetheless, the determination of the Secretary’s authority to acquire land in trust for the Tribe is outside the scope of the NEPA process.

Response to Comment 3-15

The commenter is confusing the economics effects analysis typically performed under NEPA and the analysis required in a Secretarial Determination (*see* 25 C.F.R. Part 292). 25 C.F.R. § 292.2. defines a “Nearby Indian Tribe” as:

“*Nearby Indian tribe* means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.”¹⁰

At approximately 90 miles distant (as the crow flies) Tachi Palace and the Santa Rosa Rancheria are located well outside of the 25-mile radius from the project sites. However, 25 C.F.R. § 292 and the NEPA

⁹ DOI Office of the Solicitor, *Federal Jurisdiction Status of Tejon Indian Tribe in 1934*, publication date June 30, 2020. Available online at: https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/ots/pdf/Tejon_Indian_Tribe_2.pdf. Accessed December 2020.

¹⁰ Source: [25 C.F.R. § 292.2 - How are key terms defined in this part? Available online at: https://www.law.cornell.edu/cfr/text/25/292.2.](https://www.law.cornell.edu/cfr/text/25/292.2) Accessed online December 5, 2020.

process are not the same. Because the NEPA process is focused on evaluating potential environmental (including socioeconomic) impacts, there is not a strict 25-mile radius applied. This is why the Tachi Palace was included in the competitive effects analyses in the Final EIS.

The commenter is correct that the gaming alternatives would likely have competitive effects on the Tachi Palace, and, thus, Santa Rosa Rancheria revenues. Because the Tachi Palace is situated within the regional gaming market area, it is likely that some level of competitive or substitution effects would occur as a result of the gaming alternatives analyzed in the EIS. As described in Final EIS, Volume II, Appendix I, page 23, Tachi Palace is anticipated to experience competitive effects of minus 13.7 percent and minus 12.6 percent from Alternative A1 and A2 respectively. Alternative B is also estimated to have a minus 13.7 percent effect because it is similar to Alternative A1. These percentages apply to that portion of Tachi Palace revenues derived from the Tejon market area, as it is defined in Appendix I. The competitive effects on total Tachi Palace gaming revenues would be less. As described in Final EIS, Section 3.7.4.1 “Substitution effects also tend to diminish after the first full year of operations because, over time, growth in the total population and economic growth tend to increase the dollar value of demand for particular goods and services.”

We note that IGRA does not guarantee that tribes operating existing facilities will conduct gaming free from tribal and non-tribal competition.¹¹ Nor is competition in and of itself sufficient to conclude a detrimental impact on a tribe.¹² Additionally, as stated in Final EIS, Volume I, Section 3.7.4.1:

“The substitution effects resulting from Alternatives A1 and A2 on competing gaming facility revenues are not anticipated to significantly impact these casinos. Therefore, it is anticipated that under Alternative A1, the above-listed facilities would continue to operate and generate a meaningful level of profit. This profit would be utilized by the tribal governments that own the facilities to provide services to their respective memberships. Existing cardrooms would also continue to operate. No physical environmental effects would occur. As upheld by the U.S. District Court for the Eastern District of California, “competition...is not sufficient, in and of itself, to conclude [there would be] a detrimental impact on” a tribe (*Citizens for a Better Way, et al. v. U.S. Department of the Interior, E.D. Cal., 2015*). Therefore, because Alternatives A1 and A2 would not cause significant substitution effects and because competition alone does not constitute an impact, Alternatives A1 and A2 would have less-than-significant gaming market substitution effects.”

Please see **Response to Comments 3-02** and **3-03** regarding why the EIS did not analyze a non-gaming / non-agricultural alternative. Please also see **Response to Comment 3-05** regarding the economic impacts of the various project alternatives.

¹¹ See *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 947 (7th Cir. 2000).

¹² See *Citizens for a Better Way v. U.S. Dep’t of the Interior*, No. 2:12-cv-3021-TLN-AC, 2015 WL 5648925, at *21-22 (E.D. Ca. Sep. 24, 2015), *aff’d sub. nom.*, *Cachil Dehe Band of Wintun Indians v. Zinke*, 889 F.3d 584 (9th Cir. 2018).

Response to Comment 3-16

Please see **Response to Comments 2-6, 2-7, 2-8 and 3-02** regarding the range of alternatives evaluated in the EIS. The National Indian Gaming Commission (NIGC) participated as a Cooperating Agency for the EIS; however, its approval of a gaming management contract is separate from the trust acquisition and Secretarial Determination. As with 25 C.F.R. Parts 151 and 292, the EIS will be used to make a final determination about issuance of management contract. *See* 25 C.F.R. Parts 531, 533, and 535.

COMMENT LETTER 4: MARÍA MARTINEZ

Response to Comment 4-01

As described in Final EIS, Volume I, Section 2.0, the Tribe will acquire its water supply via two onsite groundwater wells. It should be noted that the Mettler Site is not within the Mettler Water District's jurisdiction but is within the AEWS's jurisdiction.¹³ As described in Final EIS, Volume I, Section 3.3.3, the Tribe and AEWS have entered into the Water Agreement that would mitigate the proposed development's groundwater impacts. Furthermore, mitigation measures described in Final EIS, Volume I, Section 4, would ensure that the groundwater wells are located to minimize impacts on established groundwater wells within 1-mile of the Mettler Site (*e.g.* wells operated by Mettler Water District). Please also see Final EIS, Appendix V, Response to Comments 3-12 and 8-15, regarding groundwater. Because of these factors, the Mettler Water District's well system would experience less-than-significant adverse effects from development of the Mettler Site.

COMMENT LETTER 5: TEJON INDIAN TRIBE

Response to Comment 5-01

The Tribe's response to the Stand Up for California letter dated November 23, 2020, is noted.

¹³ Figure PA-5 of the *Groundwater Sustainability Management Plan, Arvin-Edison Management Area, Kern County Subbasin*. August 27, 2019. Accessed December, 2020. Available online at: kerngwa.com/gsp.html

EXHIBITS

EXHIBIT A

Comment Letters



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

November 18, 2020

Amy Dutschke
Pacific Regional Director
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, California 95825

Subject: Final Environmental Impact Statement for the Tejon Indian Tribe Trust Acquisition and Casino Project, Kern County, California (EIS No. 20200207)

Dear Amy Dutschke:

The U.S. Environmental Protection Agency has reviewed the above-referenced document. We are providing comments pursuant to the National Environmental Policy Act, Council on Environmental Quality regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act. EPA is a cooperating agency on the project and provided scoping comments (September 3, 2015), comments on the Administrative Draft EIS (September 19, 2019), the Draft EIS (July 22, 2020), and the Administrative Final EIS (October 14, 2020).

In our previous comments, we expressed concerns regarding development in a floodplain at the Mettler site, which would require importing a large amount of fill to raise the site 2.5 feet to be sufficiently out of the floodplain. Trucking this large amount of fill would cause air quality impacts in an extreme ozone nonattainment area. The predicted mitigated oxides of nitrogen (NOx) construction emissions are close to the de minimis threshold (with unmitigated emissions above it) and we commented that should any changes or refinements to the project occur that could increase emissions above the threshold, a conformity determination for the construction phase would be needed before revisions to the project action could be approved. To provide for some flexibility and better avoid the potential to exceed the NOx de minimis threshold during the construction phase, we recommended strengthening the construction best management practices by requiring Tier 4 engines for all construction equipment with a horsepower rating of greater than 50, instead of CARB-rated Tier 3 engines as proposed. No changes to the BMPs are included in the FEIS. BIA responded that a Supplemental EIS would be prepared if actual emissions would be above the predicted emissions in the FEIS. We recommend including this commitment in the Record of Decision.

1-01

We continue to advise against development in a floodplain and continue to recommend against the use of the 100-year storm event peak flows when planning for infrastructure in the floodplain since this would not accommodate the intense atmospheric river-induced precipitation extremes that are predicted to occur in California in the coming decades.¹ Our comments and recommendations regarding placement of the wastewater effluent disposal percolation pond and stormwater detention basin in the floodplain

1-02

¹ <https://ca.water.usgs.gov/pubs/2011/climate-change-atmospheric-rivers-floods-california-dettinger.pdf>

were addressed by BIA in noting that the design features included in the DEIS are for purposes of analyzing environmental impacts. According to the FEIS, prior to construction, a more detailed designed study would be conducted in order to produce construction drawings with detailed design elements and specifications. BIA states that the proposed percolation pond elements would be conservatively designed to accommodate both stormwater and treated effluent during a peak rainfall event. The mitigation measures for water resources (p. 4-2) continues to state that the wastewater treatment plant would comply with all permit requirements and regulations; we reiterate that we are not aware of applicable regulations or permits for the proposed onsite wastewater treatment plant located on tribal land. Please clarify the permits and regulations that would apply to this work in the Record of Decision.

1-02
(Cont.)

The EPA appreciates the opportunity to review this FEIS. We would appreciate receiving a copy of the Record of Decision when it is available. Please send an electronic copy to Karen Vitulano, the lead reviewer for this project, at vitulano.karen@epa.gov. If you have any questions, please contact me at (415) 947-4167, or contact Ms. Vitulano at 415-947-4178.

Sincerely,

**JEAN
PRIJATEL**

Digitally signed by JEAN
PRIJATEL
Date: 2020.11.18
16:27:43 -08'00'

Jean Prijatel
Manager, Environmental Review Branch

cc: Octavio Escobedo, Chairperson, Tejon Indian Tribe
Patia Siong, San Joaquin Air Pollution Control District

Stand Up For California!
“Citizens making a difference”

www.standupca.org

P. O. Box 355
Penryn, CA. 95663

November 23, 2020

VIA EMAIL

Amy Dutschke
Regional Director
Bureau of Indian Affairs
Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Chad Broussard
Environmental Protection Specialist
Bureau of Indian Affairs
chad.broussard@bia.gov

Re: FEIS Comments, Tejon Indian Tribe Casino Project

Dear Ms. Dutschke and Mr. Broussard:

Thank you for the opportunity to comment on the Bureau of Indian Affairs' (BIA) Final Environmental Impact Statement (FEIS) for the Tejon Indian Tribe Trust Acquisition and Casino Project. For the reasons discussed in these comments, the environmental review finalized in the FEIS continues to be deficient in numerous respects, and we accordingly ask that the Bureau of Indian Affairs (BIA) prepare a revised draft Environmental Impact Statement for this project.

First and foremost, BIA has short-changed the public's right to comment in this process. In response to comments on the Draft Environmental Impact Statement (DEIS), BIA has substantially revised numerous areas of its analysis, including the Transportation Impact Analysis, the Preliminary Grading, Drainage and Flood Impact Analysis, Economic and Community Impact Analysis, Biological Assessment, and Air Quality Modeling—all of which have now been re-titled as “Refined.”¹ In fact, these revisions are substantial enough to make clear that the DEIS failed to “fulfill and satisfy to the fullest extent possible” the requirements for a final EIS, and was “so

¹ See Appendices F, H, I, L, and M.

inadequate as to preclude meaningful analysis.”² BIA was therefore required by regulation to prepare and circulate a revised *draft* for public comment.³ The current opportunity to comment on the FEIS does not satisfy this requirement. As well as precluding an additional opportunity for comment on a final EIS, the comment period for the FEIS (30 days) does not satisfy the requirement that comment periods on drafts be no less than 45 days.⁴ This substantially longer period required for drafts is critical where, as here, substantial revisions have been made and the assistance of subject matter experts is necessary to fully evaluate highly technical reports. BIA’s failure to provide adequate opportunity for public review violates NEPA and requires additional public comment before a final decision may be issued.

2-01
(Cont.)

Even a layman’s review reveals that the substantially revised technical reports still fail to provide a full analysis. For example, a very significant potential impact associated with the project is the risk of flooding.⁵ In response to our comments on the DEIS, BIA substantially revised this analysis, preparing for the first time analyses of flood velocities and evacuation times, among other things—significant new analyses that would require additional time for subject matter experts and the public to meaningfully evaluate. Based on the new analyses, BIA still reached the conclusion that the flooding risks of a 100-year flood depth of 1.5 feet would be effectively mitigated by project design parameters that would raise critical project elements by 2.5 feet above ground level or surround them with containment berms of the same height, i.e., 1 foot of “free-board” above flood level. This analysis is facially inadequate for several reasons.

2-02

First, BIA refused to analyse the 500-year flood risk on the grounds that—even though it conceded that “it is possible that the Proposed Action may be defined as a ‘Critical Action’” that requires analysis of the 500-year flood risk under FEMA regulations—the FEMA regulations are only legally binding on FEMA, not BIA.⁶ Whether these regulations are binding on BIA is not the test under NEPA. Under NEPA, all significant, reasonably foreseeable impacts must be evaluated. BIA provides no reasoned explanation as to why FEMA’s expert opinion that 500-year flood risks should be evaluated for this type of project should be discounted. To the contrary, FEMA’s regulations should have been applied as expert agency guidance as to the types of risks that should be evaluated for this type of project. BIA should therefore have analysed the 500-year flood risk, and its failure to do so is a violation of NEPA.

Second, BIA refused to evaluate ground subsidence in its evaluation of flood risks, on the grounds that FEMA flood maps are the standard modeling database for the majority of engineering tasks and “[i]t would be speculative to adjust these maps for potential ground subsidence.”⁷ This reasoning is flawed for several reasons. The DEIS itself acknowledges that ground subsidence in the area has been documented to reach *up to 8 feet*.⁸ This is more than enough to swamp

2-03

² 40 C.F.R. § 1502.9(a).

³ *Id.*

⁴ *Id.* § 1506.10(c).

⁵ See Appendix H.

⁶ See Appendix V, Response to Comments, at 3-30 to -31.

⁷ *Id.* at 3-34.

⁸ DEIS at 3-13. This subsidence is attributed to groundwater overdraft. *Id.* The Kern County Subbasin currently continues to be a critically overdrafted basin. *Id.* at 3-14. Personal communications with Kern County water resources staff indicates that local groundwater levels are dropping up to 14 feet per year. Continued overdraft will inevitably lead to increasingly greater ground subsidence.

the 1-foot of freeboard that the FEIS relies on. The effect of ground subsidence on site elevations is therefore a critical parameter to a full analysis of flood risks and is thus essential to a reasoned choice among alternatives.⁹

2-03
(Cont.)

Furthermore, while it is reasonable to rely on FEMA maps in the absence of countervailing information, it is not “speculative” to recognize the need for additional information when up to 8 feet of ground subsidence has been documented in the area.¹⁰ Nor is it sufficient to complete a topographic survey or to develop a Base Flood Elevation at the final design phase.¹¹ As previously explained, accurate elevation data is critical to the analysis of impacts and a reasoned choice among alternatives. Incomplete or unavailable information such as this is governed by 40 C.F.R. § 1502.22. That regulation requires BIA to obtain the information if “the overall costs of obtaining it are not exorbitant.” The cost of a topographical survey of the site is not exorbitant; such surveys are in fact routine for construction projects. Indeed, the FEIS itself acknowledges that a topographical survey would be completed prior to construction in conjunction with the design of the final grading and drainage of the site.¹² BIA was therefore required to complete a topographical survey and incorporate that information in its analyses before finalizing the EIS.¹³

2-04

And flood risks are but one example. *All* of the “Refined” technical reports would require additional time for meaningful public review, especially because they would require review by subject matter experts for thorough evaluation. This is precisely why a minimum 45-day review period is required for revised drafts. The revisions to the DEIS were substantial. BIA must therefore provide the public with the public comment period required by the NEPA regulations.

2-05

Even apart from the revised technical reports, fundamental flaws in the FEIS remain apparent even to the layman. The FEIS generally fails to present reasoned responses to comments. This is perhaps most glaring with respect to comments regarding the “heart” of the environmental impact statement: a reasonable range of alternatives, which flows from the purpose and need. Stand Up submitted extensive comments regarding these issues, as well as the closely related issue of the enforceability of the mitigation measures and design parameters of the alternatives considered.¹⁴ These comments remain substantially unaddressed in the FEIS. A few examples are described below as illustration.

2-06

⁹ It is also a potentially critical parameter in other respects, as well. As a matter of elementary mathematics, the volume of fill required to elevate the project components (or construct containment berms around them) will increase *exponentially* with increasing height. It is not at all clear whether raising the project or berms up to possibly an additional 8 feet is even feasible or economically practicable. The volume of fill would also affect the flood modeling itself because it would occupy a greater area and volume of the floodplain. It would also affect construction impacts, especially if the fill would have to be trucked in from off-site. Aesthetic impacts would also be significantly different if a 10.5-foot earthen berm would need to be placed around the casino.

¹⁰ The FEIS clarifies that existing elevations were based on USGS data. DEIS App. V at 3-35. USGS quad maps, however, depict 10-foot contours, and are therefore only accurate to 5 feet—still more than enough to swamp a 1-foot freeboard.

¹¹ See FEIS App. V at 3-35.

¹² *Id.*

¹³ Even if the cost were exorbitant, BIA also failed to include a statement regarding the missing information that complies with 40 C.F.R. § 1502.22.

¹⁴ With respect to enforceability, the FEIS asserts that mitigation measures included in a ROD are enforceable by BIA, but fails to reconcile that assertion with BIA’s long-standing position that it has no authority to condition or

First, with circular logic, the FEIS asserts that alternative sites outside of the Kern County community were not considered because “[i]t is not clear that alternative sites outside of the County would be ‘practical or feasible from the technical and economic standpoint’ or result in new information that would inform the NEPA process.”¹⁵ This, of course, is precisely why potential alternatives should be considered in the first place. A determination of feasibility or practicability should flow from a reasonable screening process, not the other way around. The FEIS continues, noting that Kern County “is quite large” and asserts that no reason has been presented to include sites outside of the County. This assertion is thoroughly contradicted by Stand Up’s extensive comments on the issue, which will not be repeated here. BIA’s response, however, brings up yet another flaw in BIA’s analysis: the statutory mandate is to avoid detriment to the “surrounding community,” yet nowhere does BIA explain how it defines the relevant “surrounding community.” BIA may, in fact, be correct that Kern County is so large as to be more extensive than the relevant “surrounding community.” BIA must therefore explain and allow public comment on why alternative sites within Kern County, yet outside of the relevant “surrounding community,” were not considered. Instead, BIA claims that the public need not be informed about the screening criteria that were used to evaluate alternative sites.¹⁶

2-06
(Cont.)

The FEIS further states that the number of suitable alternative sites is limited because reasonable criteria, such as access to major roadways, “substantially reduce the number of available sites suitable for commercial development.”¹⁷ That no doubt is a truism—real estate is nowhere unlimited—but it by no means establishes that such sites are not available. Again, such a determination should have been made at the scoping stage, not speculated upon in the FEIS.

2-07

The Tejon’s preference for a site in relative proximity to the 1851 Treaty area is cited, but BIA does not address Stand Up’s comments regarding the applicability of the 1851 Treaty.¹⁸ Similarly, the FEIS asserts that Stand Up’s comments regarding the Tejon’s right to reside and conduct gaming at the Tule River Reservation is dismissed as a non-NEPA issue, as well as on the grounds that Stand Up did not attach to its comments certain referenced documents that are in BIA’s possession.¹⁹ Those documents are attached to these comments.

The Tejon’s right to the Tule River Reservation, however, is most certainly a NEPA issue because, as explained in Stand Up’s comments on the DEIS, it goes straight to the adequacy of the range of alternatives considered. To put it simply, if the Tejon have rights to the Tule River Reservation, alternatives on or near that Reservation should have been considered. If, however, the Tejon do not, then the legality of the Tejon’s “reaffirmation” is necessarily brought into doubt. The attached correspondence describes some of the grounds to doubt the legal and factual basis for that “reaffirmation.”²⁰ Stand Up reserves the right to supplement these comments regarding the Tejon’s “reaffirmation” and to challenge any final decision to take land into trust for the

2-08

restrict the use of trust lands through the trust acquisition process. See FEIS App. V at 3-26 to -27. The FEIS also asserts that the impacts that would occur without mitigation measures are described in the DEIS, but ignores the point that BIA assumes the enforceability of project parameters included in the project description.

¹⁵ FEIS App. V at 3-22.

¹⁶ *Id.* at 3-24 (“the presentation of a specific list of screening criteria in the EIS is not warranted”).

¹⁷ *Id.* at 3-23.

¹⁸ *Id.* at 3-24 to -25.

¹⁹ *Id.* at 3-25.

²⁰ See also Stand Up’s letter of August 17, 2020 regarding the *Carcieri* analysis for Tejon.

Tejon on the grounds that the Tejon’s “reaffirmation” lacks basis in law, and the Department therefore lacks legal authority to take land into trust for gaming for the benefit of the Tejon.

2-08
(Cont.)

There are other glaring inadequacies throughout the FEIS, as well. A preliminary geotechnical feasibility report is not included, despite the close proximity of multiple, major, active earthquake faults—as close as 240 feet away—on the grounds that seismic risks can be addressed at the final design phase.²¹ But without even a preliminary feasibility report, whether the project is feasible at any given site is conjecture, not reasoned analysis. Regarding groundwater impacts, the FEIS now relies on a new agreement between the Tejon and the local water district.²² That agreement, however, relies on future agreements with other water users, the feasibility of which is not evaluated. The agreement also relies on highly technical assumptions²³ that, again, demand a full opportunity for public review and comment. The FEIS also does not evaluate whether the local groundwater is contaminated with 1, 2, 3 trichloropropane (TCP), as has been reported for the local water district, or other “forever chemicals.”²⁴ The revised Transportation Impact Analysis does not address impacts to I-5—which are particularly relevant to evacuation times, especially in flooding emergencies—or reflect that when there is snow, ice or fog, it is necessary for CHP to lead cars over the Grapevine or to close the highway entirely. The FEIS continues to side-step the public health risks of the use of hazardous agricultural chemicals on surrounding properties, as well as the accumulation of pesticide residues from long agricultural use.²⁵

2-09

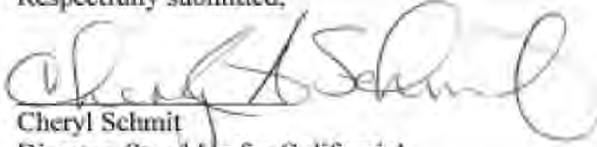
2-10

2-11

2-12

In short, the FEIS remains fundamentally flawed, even apart from its inadequate technical analyses and evaluation of impacts. BIA must therefore prepare a revised draft EIS and afford the public the full review and comment period required by law.

Respectfully submitted,


Cheryl Schmit
Director, Stand Up for California!

Att.

²¹ FEIS App. V at 3-29 to -30.

²² App. W.

²³ FEIS App. V at 3-15 to -17.

²⁴ See https://www.bakersfield.com/columnists/lois-henry-tainted-valley-groundwater-could-stymie-banking-deals/article_a7b50638-ee48-11ea-87be-535a106d4220.html. See also <https://calmatters.org/projects/california-water-contaminated-forever-chemicals/>.

²⁵ *Id.* at 3-55 to -56.

April 7, 2015

The Honorable Kevin Washburn
Assistant Secretary—Indian Affairs
MS-3642-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Jennifer A. MacLean
JMacLean@perkinscoie.com
D. (202) 434-1648
F. (202) 654-9665

Paula Hart, Director
Office of Indian Gaming
1849 C Street, N.W.
Washington, DC 20240

Re: Response to the Tejon Tribe Request for Indian Lands Opinion

Dear Mr. Washburn and Ms. Hart:

On behalf of Stand Up for California! (“Stand Up!”), we are responding to arguments made by the Tejon Indian Tribe (“Tribe” or “Tejon”) regarding the gaming eligibility of certain property in Mettler, California (the “Mettler Parcels”).¹ On May 5, 2014, the Tribe asked the Department for an opinion determining that the Mettler Parcels qualify for gaming under the “last recognized reservation” exception to the prohibition on off-reservation gaming in the Indian Gaming Regulatory Act (“IGRA”), 25 C.F.R. § 2719(a)(2)(B).

The Mettler Parcels, however, do not qualify as the Tribe’s “last recognized reservation” for three key reasons. First, the land that was set aside by the United States for the use and benefit of the Tejon (and other tribes) is the Tule River Reservation. According to the Department’s 2012 “reaffirmation” of the Tejon in 2012, the Tribe’s status as a recognized tribe

¹ Stand Up! is a non-profit organization that focuses on gambling issues affecting California, including tribal gaming.

never lapsed; it was only left off the list of recognized tribes due to “administrative oversight.”² If so, it necessarily follows that the Tribe was not only a recognized tribe when IGRA was enacted in 1988, it also had a reservation, the Tule River Reservation, which was established by Executive Order in 1873 for several tribes, including the Tejon, and is still in existence. The Tribe therefore does not qualify for the “last recognized reservation” exception. In fact, it does not qualify for any off-reservation gaming; the Tribe can conduct gaming on the Tule River Reservation.

Second, the Tribe’s arguments regarding the establishment of a reservation in and around Tejon Ranch have been rejected by federal courts on several occasions. The United States did not and could not establish a reserve or reservation at Tejon because the land was in private ownership, subject to Spanish land grants, which were proven in court and for which the United States issued patents. Nor does an unratified treaty—which is a legal nullity—constitute a “recognized reservation.”

Third, the United States’ effort to set aside land for Indians living on Tejon Ranch was not a “recognized reservation,” but in any case, the Mettler Parcels are certainly not located within that area. Accordingly, the Mettler Parcels are not within the boundaries of any possible reservation. The plain language, structure, and legislative history of IGRA confirm that the Mettler Parcels are not the type of lands to which the “last recognized reservation” exception is intended to apply.

² This analysis does not address the legality of the “reaffirmation” of the Tejon Indian Tribe, whether it was proper for the Department to base its decision on its 1916 attempt to set aside land, or whether the current Tejon Indian Tribe can trace back to the signatories of the 1851 “Treaty with the Castake, Texon, etc.,” also known as “Treaty D.” As the Department is aware, several other groups claim to be the beneficiaries of Treaty D. Because the Department did not comply with 25 C.F.R. Part 83 in reaffirming Tejon, there is substantial controversy regarding membership and lineage to the Indians living in and around Tejon Ranch.

If the Tribe wishes to conduct gaming on the Mettler Parcels, the appropriate avenue is to pursue the “two-part determination” process under 25 U.S.C. § 2719(b)(1)(A). That process will ensure, subject to gubernatorial concurrence, that any gaming on the Mettler Parcels will be in the best interest of the Tribe and its members and will not be detrimental to the surrounding community.

**The Mettler Parcels Do Not Qualify for Gaming
Under Any Provision of Section 20 of IGRA.**

IGRA generally prohibits gaming on lands acquired in trust after 1988, with limited exceptions. 25 U.S.C. § 2719(a). The most commonly invoked exceptions—settlement of a land claim, the initial reservation of a new acknowledged tribe under 25 C.F.R. Part 83, and restored lands of a restored tribe—do not apply to “reaffirmed” tribes. *See* 25 U.S.C. § 2719(b)(1)(B). Thus, the only other avenues for a gaming eligibility determination are set forth in subsection (a) of Section 20.

Subsection (a) provides, in relevant part, that a tribe can game on newly-acquired lands if “such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act,” or the lands “are within the Indian tribe’s last recognized reservation within the State or States within which such Indian tribe is presently located.” *Id.* § 2719(a).

The regulations that implement Section 20 define “reservation” as:

- (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;
- (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

25 C.F.R. § 292.2. The Tribe argues that the “Tejon reservation has traits in common with all four of these categories” but “[i]f it is necessary that the Tribe’s reservation qualify under a single category,” it meets the requirements of subpart (2). Because the United States neither “set aside” nor “acquired” any land for Tejon reasonably proximate to the Mettler Parcels, there is no basis for concluding that the Parcels are eligible for gaming under “subpart (2)” or any other provision of Section 20. The Mettler Parcels cannot qualify as the Tribe’s “last recognized reservation.”

A. The only reservation that the United States set aside for Tejon is the Tule River Reservation.

The Department administratively “reaffirmed” the Tejon Tribe in 2012.³ Thus, the Tribe’s government-to-government relationship with the United States never lapsed nor was terminated. Accordingly, Tejon was a recognized tribe in 1988.

The Tribe’s “last recognized reservation”—and, indeed, its only reservation—is the reservation the United States established for the Tejon, among other bands, in 1873: the Tule River Reservation. In 1864, Congress enacted a statute known as “the Four Reservations Act” authorizing the President to consolidate all the tribes of California into no more than four reservations in the State. Act of April 8, 1864, 13 Stat. 39. All other reservations were abandoned, as a matter of law. One of the four reservations the United States formally

³ See Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Kathryn Montes Morgan, Chairwoman - Tejon Indian Tribe (Jan. 6, 2012) and Memorandum from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Regional Director - Pacific Region and Deputy Director - Office of Indian Services (April 24, 2012) (“2012 Reaffirmation Memorandum”); attached as Exhibits 3 and 4, respectively, of the Tejon’s request.

established pursuant to the 1864 Act was the Tule River Reservation, which President Grant established by Executive Order in 1873.

Prior to the passage of the 1864 Act, the United States had begun its effort to relocate the Tejon Indians to the Tule River Reservation. The Tribe, in fact, acknowledges this history. Likewise, the Department states in its decision to reaffirm the Tejon that, “[i]n 1873, the Tule River Reservation was established by executive order *for the Tejon (Manche Cajon) and other bands of Indians.*” 2012 Reaffirmation Memorandum at 4 (emphasis added); *see* Executive Order of January 9, 1873; I Kapp. 831.⁴

The Tribe, however, claims that the majority of its members refused to relocate to the Tule River Reservation. Although Charles C. Royce, the authoritative source on tribal land cessions in the United States, states that “[t]he last of the Indians were removed to Tule River, as reported by Superintendent Wiley, July 11, 1864,” Tejon insists that Royce’s conclusion is incorrect and that many members remained in and around Tejon Ranch. Whether some Indians remained near Tejon, however, is irrelevant. Pursuant to Part 292, what is legally significant for gaming purposes is what the United States “set aside” or “acquired” for the Tribe. *See* 25 C.F.R. § 292.2. And what the United States “set aside” or “acquired” for the Tejon Tribe is the Tule River Reservation. *See* Executive Order of January 9, 1873; *see also* 2012 Reaffirmation Memorandum at 4 (“In 1873, the Tule River Reservation was established by executive order for the Tejon (Manche Cajon) and other bands of Indians.”).

The Tule River Reservation continues in existence to this day. The United States has not disestablished the Reservation, nor revised the Executive Order to change its purpose. That the Indians living on the Tule River Reservation chose to organize in 1935 under the IRA does not

⁴ *See also* Executive Orders of October 3, 1873 and August 3, 1878 (modifying boundaries).

change the fact that the Tule River Reservation was formally set aside for the Tejon Indians, among others, and therefore constitutes a “recognized reservation” for the Tribe. Under IGRA, if the Tejon were to acquire land on the Tule River Reservation, it could game there without undergoing additional review under IGRA. No other parcels qualify for gaming without undergoing review under 25 U.S.C. § 2719(b)(1)(a).

B. The United States never established a reservation in or around Tejon Ranch.

The history of the land at Tejon Ranch, which has been extensively litigated, clearly establishes that the United States did not—at any point—establish a reservation in or around the Mettler Parcels. *See Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1020-21 (E.D. Cal. 2012), *appeal filed, sub nom. Robinson v. Jewell*, No. 12-17151 (9th Cir. Sept. 26, 2012); *United States v. Title Insurance & Trust Company*, 265 U.S. 472 (1924). Indeed, as is evident from those cases and the Department’s files, the United States could not establish a reservation at Tejon because the land was privately owned. As a consequence, the United States established a reservation for the Tejon Indians at the Tule River Reservation in 1864. Tejon’s arguments have no legal or factual support.

1. The United States never formally established a reserve or reservation at Tejon Ranch.

The Tribe claims that the Mettler Parcels are eligible for gaming under the “last recognized reservation” exception because the Parcels are within the boundaries of an area that was to have been reserved for various tribes under the 1851 treaty, commonly referred to as Treaty D. The United States negotiated Treaty D with the historical “Texon” tribe, among others. Treaty D, and 17 other similar treaties negotiated at approximately the same time, were never ratified. *Indians of California by Webb v. United States*, 98 Ct. Cl. 583, 598 (1942). An

unratified treaty has no legal effect.⁵ See *Robinson v. Salazar*, 885 F. Supp. 2d at 1020-21. Thus, whatever area was encompassed within Treaty D is irrelevant because the United States did not and could not, as a matter of law, “set aside” or “acquire” any land pursuant to an unratified treaty.

The Tribe also argues that Edward Beale, the federal Superintendent of Indian Affairs for California in the early 1850s, established the “Tejon reservation” under the Act of March 3, 1853 (10 Stat. 226, 238) (“1853 Act”). The 1853 Act authorized the President to set aside five military reservations from the public domain, up to 25,000 acres each, for Indian purposes in California. Beale did identify an area within Tejon Ranch that he attempted to set aside as the Tejon or Sebastian Reserve. Scattered Indian bands, including apparently the Tejon, moved onto the site between 1853 through 1864. The land, however, was never formally set aside as a reservation by the President as required by the Act. See *Robinson*, 885 F. Supp. 2d. at 1021-23. There is no legal basis for concluding that the United States “set aside” or “acquired” this land within Tejon Ranch pursuant Treaty D or the 1853 Act.

2. The United States could not “set aside” or “acquire” land at Tejon Ranch because the land was privately owned.

The United States did not “set aside” land at Tejon Ranch for the Tejon/Sebastian Reserve, as subpart (2) of the Part 292 definition of “reservation” requires, because the land was

⁵ In addition to questions about the appointments of the negotiating commissioners and the specific areas of land involved, one of the reasons the 1851 treaties were not ratified was the uncertainty of land rights in California after the United States acquired the territory through the Treaty of Guadalupe Hidalgo, which obligated the United States to honor existing land rights. See Larisa K. Miller, *The Secret Treaties With California's Indians*, Prologue Magazine at 39 (National Archives, Fall-Winter 2013), available at: <http://www.archives.gov/publications/prologue/2013/fall-winter/treaties.pdf>. The purpose of the Act of March 3, 1851 was to resolve all existing land rights, including Indian land rights or aboriginal rights of occupancy, and establish clear title throughout California, including the public domain. In 1928, the United States compensated the Indians of California for its failure to ratify Treaty D and the 17 other Indian treaties (known as “the 18 unratified treaties”). See Act of May 18, 1928, 45 Stat. 602 (codified at 25 U.S.C. § 652); *Indians of California by Webb*, 98 Ct. Cl. at 598 (“The failure of Congress to set apart certain reservations for these Indians in 1852, and its failure to provide the goods, chattels, school houses, teachers, etc. was recognized as a loss to these Indians and was made by the Congress an equitable claim to be paid in money value.”).

not in the public domain.⁶ Superintendent Beale recognized from the start that the area he chose for the Tejon/Sebastian Reserve was largely covered by Spanish land grants and proceeded only on the hope that Congress would either purchase the lands if necessary “or remove the Indians to some less suitable locality.” 1853 Annual Reports of the Commissioner of Indian Affairs (“ARCIA”) at 230. The United States upheld the Spanish land grants and issued patents for the land pursuant to the Act of March 3, 1851 (9 Stat. 631) (“1851 Act”), which Congress enacted to provide clear title to land in California after the United States acquired that territory from Mexico under the Treaty of Guadalupe Hidalgo. Failure to file claims by the deadline set forth in the 1851 Act precludes the assertion of any claim to land, including claims based on aboriginal rights.⁷ See *Robinson*, 885 F. Supp. 2d at 1017-19; see also *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1019 (E.D. Cal. 2012), citing *Super v. Work*, 271 U.S. 643 (1926); *Title Insurance & Trust Company*, 265 U.S. at 484-86; *Barker v. Harvey*, 181 U.S. 481, 491 (1901); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 646 (9th Cir. 1986).

That the United States was aware of the Spanish land grants and that they precluded the establishment of a reserve at Tejon is evident from the 1859 record of J. R. Vineyard, an Indian agent located at the site:

During the time Congress was authorizing the changes referred to [reducing the original, surveyed 50,000 acre extent of the Tejon or Sebastian reservation to 10,000 acres, then increasing it to 25,000 acres, but leaving it unsurveyed], *the entire reservation was claimed as private property under a grant from the Mexican government; which claim has been submitted to two of the United States courts in California, and, in both, the decisions have been in favor of the claimants, and adverse to the United States.*

⁶ Further, the United States never acquired the lands, nor was it authorized to under the 1853 Act, which provided for the establishment of reservations “out of the public domain” and only appropriated funds for “subsisting the Indians in California and removing them to said reservations[.]”

⁷ Thus, the public domain in California was not defined prior to March 3, 1853, the deadline for filing claims under the 1851 Act, and also the date of the enactment of the 1853 Act authorizing the establishment of reservations “from the public domain in the State of California.”

In consequence of the uncertainty brought about by the above causes, as to what is or is not reserved land, also as to who are the rightful owners of the premises, has induced several white men to settle upon the land embraced within the first survey, and what evidently must belong to the reservation, *if such an institution has existence.*

1859 ARCIA at 443-44 (emphases added); *see also* 1862 ARCIA at 325. Although Vineyard erroneously expressed the belief that the Indians had some rights and privileges to the land, he nonetheless acknowledged that the entire reservation was subject to land grants, and these grants were incompatible with the existence of a reservation. The Superintendent ultimately conceded that the patents issued required him to “yield the possession of the property under that title without reserve and on the instant.” 1863 ARCIA at 102. The United States officially abandoned efforts to establish the Tejon/Sebastian Reserve by 1864. *See also* 1864 ARCIA at 118 (all the Indians of the southern district removed to Tule River); 1865 ARCIA at 111 (noting abandonment of reservations in California); 1866 ARCIA at 105 (noting Indian agent report of July 24, 1863, that the Tejon reservation Indians had been removed to Tule River farm).

The 1853 Act only authorized the creation of reservations “from the public domain.” Because the area of the Tejon/Sebastian Reserve was never in the public domain, no reserve was established.⁸ Indeed, the Tribe even acknowledges that the United States never established any boundaries, which are necessarily required to establish a reservation. Yet the Tribe does not explain how a 75,000-acre reservation could be established under the 1853 Act, which authorized only 25,000-acre reserves. In fact, Royce notes that the originally surveyed 75,000 acre reserve was ordered reduced to 25,000 acres by the Secretary of the Interior on November 25, 1856, in order to bring it within the limits of the 1853 Act. H.R. Doc. No. 736, 56th Cong.,

⁸ The two National Indian Gaming Commission land opinions cited by the Tribe each involved lands acquired by the United States for the benefit of a tribe, and are therefore inapposite.

1st Sess. 789 (1899). Royce also states that the boundaries of the reduced reserve were never surveyed, but there is no basis for assuming that the area was moved to include Mettler.⁹ As is evident from the Tribe's own map (Exhibit A of the Tribe's request), the primary area being considered was at least five miles, and more likely 10–15 miles away, from Mettler.¹⁰

The United States did not and could not “set aside” or “acquire” land in the area the Tribe identifies because the land was not in the public domain. The fact that boundaries were never surveyed only underscores that fact. None of the area the Tribe identifies can qualify as a “reservation,” let alone the Tribe's “last recognized reservation.”

C. The only other land the United States set aside for Tejon does not encompass the Mettler Parcels.

The BIA independently raised the question of whether a 1916 withdrawal of land near Tejon would qualify as the Tribe's “last recognized reservation.” The Tribe responded that the 1916 withdrawal of public lands for the Tejon Indians, which the United States revoked in 1962, cannot be the Tribe's last recognized reservation because a temporary withdrawal cannot be considered a “reservation.” We agree that the 1916 withdrawal does not qualify as Tejon's “last

⁹ While the lack of boundaries alone proves that no reserve existed, the Tribe's arguments regarding the scope of the supposed reservation only underscore the fact that even if one could have been created, the Mettler Parcels still would not have fallen within those boundaries. For example, the Tribe notes that the area it wishes to claim was variously estimated by federal Indian agents as between 10,000 and 50,000 acres, but argues that its geographic scope was far more extensive than the 75,000-acre area identified and mapped by Royce. Although the Tribe argues that there are “informal indications” that the true extent is consistent with the vastly larger area encompassed by the 1851 treaty boundaries, Beale's description of the “broad range of tribes” with whom he met to establish the reservation indicate the area in which those tribes were found, not the area of the reservation on to which they were to be gathered. Similarly, the reliance on “resources found in the mountains and lakes” describes access to off-reservation areas; the Superintendent's reports confirm that the Indians were often forced to leave the reservation to provide for themselves when crops failed due to drought and other causes. *See, e.g.*, 1857 ARCIA at 389; 1858 ARCIA at 283; 1861 ARCIA at 143 (describing difficulty in estimating the number of Indians on the Tejon reservation “as many are, no doubt, driven to the mountains in search of those necessities *denied to them on the reserve.*”) (emphasis added). In any case, those areas are to the south and east, not northwest towards Mettler.

¹⁰ The military officers' suggestion that the reservation extends north to the Kern River was just that, a suggestion, and again, would not have extended northwest towards Mettler. The roughly 5,000-acre area occupied by the remaining Tejon Indians that was the subject of the land claim litigation in *United States v. Title Insurance & Trust Company*, 265 U.S. 472 (1924) is approximately 15-20 miles almost directly due east of Mettler.

recognized reservation,” but only because the Tule River Reservation was established for Tejon, among others.

Assuming that Tejon does not have rights in the Tule River Reservation, the 1916 withdrawal satisfies Part 292, contrary to Tejon’s argument.¹¹ The plain language of the Part 292 definition of “reservation” includes “[l]and set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent.” The 1916 withdrawal plainly satisfies this definition.¹² In promulgating this definition for Part 292 purposes, the Department did not include any temporal limitation. Given that temporal impermanence is necessarily inherent in the last recognized reservation exception (i.e., the exception only applies if a reservation no longer exists), the Department’s interpretation is entitled to deference.¹³

Thus, the Tribe’s last recognized reservation is either the Tule River Reservation or, if the Tribe claims to have somehow lost its rights to the Tule River Reservation before 1962, the 1916 withdrawal. The Mettler Parcels are not located within the boundaries of either.

D. The only way that the Mettler Parcels could possibly qualify for gaming is pursuant to 25 U.S.C. § 2719(b)(a)(A) .

Congress enacted IGRA on October 17, 1988 to regulate the inherent right of tribes to conduct gaming on tribal lands—even if contrary to state law—a right recognized by the

¹¹ The Tribe actually does not cite any authority regarding the Part 292 definition of reservation, but only cases regarding whether Indians were due compensation when a withdrawal of lands from the public domain was later revoked (compensation is due for the revocation of a permanent withdrawal, but not a temporary withdrawal).

¹² Departmental Order of Nov. 9, 1916; revoked by Public Land Order No. 2738 (July 27, 1962).

¹³ Moreover, if the Tribe’s argument that temporary reservations do not qualify has any validity, it would apply equally to the “Tejon reservation” claimed by the Tribe. That area was only administered by the BIA provisionally, with the explicit acknowledgment that the area was likely subject to land grants, and would have to be either purchased by Congress (purchase was not authorized under the 1853 Act), or the Indians moved to some other locality. 1853 ARCA at 230. Indeed, all claims under the 1851 Act were required to have been filed by March 3, 1853, the same date as the enactment of the 1853 Act. Superintendent Beale did not begin to administer the area of the Tejon/Sebastian Reserve until September 1853, at the earliest, and therefore acted conditionally, pending the outcome of the already-filed claims. Patents under the 1851 Act were eventually issued for the entire area of the Reserve, and by 1864, the Reserve was abandoned.

Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). As a compromise between state and tribal interests, the areas where tribal gaming would be allowed was restricted to the reservations and trust lands existing at the time of IGRA's enactment, with limited exceptions. For tribes without a reservation at the time of enactment, IGRA provides an exception for newly acquired lands within the tribe's "last recognized reservation" in the state(s) where the tribe is located.¹⁴ 25 U.S.C. § 2719(a)(2)(B). A similar provision is made for tribes in Oklahoma for lands located within the tribe's "former reservation" or lands "contiguous to other land held in trust or restricted status[.]" *Id.* § 2719(a)(2)(A). The legislative history of these provisions confirms that the exception is intended to allow tribes who were without reservations in 1988 to game on lands within the areas of their last officially designated reservations:

Subsection (a) makes Indian gaming unlawful on any lands taken into trust by the Secretary of the Interior after the date of enactment of this Act, if such lands are located outside the boundaries of such tribe's reservation. It also provides, however, that for purposes of Oklahoma, where many Indian tribes occupy and hold title to *trust lands which are not technically defined as reservations*, such tribes may not establish gaming enterprises on lands which are outside the boundaries of such tribes *former reservation* in Oklahoma, as defined by the Secretary of the Interior, unless such lands are contiguous to lands currently held in trust for such tribes. *Functionally, this section treats these Oklahoma tribes the same as all other Indian tribes.* This section is necessary, however, because of the unique historical and legal differences between Oklahoma and tribes in other areas. *Subsection (a) also applies the same test to the non-Oklahoma tribes whose reservation boundaries have been removed or rendered unclear as a result of federal court decisions, but where such tribe continues to occupy trust land within the boundaries of its last recognized reservation. This section is designed to treat these tribes in the same way they would be treated if they occupied trust land within a recognized reservation.* It is not intended to allow a tribe to take land into trust, for the purposes of gaming, on lands which are located outside the state or states in which the tribe has a current and historical presence. These limitations were drafted to clarify that Indian tribes should be prohibited from acquiring land outside their traditional areas for the expressed purpose of establishing gaming enterprises. Congress may, in the future, determine in specific situations that

¹⁴ Assuming the Tribe was validly "reaffirmed" in 2012, and therefore is a tribe whose government-to-government relationship with the federal government had never lapsed or been terminated, the Tribe does not meet the requirement of having no reservation at the time of IGRA's enactment, as the Tule River Reservation continues in existence. The Tribe has not articulated its position regarding its rights to the Tule River Reservation.

equity requires that a specific exemption to this rule be granted. The Committee feels, however, that such exemptions should be carefully considered on a case by case basis.

Sen. Rpt. 99-493, at 10 (emphases added). As this legislative history makes evident, there is a distinction between trust lands and “reservations.” This distinction is also evident in the plain language of the Oklahoma provision, which distinguishes between reservations and lands held in trust or restricted status, and applies “the same test” as the non-Oklahoma provision. Thus, consistent with the plain meaning of “recognized,” which indicates official or formal acknowledgment, or having official or legal authority, “recognized reservations” are not all lands set aside (even in trust) and administered by the United States for the benefit of Indians. “Recognized reservations” must be “technically defined” as reservations, and they must have clear boundaries. In addition, the exception is intended to treat tribes without reservations the same way as others, by treating trust lands within their “last” recognized reservation the same way as trust lands within an existing recognized reservation. This interpretation is confirmed by the definition in the Part 292 regulations of “former reservation” for the Oklahoma provision: “lands in Oklahoma that are within the exterior boundaries of the last reservation that was *established by treaty, Executive Order, or Secretarial Order* for an Oklahoma tribe.” 25 C.F.R. § 292.2 (emphasis added). As noted in the legislative history, IGRA applies “the same test” to non-Oklahoma tribes. Thus, “last recognized reservation” should similarly be interpreted to mean the last reservation formally established for a tribe by treaty, Executive Order, or Secretarial Order.

The Mettler Parcels fail each of these requirements. As previously described, the “Tejon reservation” was never officially established, and lacked legal authority in any case; and therefore does not qualify as a “technically defined” reservation. The “Tejon reservation” never

had clear boundaries (and any plausible boundaries cannot possibly have encompassed the area of the Mettler Parcels). And even if validly was established, the “Tejon reservation” was not the Tribe’s “last” recognized reservation in California.

Finally, the Tribe attempts to side-step the precise definition of “reservation” under Part 292, and the plain meaning of “last recognized reservation” under IGRA, by asserting that the Mettler Parcels meet the “spirit” of the last recognized reservation exception, and concluding that, “[i]n the end, the BIA’s literal set aside and administration of the Tejon reservation as such is the most powerful evidence that it qualifies as the Tribe’s last reservation. The actions of the BIA must have meaning.” The actions of the BIA, however, cannot and do not have meaning when they exceed BIA’s authority. It is Congress that authorizes BIA to act within certain parameters. The Tribe may wish that the language of the statute did not preclude its arguments, but it is the law that governs.

Putting aside that BIA did not, and could not have, validly set aside the “Tejon reservation,” the Mettler Parcels do not meet the spirit of the last reservation exception. The plain text, structure, and legislative history of IGRA show that the equitable intent of the exception was to allow tribes without reservations to game in the last place in the state where they could have plainly exercised the inherent, sovereign tribal right to conduct gaming without state interference. For the Tejon Indian Tribe, that place is the Tule River Reservation or, possibly, the 1916 withdrawal. It is clearly not a non-existent “Tejon reservation,” which would not have encompassed the Mettler Parcels in any case.¹⁵

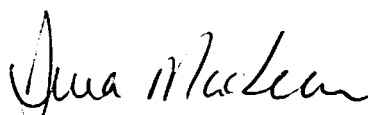
¹⁵ The 1916 withdrawal satisfies the intent of the exception, as the Tribe undoubtedly could have exercised its inherent, sovereign right to game on the withdrawn lands until revocation of the withdrawal in 1962. It only fails to be the Tribe’s “last” recognized reservation if the Tribe claims it somehow lost its rights to the Tule River Reservation between 1962 and the enactment of IGRA in 1988, which the Tribe has not addressed. (And as previously noted, if the Tribe continued to have rights to the Tule River Reservation in 1988, it does not meet the exception’s requirement that the Tribe have had no reservation at the time of IGRA’s enactment.)

Conclusion

The Department must reject the Tejon Indian Tribe's request for an Indian lands opinion that the Mettler Parcels are within the Tribe's "last recognized reservation." The "Tejon reservation" claimed by the Tribe was never established as a matter of law, and in any case, the Mettler Parcels are not within the boundaries of the putative reservation. Assuming that the Tribe was validly "reaffirmed" in 2012, and was therefore a recognized tribe at the time of IGRA's enactment, the Tule River Reservation is the Tribe's reservation, and the Tribe does not qualify for any off-reservation gaming exception.

If the Tribe wishes to game on the Mettler Parcels, the only avenue open under IGRA is the two-part determination process under 25 U.S.C. § 2719(b)(1)(a). That process will ensure, subject to the concurrence of the Governor, that any gaming on the Mettler Parcels will be in the best interest of the Tribe and its members, and will not be detrimental to the surrounding community.

Sincerely,



Jena A. MacLean

cc:

July 22, 2015

Jennifer A. MacLean
JMacLean@perkinscoie.com
D. +1.202.434.1648
F. +1.202.654.9665

The Honorable Kevin Washburn
Assistant Secretary—Indian Affairs
MS-3642-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Paula Hart, Director
Office of Indian Gaming
1849 C Street, N.W.
Washington, DC 20240

Re: Tejon Request for Last Recognized Reservation Opinion

Dear Mr. Washburn and Ms. Hart:

On behalf of Stand Up for California! (“Stand Up!”), I would like to respond to the Tejon Indian Tribe’s June 1, 2015 letter regarding its gaming eligibility request for certain property in Mettler, California (the “Mettler Parcels”).¹

First, I would like to call to your attention a recent Ninth Circuit decision—*Robinson v. Jewell*, — F.3d —, 2015 WL 3824658 (9th Cir. 2015)—which addresses a number of the authorities the Tejon have relied on in support of their request. Attachment 1. The decision confirms the arguments set forth in our initial letter of April 7, 2015 and contradict many of the claims that the Tejon make in their June 1, 2015 letter. The Tejon argue, for example, that Spanish land grants did not extinguish its aboriginal title. June 1, 2015 letter at 4-6. That is correct. *Spanish* grants did not extinguish aboriginal title. Rather, aboriginal title was extinguished under the Land Claims Act of 1851, which required that “each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners....” 9 Stat. 631, § 8. The Tejon did not present any claim to any land to the Commission—which was “the only avenue allowed by the Act for preservation of claims and the issuance of a patent.” *Robinson*, 2015 WL 3824658, *4. “[T]he Act of 1851 fully extinguished any existing aboriginal title or unregistered land grants.” *Id.* at *6 (citing *Barker v. Harvey*, 181 U.S. 481 (1901)); *see also id.* (citing *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 646 (9th Cir. 1986) (holding that the Treaty of

¹ The Mettler Parcels, APN 238-204-02, -04, -07, and -14, are located in Kern County near the intersection of I-5 and Hwy. 99, approximately 24 miles south of Bakersfield.

Guadalupe Hidalgo did not convert tribe’s aboriginal title into recognized title and that its aboriginal title was extinguished by its failure to present its claim under the Act of 1851)).

The Tejon also rely on the Department’s effort to create the “Tejon/Sebastian Reserve” and assert that “nothing in the governing regulations conditions reservation status on a survey.” June 1, 2015 letter at 2 n. 3. Boundaries, however, necessarily define any land that has been set aside and are particularly important when the only plausible statutory authority for the establishment of the Tejon/Sebastian Reserve limited the size of reservations to 25,000 acres. Act of March 3, 1853 (10 Stat. 238). In any case, the Ninth Circuit held that “there is no evidence that the President ever approved the creation of the Tejon Reservation,” and accordingly it “was not a reservation established by the President and therefore cannot provide legal rights.” *Robinson*, 2015 WL 3824658, at *7 (quoting the district court’s opinion). And for IGRA purposes, the legislative history of the Act confirms that “recognized reservations” must be “technically defined” and have “clear” boundaries.² Sen. Rpt. 99-493, at 10.

Second, the Tejon’s arguments that the Mettler Parcels qualify as their “last recognized reservation” are not persuasive and seem to call into question the basis for their reaffirmation.³ The Tejon make three basic arguments. First, the Tejon argue that their refusal to take up residence on the Tule River Reservation preclude the Department from finding that the Tejon have any rights to the Tule River Reservation. But the Executive Order establishing the Tule River Reservation expressly states that the reservation is for the Tejon Indians (among others). *See* Executive Order of January 9, 1873, I Kapp. 831 (establishing Tule River Reservation); *see also* Memorandum from Assistant Secretary - Indian Affairs to Regional Director, Pacific Region, “Reaffirmation of Federal Recognition of Tejon Indian Tribe” (April 24, 2012) (“2012 Reaffirmation Memo”) at 8 (“In 1873, the Tule River Reservation was established by executive order for the Tejon (Manche Cajon) and other bands of Indians.”). The Tule River Reservation still exists, without modification to its purpose. Thus, under the Executive Order, the Tejon Tribe has a reservation.

The Tejon erroneously claim that their failure to occupy the Tule River Reservation disqualify them from using it now and the Department from concluding that Tule River is their Reservation. But it is well established that disestablishment of a reservation cannot be presumed absent federal actions with the clear intent to effect such a result. *See South Dakota v. Yankton Sioux*

² Definite boundaries are obviously necessary to determine whether the Mettler Parcels are within any claimed “last recognized reservation.”

³ Although our April 7, 2015 comments did not address the legality of “reaffirmation,” the Tejon’s response also asserts that the legality of “reaffirmation” was upheld in *Muwekma Ohlone v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013). The legality of “reaffirmation,” however, was not at issue in *Muwekma*. The plaintiff in that case was *seeking* recognition and challenged the Department’s denial of recognition on various legal theories, including violation of equal protection because the Department had “reaffirmed” similarly situated groups. The D.C. Circuit concluded that the Muwekma was not similarly situated to the previous groups, but the court did not consider or address the legality of “reaffirmation.”

Tribe, 522 U.S. 329, 343 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1007-10 (8th Cir. 2010). And the United States’ trust obligation to the Tejon prevents the Secretary from disallowing the Tejon from using the Reservation. Doing so would violate the plain terms of the Executive Order. A tribe may refrain from exercising rights to a reservation, but doing so does not result in its rights being automatically rescinded. The federal trust obligation obviously prevents that from occurring. It is also well established that a tribe cannot unilaterally terminate the trust relationship.⁴ And if the United States terminated its relationship with the Tejon, such action would clearly preclude any subsequent “reaffirmation” of their status. *See* 2012 Reaffirmation Memo at 8.

Second, the Tejon argue that the establishment of the Tule River Reservation did not extinguish their rights and interests in that part of their aboriginal territory that they continued to occupy—Tejon Ranch. But as the Supreme Court held in *U.S. v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924), any aboriginal rights the Tejon may have had were extinguished under the 1851 Act. *See also Robinson*, 2015 WL 3824658, *4. The establishment of the Tule River Reservation had nothing to do with the extinguishment of the Tejon’s aboriginal rights; the Act of 1851 did that. Accordingly, the United States’ failed attempt in the 1920s to assert aboriginal land claims on behalf of Tejon Indians does not change the fact that the Tule River Reservation was created for the Tejon, among others.

Third, the Tejon argue that the Secretary’s approval of the 1936 organization of the Tule River Tribe under the Indian Reorganization Act effectively revoked the rights of the Tejon to the Tule River Reservation by limiting “membership on that reservation” to Indians listed on the 1935 census of the reservation and their descendants. This is incorrect—the Secretary’s decision addressing rights to membership in the Tule River *Tribe* has no bearing on the rights of the Tejon to occupy the Tule River *Reservation* under the Executive Order.⁵ And if the Tejon’s argument is correct, Secretarial approval of that Constitution would appear to violate the federal trust responsibility to the Tejon, would be indicative of an administrative termination, contrary to the “reaffirmation,” or would constitute a membership dispute with Tule River Tribe.⁶ These are the

⁴ *See Kennerly v. District Court of 9th Judicial District of Montana*, 400 U.S. 423 (1971); *Joint Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

⁵ *See* Constitution and Bylaws of the Tule River Indian Tribe (approved January 15, 1936), art. II (Membership), available at: <http://www.tulerivertribe-nsn.gov/wp-content/uploads/2014/04/constitution-bylaws.pdf>.

⁶ The Tule River Tribe’s Constitution, approved by the Secretary, appears to assign all unallotted lands on the Reservation, and jurisdiction over the entire Reservation, to the Tule River Tribe. *Id.* art. I (Territory) and VII (Tribal Lands). Secretarial approval of the Tule River Tribe’s Constitution—if interpreted to strip the Tejon of their rights under the Executive Order—is in considerable tension with the Department’s “reaffirmation” of the Tejon, which was based on the fact that “[t]here is no evidence of any affirmative action or declaration by either Congress or the Department to terminate the Tejon Indian Tribe or to cease recognition of the Tribe.” 2012 Reaffirmation Memo at 8. The 2012 Reaffirmation Memo itself contains evidence of administrative termination of the Tribe. *See, e.g., id.* at 6 (after the 1952 earthquake devastated the Tejon Indians at Tejon Ranch, BIA “determined that Indian Services’ appropriations could not be used for them.”).

The Honorable Kevin Washburn, Assistant Secretary–Indian Affairs
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sorts of questions that arise when the Department resorts, not to the regulations that govern acknowledgment, but rather “other mechanisms” having no legal basis.

Conclusion

The day after submitting its June 1, 2015 letter—which is focused on defending the Tejon’s arguments for application of the “last recognized reservation” exemption—the Tejon participated in a public meeting before the Kern County Board of Supervisors regarding their request for a cooperative agreement with the County.⁷ During that meeting, the Tejon explained that they would need such an agreement in order to satisfy the two-part test, and the Tejon’s attorney—Kevin Wadzinski—expressly stated that a two-part determination was necessary in this case for the lands under consideration.⁸

It is therefore not clear whether the Tejon intend to continue to pursue their request for a “last recognized reservation” determination by the Department, whether the Department rejected their request, or whether the Tejon’s attorney erroneously provided the County incorrect information. Clearly, what was conveyed during the public hearing is not consistent with the Tejon’s June 1, 2015 letter.

Accordingly, we ask that the Department clarify the status of the Tejon’s request so that the public is informed about the processes that will apply under IGRA.

Sincerely,



Jena A. MacLean

⁷ Board of Supervisors of Kern County, California, Regular Meeting PM (June 2, 2015) (minutes, video, and linked presentation materials), available at: <http://www.co.kern.ca.us/bos/AgendaMinutesVideo.aspx>.

⁸ *Id.* (video available at: http://kern.granicus.com/MediaPlayer.php?view_id=33&clip_id=2980) at 1:43:59 - 1:50:35 (statement of Kevin Wadzinski, attorney for the Tribe) (“And in this particular case, in order for that land to be taken into trust and used for gaming purposes, the Secretary of the Department of the Interior needs to make what is called a two-part determination.”). As set forth in detail in our April 7, 2015 letter, the Mettler Parcels do not qualify for the “last recognized reservation” exemption to the prohibition on off-reservation gaming, 25 C.F.R. § 2719(a)(2)(B), or any other exception. Accordingly, we agree with the Tejon’s counsel’s representation that the “two-part determination” process under 25 U.S.C. § 2719(b)(1)(A) applies.

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H

United States Court of Appeals,
Ninth Circuit.

David Laughing Horse ROBINSON, an individual
and Chairman, Kawaiisu Tribe of Tejon; Kawaiisu
Tribe of Tejon, Plaintiffs–Appellants,

v.

Sally JEWELL, Secretary, U.S. Department of the
Interior; Tejon Mountain Village, LLC; County of
Kern; Tejon Ranch Corporation; Tejon Ranchcorp,
Defendants–Appellees.

No. 12–17151.

Argued and Submitted Nov. 20, 2014.

Filed June 22, 2015.

Background: Non-federally recognized Native American tribe and its elected chairperson sued Secretary of Department of Interior (DOI), county, and ranch owners asserting title to ranch. The United States District Court for the Eastern District of California, Barbara McAuliffe, United States Magistrate Judge, 885 F.Supp.2d 1002, dismissed complaint, and plaintiffs appealed.

Holdings: The Court of Appeals, Thomas, Chief Judge, held that:

- (1) tribe's failure to present claim pursuant to California Land Claims Act of 1851 extinguished its title to property;
- (2) Congress's ratification of 1849 Treaty with Utah did not give tribe any enforceable rights to property;
- (3) treaty that was never ratified by Senate carried no legal effect;
- (4) reservation for tribe was not created pursuant to Act of Congress of 1853; and
- (5) any rights to property that tribe possessed as result

of Acts of 1853 and 1855 were extinguished by Act of 1864.

Affirmed.

West Headnotes

[1] **Indians 209**  **153**

209 Indians

209IV Real Property

209k153 k. Loss or Termination of Rights in General; Extinguishment. [Most Cited Cases](#)

Kawaiisu tribe's failure to present claim pursuant to California Land Claims Act of 1851 extinguished its title to property based on its alleged receipt of Spanish land grant. 9 Stat. 631, § 8.

[2] **Indians 209**  **153**

209 Indians

209IV Real Property

209k153 k. Loss or Termination of Rights in General; Extinguishment. [Most Cited Cases](#)

Absent recognition by Congress, aboriginal right of occupancy can be terminated by sovereign at any time without any legally enforceable obligation to compensate Indians.

[3] **Indians 209**  **151**

209 Indians

209IV Real Property

209k151 k. Title and Rights to Indian Lands in General. [Most Cited Cases](#)

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Recognition of aboriginal title requires clear statement from Congress unequivocally granting legal rights.

[4] Indians 209  **154**

209 Indians

209IV Real Property

209k154 k. Treaties, Construction, and Operation in General. [Most Cited Cases](#)

Congress's ratification of 1849 Treaty with Utah did not give Kawaiisu tribe any enforceable rights to property; treaty's language indicated that any rights to land that Indians occupied at time of its execution were not recognized by United States government, but rather aimed at promoting peaceful relations and encouraging Indians to adopt more geographically constrained agrarian mode of living.

[5] Indians 209  **154**

209 Indians

209IV Real Property

209k154 k. Treaties, Construction, and Operation in General. [Most Cited Cases](#)

Kawaiisu tribe's participation in Treaty D, executed in 1851 by tribe and United States, did not constitute substantial compliance with California Land Claims Act of 1851, and thus did not perfect tribe's title to property, where treaty was never ratified by Senate. *U.S.C.A. Const.Art. 2, § 2, cl. 2*; 9 Stat. 631, § 8.

[6] Indians 209  **157**

209 Indians

209IV Real Property

209k156 Reservations or Grants to Indian Nations or Tribes

209k157 k. In General. [Most Cited Cases](#)

Reservation for Kawaiisu tribe was not created pursuant to Act of Congress of 1853, even though President subsequently directed his officers to execute plan for creating reservations in California, where that plan lacked specificity, and there was no evidence that President ever approved creation of reservation. Act of March 3, 1853, ch. 104, 10 Stat. 226, 238.

[7] Indians 209  **153**

209 Indians

209IV Real Property

209k153 k. Loss or Termination of Rights in General; Extinguishment. [Most Cited Cases](#)

Any rights to property that Kawaiisu tribe possessed as result of Acts of Congress of 1853 and 1855 were extinguished by Act of 1864, which superseded Acts of 1853 and 1855 by allowing only four reservations in California. Act of March 3, 1853, ch. 104, 10 Stat. 226, 238; Act of March 3, 1855, 10 Stat. 699; Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39.

[8] Indians 209  **159**

209 Indians

209IV Real Property

209k156 Reservations or Grants to Indian Nations or Tribes

209k159 k. Disestablishment and Termination. [Most Cited Cases](#)

Congressional determination to terminate Indian reservation must be expressed on face of Act or be clear from surrounding circumstances and legislative history.

[Jeffrey M. Schwartz](#) (argued), Schwartz Law, P.C., San Clemente, CA, for Plaintiffs–Appellants.

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Tamara N. Rountree (argued), Barbara M.R. Marvin, and William Lazarus, Attorneys, United States Department of Justice, Environment & Natural Resources Division, Appellate Section, Washington, D.C., Defendant–Appellee Secretary of Interior.

Eric D. Miller (argued), Perkins Coie LLP, Seattle, WA; Jennifer A. MacLean, Benjamin S. Sharp, and Elisabeth C. Frost, Perkins Coie LLP, Washington D.C., for Defendants–Appellees Tejon Mountain Village, LLC, Tejon Ranch Corporation, and Tejon Ranchcorp.

Charles F. Collins (argued) and Theresa A. Goldner, Kern County Administrative Center, Bakersfield, CA, for Defendant–Appellee Kern County.

Appeal from the United States District Court for the Eastern District of California, Barbara McAuliffe, Magistrate Judge, Presiding. D.C. No. 1:09–cv–01977–BAM.

Before: SIDNEY R. THOMAS, Chief Judge, and STEPHEN REINHARDT and MORGAN CHRISTEN, Circuit Judges.

OPINION

THOMAS, Chief Judge:

*1 In this appeal, the Kawaiisu, a non-federally recognized Native American group indigenous to the Tehachapi Mountains and the Southern Sierra Nevada (“the Tribe” or “the Kawaiisu”), and its elected chairperson, David Laughing Horse Robinson, appeal the dismissal of their claims asserting title to the Tejon Ranch, one of the largest continuous expanses of private land in California. We review *de novo* a district court’s order granting a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), *Manzarek v. St. Paul Fire & Marine Ins., Co.*, 519 F.3d 1025, 1030 (9th Cir.2008), and we affirm the judgment of the district court.

I

As with most land disputes of this type, historical perspective is important in resolving the claims. During first the Spanish and then the Mexican occupations of what is now California, those governments encouraged settlement by issuing large land grants in the territory. At the conclusion of the Mexican–American War in 1848, the United States acquired California from Mexico through the Treaty of Guadalupe Hidalgo. The treaty promised to honor Spanish and Mexican land grants. Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic art. VIII–IX, Feb. 2, 1848, 9 Stat. 922 (“Treaty of Guadalupe Hidalgo”).

The discovery of gold in California just eight days prior to the signing of the treaty, and the subsequent, unprecedented influx of settlers to the territory, placed a great deal of pressure on land claims. To resolve disputes over the validity of private title to land, Congress passed the Act of March 3, 1851, ch. 41, 9 Stat. 631 (“Act of 1851”), commonly known as the California Land Claims Act of 1851. The Act created a Board of Commissioners (“Commission”) to evaluate claims and required that anyone claiming title derived from a Mexican or Spanish grant present a claim to the Commission within two years. *Id.* § 8. Any land not claimed within that period, or for which a claim was rejected, would be returned to “the public domain of the United States.” *Id.* § 13.

No Indian groups, including the predecessors to the Kawaiisu, registered claims with the Commission during the two-year period. In addition, the United States Senate refused to ratify any of the eighteen treaties negotiated with California tribes between 1851 and 1852, a decision that was sealed until 1905. William C. Sturtevant, HANDBOOK OF NORTH AMERICAN INDIANS: CALIFORNIA 702–03 (1978).

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Following the cessation of hostilities with Mexico and the signing of the Treaty of Guadalupe Hidalgo, the United States entered into and ratified a treaty with an array of western Native American leaders collectively referred to as “the Utah.” The Treaty with the Utah, signed in 1849 in Santa Fe, New Mexico, provided for an end to hostilities between the Utah tribes and the United States and stipulated that the Utahs accept and submit to the jurisdiction of the United States. Further, it stated:

*2 [The United States] shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries.... [a]nd the said Utahs, further, bind themselves not to depart from their accustomed homes or localities unless specially permitted ... and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits, under pueblos, or to settle in such other manner as will enable them most successfully to cultivate the soil, and pursue such other industrial pursuits as will best promote their happiness and prosperity: and they now deliberately and considerately, pledge their existence as a distinct tribe, to abstain, for all time to come, from all depredations; to cease the roving and rambling habits which have hitherto marked them as a people; to confine themselves strictly to the limits which may be assigned them; and to support themselves by their own industry, aided and directed as it may be by the wisdom, justice, and humanity of the American people.

Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 984. The Kawaiisu allege that several of its leaders, including its head chief at the time, Acaguete Nochi, were among the signatories to the treaty.

The Kawaiisu identify themselves as “an Indian Tribe that has resided in and around Kern County, California since time immemorial.” Plaintiff Robinson

traces his lineage through multiple previous head chiefs of the Kawaiisu back to Acaguete Nochi. The Kawaiisu are not currently, and have never been, included on the official list of federally recognized tribes maintained by the Bureau of Indian Affairs at the Department of the Interior.

According to the Tribe's complaint, the Kawaiisu first appeared in the historical record in the 1776 diary of Father Francisco Garces. Father Garces' map of the following year notes the Tribe's presence according to a number of its historic names. While the name Kawaiisu derives linguistically from a tribe to the north in San Joaquin Valley, the Tribe identifies as “one of the ancient Great Basin Shoshone Paiute Tribes whose pre-European territory extended from Utah to the Pacific Ocean.” The Kawaiisu's complaint lists an array of ethnographic accounts documenting its unique tribal identity, including the Bureau of American Ethnology's 1907 Handbook of American Indians North of Mexico.

In 1851—two years after the signing of the Treaty with the Utah and just a few months after the California Land Claims Act of 1851 went into effect—the United States executed a treaty with “various tribes of Indians in the State of California” in which the tribes agreed to cede large portions of land and the federal government promised to set aside reservations “for the sole use and occupancy” of the tribes and supply the Indians with goods and services, including schools. This treaty, known as “Treaty D,” was submitted to Congress but never ratified by the Senate.^{FNI}

In the absence of any ratified treaties with the Indians of California, the establishment of reservations in the state could only result from an act of Congress or from the President acting under delegation from Congress. Three acts of Congress—taking place in 1853, 1855, and 1864—are relevant here. The Act of 1853 authorized the President to create five “military reservations” no more than 25,000 acres in size in the state of California or the territories of Utah

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and New Mexico. Act of March 3, 1853, ch. 104, 10 Stat. 226, 238. In 1855, Congress amended the Act of 1853 to provide funding and authorization for two additional reservations. Act of March 3, 1855, 10 Stat. 699.

*3 During the period prior to 1864, the President appears to have only officially created three reservations in California. *Mattz v. Arnett*, 412 U.S. 481, 489, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) (“At the time of the passage of the 1864 Act there were, apparently, three reservations in California: the Klamath River, the Mendocino, and the Smith River.”). The Tribe alleges that the Tejon/Sebastian Reservation was created pursuant to the Act of 1853, pointing to a letter from President Franklin Pierce to the Secretary of the Interior, Robert McClelland, and a subsequent letter from the Secretary to the Superintendent of Indian Affairs for California, Edward F. Beale, from that same year.

After quoting the paragraph of the 1853 Act authorizing creation of five reservations, President Pierce's letter states, “In the exercise of discretion vested in me by said act of Congress, I have examined and hereby approve the plan therein proposed for the protection of the Indians in California, and request that you will take the necessary steps for carrying the same into effect.” Secretary McClelland's letter to Superintendent Beale repeats the language from the Act of 1853 and then states that:

The President of the United States has examined and approved the plan provided for in said act, and directs that you be charged with the duty of carrying it into effect. For this purpose you will repair to California without delay, and by the most expeditious route. The selections of the military reservations are to be made by you in conjunction with the military commandant in California, or such officer as may be detailed for that purpose, in which case they must be sanctioned by the commandant. It is likewise the President's desire that, in all other

matters connected with the execution of this “plan,” you will, as far as may be practicable, act in concert with the commanding officer of that military department.

However, no Presidential proclamation or executive order was ever issued regarding the Tejon or Sebastian Reservation.

In 1864, Congress significantly reorganized management of reservations in California. The Act of 1864 consolidated California as one Indian superintendency, empowered the President to create no more than four reservations, and required that lands not retained as reservations under the Act be offered for public sale. Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39. The President eventually established four reservations by executive order. The Tejon/Sebastian Reservation was not among them.

The land at issue in the case—the 270,000 acres comprising Tejon Ranch and the 49,000 of those acres referred to as the Tejon or Sebastian Reservation—is made up of portions of four different Mexican land grants: Rancho El Tejon, Rancho los Alamos y Agua Caliente, Rancho Castac, and Rancho La Liebre. The various holders of those four grants submitted claims pursuant to the Act of 1851, all of which were confirmed by the Commission, which issued patents for the claims between 1863 and 1875. The rights to all four of these grants were acquired by Edward F. Beale between 1855 and 1866. Defendants Tejon Mountain Village, LLC, Tejon Ranch Corporation, and Tejon Ranchcorp (collectively, “Tejon Ranch Defendants”) ultimately acquired title through transactions traceable to the patents. The Tejon Ranch Defendants propose a 3,450-home development named Tejon Mountain Village on the Tejon Ranch.

*4 The Tribe filed this action asserting title under a variety of theories ultimately asserting four claims against the Secretary of Interior,^{FN2} two against the

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Tejon Ranch Defendants,^{FN3} and one against Kern County, California.^{FN4}

After dismissing two complaints with leave to amend, the district court dismissed the complaint with prejudice.

II

The Tribe has waived appeal of its claims against the Secretary by failing to “present a specific, cogent argument for our consideration.” *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir.1994); see also *Fed. R.App. P. 28(a)(8)(A)* (requiring that an appellant's brief must contain an argument section which includes their “contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

On appeal, the Tribe asserts a new theory of estoppel against the Secretary and suggests that the United States violated its trust responsibility by failing to present or preserve the Tribe's claims before the Commission. Neither theory was presented to the district court. We decline to consider arguments raised for the first time on appeal. *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir.2007).

III

A

The Tribe claims ownership to the Tejon Ranch as against the Tejon Ranch Defendants on its alleged receipt of a Spanish land grant, its rights under the 1849 Treaty with the Utah, and its negotiation of Treaty D with the federal government. However, the district court correctly concluded that the Tribe's failure to present a claim to the Commission pursuant to the California Land Claims Act of 1851 extinguished its title, that the Treaty with the Utah did not convey land rights to the signatory tribes or recognize aboriginal title, and that Treaty D was never ratified and conveyed no rights.

[1] The Tribe asserts that “[i]n 1777, the Spanish government granted the Kawaiisu land in what would become the State of California.” The only support for this assertion is its alleged presence on Diseno Maps from that year created by Father Francisco Garces.^{FN5} Even assuming that the Kawaiisu possessed such a grant, the terms of the Treaty of Guadalupe Hidalgo alone were insufficient to preserve it. The Land Claims Act of 1851 required that “each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners....” 9 Stat. 631, § 8. Presentation to the Commission was the only avenue allowed by the Act for preservation of claims and the issuance of a patent. Section 13 of the Act provides that “all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States.” *Id.* § 13. The Tribe concedes that it did not present any claims to the Commission within the statutory time frame.

*5 The Tribe claims land rights were bestowed by the subsequent Treaty with the Utah, or, alternatively, argues that its participation in Treaty D constituted substantial compliance with the Act of 1851. Neither argument is persuasive.

[2][3] The Treaty with the Utah did not grant the Tribe title to Tejon Ranch, nor did it recognize aboriginal title of any of the signatory tribes, including the Kawaiisu. Aboriginal title “means mere possession not specifically recognized as ownership by Congress.” *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 75 S.Ct. 313, 99 L.Ed. 314 (1955). Absent such recognition by Congress, aboriginal right of occupancy can be terminated by the sovereign at any time “without any legally enforceable obligation to compensate the Indians.” *Id.* Recognition of aboriginal title requires a clear statement from Congress unequivocally granting legal rights. See *Uintah Ute Indians of Utah v. United States*, 28 Fed.Cl. 768, 786

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(Fed.Cl.1993) (“Recognition of Indian title may take various forms, but such recognition must manifest a definite intention to accord legal rights.”). “The Congress must affirmatively intend to grant the right to occupy and use the land permanently. By ‘recognition,’ the courts have meant that Congress intended to acknowledge ... to Indian tribes rights in land which were in addition to the Indians’ traditional use and occupancy rights exercised only with the permission of the sovereign.” *Sac & Fox Tribe v. United States*, 315 F.2d 896, 900 (Ct.Cl.1963) (internal quotation marks and citation omitted).

The question of whether the Treaty with the Utah created any enforceable property rights has been addressed by the Court of Federal Claims, which determined in 1993 that the 1849 treaty did not recognize Indian title. *Uintah Ute Indians*, 28 Fed.Cl. at 786. As that court observed, “Article VII of the 1849 treaty does not recognize title because the boundaries of aboriginal lands were to be settled in the future. By its terms the treaty does not designate, settle, adjust, define, or assign limits or boundaries to plaintiff; it leaves such matters to the future. Consequently, the treaty cannot be said to recognize Indian title.”

[4] The district court correctly adopted the reasoning of *Uintah Ute Indians*. By referring to “limits which may be assigned [the Utahs]” that they would be “bound to confine themselves to,” the Treaty’s language indicates that any rights to the land the Indians occupied at the time of its execution were not recognized by the United States government. Treaty with the Utah, art. VII. We cannot assume that Congress would have intended through its ratification of the Treaty with the Utah to grant title to the vast, then-indeterminate expanses of land occupied by the various signatory tribes. The Treaty’s language points to its aims of promoting peaceful relations and encouraging the Indians to adopt a more geographically constrained agrarian mode of living. *Id.*^{FN6}

*6 [5] Treaty D, executed in 1851 by the Kawa-

iisu and the United States, was never ratified by the Senate and thus carries no legal effect. *See U.S. Const. Art. II, § 2, cl. 2*. The treaty itself contained language to that effect, stating that it would “be binding on the contracting parties when ratified and confirmed by the President and Senate of the United States of America.” The Kawaiisu argue that through its participation in Treaty D, the Tribe “substantially complied” with the Act of 1851 and thus perfected title tracing to its alleged Spanish land grant or the Treaty with the Utah. This argument also fails. The Act of 1851 provides for no alternative to presenting one’s claims to the Commission.

Treaty D granted no land rights, nor did it create any other enforceable rights, as it was never ratified and is thus a legal nullity.^{FN7} It was also insufficient for the purposes of the Act of 1851’s requirement that any parties claiming title to land in California under Spanish or Mexican grants present their claims to the Commission.

Subsequent case law established that the Act of 1851 fully extinguished any existing aboriginal title or unregistered land grants. In 1901, the Supreme Court held in *Barker v. Harvey*, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963, that even perfect title was subject to the presentation requirement of the Act of 1851, as were claims by Mission Indians derived from Mexican land grants. *Id.* at 491, 21 S.Ct. 690 (“If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration.”). The Court further suggested that the Act itself extinguished aboriginal title: “Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.” *Id.* at 492, 21 S.Ct. 690.

This construction was applied to extinguish aboriginal title in California. *Super v. Work* extended the

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rationale to nomadic, non-Mission Indians. *See* 3 F.2d 90 (D.C.Cir.1925), *aff'd per curiam*, 271 U.S. 643, 46 S.Ct. 481, 70 L.Ed. 1128 (1926). We declined to create an exception to the “extensive reach” of the Act for the indigenous occupants of the Santa Barbara Islands. *See United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 646 (9th Cir.1986) (holding that the Treaty of Guadalupe Hidalgo did not convert tribe’s aboriginal title into recognized title and that its aboriginal title was extinguished by its failure to present its claim under the Act of 1851).

The Supreme Court in *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924), applied the rule to a dispute involving one of the very land patents at issue in this case. Despite the condition placed on an 1843 Mexican land that the Tejon Mission Indians would be allowed to continue to reside there under the protection of the grantees, the Court held that the land patent issued pursuant to the grantees’ presentation to the Commission under the Act of 1851 “passed the full title, unincumbered [sic] by any right in the Indians” to occupy and use the lands. *Id.* at 482, 44 S.Ct. 621. The Court’s opinion emphasized the especial importance of repose in matters involving land, where titles are “purchased on the faith of their stability.” *Id.* at 487, 44 S.Ct. 621 (“Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.” (internal quotation marks and citation omitted)).

*7 Thus, the district court correctly concluded that the Tribe has no cognizable ownership interest in the Tejon Ranch.

B

The Tribe also complains about numerous acts of alleged forgery and deception on the part of Edward F. Beale and others in obtaining patents for the four Mexican land grants comprising Tejon Ranch. On this basis, the Tribe contends that Tejon Ranch Defendants’ title—acquired, ultimately, from Beale’s pa-

tents—is defective. However, all the alleged acts occurred prior to the submission of the claims to the Commission pursuant to the Land Claims Act of 1851. The Commission confirmed all four of the claims, and at least one of the patents has survived a challenge in court. *See United States v. Title Ins. & Trust Co.*, 288 F. 821 (9th Cir.1923), *aff'd*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924). The district court, pointing to the value of stability identified by the Supreme Court in *Title Insurance*, 265 U.S. at 484, 44 S.Ct. 621, concluded that “Plaintiffs cannot now challenge the validity of United States issued land patents after over a century of time has elapsed.”

IV

The Tribe also claims that it owns a 49,000–acre subset of Tejon Ranch, known historically as the Tejon or Sebastian Reservation (“Reservation”), alleging that a reservation reserved to the Tribe was established pursuant to the Act of 1853. The Tribe claims that the Reservation, once established, was never terminated and that it possesses superior title to the parcel. The district court properly rejected the claim.

[6] The Tribe argues that the Reservation was created pursuant to the Act of Congress of 1853 and that it survived a subsequent Act of Congress of 1864. In support of its claim, the Tribe cites two letters from the months immediately following the passage in 1853: one from President Franklin Pierce to Interior Secretary Robert McClelland, and a second from Secretary McClelland to Edward F. Beale, Superintendent of Indian Affairs for California and Nevada. While these letters certainly establish that the President directed his officers to execute a plan for creating reservations in California, that plan lacks specificity and there is no evidence that the President ever approved the creation of the Tejon Reservation. Thus, the district court properly concluded that it “was not a reservation established by the President and therefore cannot provide legal rights to plaintiffs.”

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[7][8] Further, any rights that the Tribe possessed were extinguished by the Act of 1864, which superseded the Acts of 1853 and 1855 by allowing only four reservations in California. *Shermoen v. United States*, 982 F.2d 1312, 1315 (9th Cir.1992). *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), articulates a relatively high standard for Congressional termination of an Indian reservation: “A congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.” *Id.* at 505, 93 S.Ct. 2245. The district court properly rejected the Tribe's claims of ownership in the Reservation.

V

*8 The Tribe's claims against Kern County are contingent upon the establishment of ownership in the Tejon Ranch. Because its ownership claim fails, so do its claims against Kern County. Robinson's individual claims against Kern County are waived for failure to present a “specific, cogent argument for our consideration” on appeal. *Greenwood*, 28 F.3d at 977.

VI

The district court properly determined that the Tribe has no ownership interest in the Tejon Ranch and that no reservation was established. The claims against Kern County are subsumed into the ownership determination. The claims originally asserted against the Secretary, along with Robinson's individual claims, were waived for failure to assert on appeal. We decline to consider the Tribe's new arguments on appeal. We need not reach any other issue urged on appeal.^{FN8}

AFFIRMED.

FN1. In 1927, the California legislature passed a statute authorizing the California Attorney General to bring suit on behalf of the tribes who were party to Treaty D and

seventeen other unratified treaties. On May 18, 1928, Congress passed The Indians of California Act, 25 U.S.C. § 651, which granted jurisdiction to the Court of Claims to hear these cases. Earl Warren, representing “all those Indians of the various tribes, bands and rancherias who were living in the State of California on June 1, 1852, and their descendants living in the State,” *Indians of California by Webb v. United States*, 98 Ct.Cl. 583, 585 (Ct.Cl.1942), negotiated a \$5,024,842.34 judgment in favor of the Indians. See *Round Valley Indian Tribes v. United States*, 97 Fed.Cl. 500, 504 (Fed.Cl.2011).

FN2. The Tribe's claims against the Secretary are (1) deprivation of property without due process in violation of the Fifth Amendment by wrongfully omitting the Tribe from the list of federally recognized tribes and failing to correct that omission; (2) breach of fiduciary duty by not intervening on the Tribe's behalf to stop the proposed development of Tejon Mountain Village; (3) denial of equal protection in violation of the Fifth Amendment by extending benefits to other tribal groups while failing to recognize the Tribe; and (4) non-statutory review of the Secretary's failure to recognize the Tribe, based on federal recognition by virtue of the Act of Congress ratifying the 1849 Treaty with the Utah.

FN3. The Tribe's claims against the Tejon parties include unlawful possession of Tejon Ranch, trespass, violation of NAGPRA, and violation of the Non-Intercourse Act.

FN4. The Tribe's sole claim against Kern County is for equitable enforcement of treaty—essentially forcing the County to revoke its approval of permits for the development

--- F.3d ---, 2015 WL 3824658 (C.A.9 (Cal.)), 15 Cal. Daily Op. Serv. 6513, 2015 Daily Journal D.A.R. 7046
(Cite as: 2015 WL 3824658 (C.A.9 (Cal.)))

of Tejon Mountain Village.

FN5. We note, however, that in its Second Amended Complaint, and in the Tribe's opposition to the Tejon Ranch Defendants' motion to dismiss the Third Amended Complaint, the Tribe argued that its land rights explicitly do *not* derive from any Spanish or Mexican grant.

FN6. The Tribe also contends that “the district court's interpretation of the Treaty with the Utahs was fatally flawed because the court failed to consider how the Kawaiisu interpreted the Treaty, as the Supreme Court requires.” However, “[t]he interpretation of a treaty is a question of law and not a matter of fact.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986); see also *Sioux Tribe v. United States*, 205 Ct.Cl. 148, 158, 500 F.2d 458 (Ct.Cl.1974) (“We have repeatedly held that the interpretation of an Indian treaty is a question of law, not a matter of fact.”). As in *Chunie*, the issue of whether the Treaty with the Utah granted any enforceable rights is relatively settled as a matter of law.

FN7. The district court and Tejon Defendants point out that the Kawaiisu were partially compensated for the failure of the United States to ratify Treaty D. A 1942 settlement negotiated by Earl Warren, then-Attorney General of California, obtained over five million dollars in compensation for “the Indians of California” for the federal government's failure to ratify eighteen treaties with Native Americans, including Treaty D. See *Indians of California by Webb v. United States*, 98 Ct.Cl. 583 (Ct.Cl.1942). This litigation was made possible by an Act of Congress in 1928 granting jurisdiction to the court of claims to hear such cases. The In-

dians of California Act, 25 U.S.C. § 651. The Court of Claims determined that the Act granted a right of action for an equitable claim, not a legal one, “allowing all the Indians of California to recover the amount specified in these unratified treaties, both in the value of the land promised to be set aside and the other compensation provided.” *Indians of California*, 98 Ct.Cl. at 598.

FN8. The Tejon Ranch Defendants and Kern County contend that we lack jurisdiction, arguing that our Appellate Commissioner erroneously granted the Tribe's motion to reinstate the appeal. A motions panel of our court has already considered, and rejected, these arguments, and we conclude the Appellate Commissioner acted within his discretion in granting the reinstatement motion.

C.A.9 (Cal.),2015.

Robinson v. Jewell

--- F.3d ---, 2015 WL 3824658 (C.A.9 (Cal.)), 15 Cal. Daily Op. Serv. 6513, 2015 Daily Journal D.A.R. 7046

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SANTA ROSA RANCHERIA TACHI YOKUT TRIBE

Leo J. Sisco
Chairman

Robert Jeff II
Vice Chairman

Candida L. Cuara
Secretary

Dena Baga
Treasurer

Crystalgrace Ignacio/Patricia Lewis
Delegates

November 23, 2020

Chad Broussard
Environmental Protection Specialist
Bureau of Indian Affairs
Sent via email to chad.broussard@bia.gov

RE: FEIS Comments, Tejon Indian Tribe Casino Project

Dear Mr. Broussard:

On behalf of the Tachi Yokut Tribe, known as the Santa Rosa Indian Community of the Santa Rosa Rancheria, California, ("Tachi"), a federally recognized Indian tribe, 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020), I am writing to submit the following comments as requested on October 23, 2020 by the Bureau of Indian Affairs ("BIA") on the Final Environmental Impact Statement ("FEIS") for the Tejon Indian Tribe Trust Acquisition and Casino Project (the "Project").

The Project proposes three separate federal actions: (1) the acquisition by the federal government of approximately 306 acres of land in unincorporated Kern County, California (the "Mettler Site") in trust for the benefit of the Tejon Indian Tribe ("Tejon"), (2) issuance of a Secretarial Determination under the Indian Gaming Regulatory Act ("IGRA") on whether Tejon can conduct gaming on the Mettler Site once taken into trust, and (3) approval of a management contract by the National Indian Gaming Commission ("NIGC"). Upon approval of the Mettler Site into trust, a Secretarial Determination that gaming can be conducted, and approval of a management contract by the NIGC, Tejon proposes to construct a 715,800 square foot casino resort, RV park, fire and sheriff stations, and associated facilities. The remainder of the Mettler Site not proposed for development would continue to be used for agricultural production for the time being but would eventually be used to deliver governmental services.

We believe that the FEIS is deficient because the BIA failed to examine and analyze reasonable alternatives to the Project, analyze the impact that the COVID-19 pandemic will have on the construction, operation, and profitability of the Project, and inaccuracies are apparent in

the BIA’s examination of environmental impacts. Moreover, this Project application’s environmental review process has moved faster than most other similar projects have in the past, which is extremely concerning to the Tribe, because the final stages of approval are taking place during a worldwide pandemic that has severely impacted our Tribe’s ability to allocate resources to tracking the process and properly evaluating the impacts that the project will have on our Tribe, as well as the surrounding community.

Additionally, the Project would be detrimental to Tachi, as Tachi’s governmental functions and/or services will be directly, immediately and significantly impacted by the proposed gaming establishment and the FEIS did not explore adequate non-gaming alternatives. As such, the Secretary should deny the acquisition of such lands into trust for gaming under 25 U.S.C. § 2719. In that same regard, the NIGC should also deny approval of the management contract.

COMMENTS

THE FIES IS DEFICIENT

Under the National Environmental Policy Act (“NEPA”), prior to taking any “major Federal actions significantly affecting the quality of the human environment,” all federal agencies must prepare a detailed statement on (1) the environmental impact of the proposed action(s), (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (3) alternatives to the proposed action(s), (4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (5) any irreversible and irretrievable commitments of resources.¹ NEPA requires the BIA to take a “hard look” at the environmental consequences of any Project prior to approval.

I. Deficient Alternatives Analysis

In drafting the FEIS, the BIA was required to consider a “range of reasonable alternatives” to the proposed actions.² The “purpose and need” statement for the Project “necessarily dictates the range of reasonable alternatives.”³

The stated “purpose” of the three proposed federal actions is “to facilitate tribal self-sufficiency, self-determination, and economic development.”⁴ In stating the “need” for the

¹ 42 U.S.C. § 4332(c).

² 40 C.F.R. § 1502.14(a).

³ *Wetlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (citing *City of Carmel–By–The–Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir.1995); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 192 (D.C.Cir.1991)).

⁴ FEIS at 1-1.

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(Cont.)

proposed federal actions, the BIA directs the public to the Department of Interior’s (“DOI’s”) obligations under its trust land acquisition regulations, the DOI’s regulations governing Secretarial Determinations under IGRA, and the NIGC’s obligations under its regulations for review of management contracts.⁵

The FEIS discussed four alternatives to Tejon’s proposal:

1. Reduced Casino Resort Alternative;
2. Organic Farm Alternative;
3. Alternative Site; and
4. No Project Alternative.⁶

A. The Organic Farm Alternative is not meaningfully different from the No Project Alternative.

The BIA’s Scoping Report recognized that “[t]he intent of the analysis of alternatives in the FEIS is to present to decision-makers and the public a reasonable number of alternatives that are both feasible and *sufficiently different* from each other in critical aspects.”⁷ However, the BIA’s inclusion of the Organic Farm Alternative is nothing more than the No Project Alternative dressed up to look like a separate non-gaming development alternative.

Currently, the Mettler Site is “developed with agricultural fields, a single residence, and agricultural storage buildings.”⁸ The Organic Farm Alternative, which the BIA classified as a “non-gaming alternative” to the proposed Project, is not meaningfully different from the No Project Alternative. This is apparent when reviewing Section 3.0 of the EIS which discusses the affected environment and the environmental consequences under each alternative. The BIA found that, as a result of implementing the Organic Farm Alternative, no significant impacts would occur to soil erosion or sedimentation, seismic hazards, flooding, surface water, groundwater, air quality, habitat, special-status species, migratory birds and other birds of prey, wetlands, waters of the United States, paleontological resources, the local economy, socioeconomic effects, transportation/circulation, land use, municipal waste water systems, law enforcement services, fire protection, emergency medical transportation, emergency medical services, electricity or natural gas services, schools, libraries, parks, ambient noise levels, or aesthetics, and there would be no indirect effects or growth-inducing effects, because the alternative would result in *no*

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3-02

⁵ *Id.* at 1-1:1-2.

⁶ FEIS at 2-1.

⁷ Scoping Report, 2-8.

⁸ FEIS, at 2-1.

*changes to the use of the site.*⁹ The classification of the Organic Farm as an “alternative” is misleading and prevents “the decision maker and the public [from making] an informed comparison of the alternatives.”¹⁰

3-02
(Cont.)

B. The BIA should have considered a non-gaming alternative at the Mettler Site.

The purpose for the Project was stated very broadly; to facilitate tribal self-sufficiency, self-determination, and economic development. Because the purpose and need statement for the Project “necessarily dictates the range of reasonable alternatives,” it is inconceivable that no other type of economic development alternative was considered at either the Mettler Site or the Maricopa Highway Site.¹¹ The BIA’s attempt to couch the Organic Farm Alternative as “a non-gaming alternative analyzed for the Mettler Site”¹² is entirely misleading, as discussed above. Moreover, there is not a single mention of other forms of economic development that could take place at the sites such as energy development, tourism and lodging, retail development, etc. The proposed acquisition sites are adjacent to Interstate 5, which carries international travelers from across both the Southern and Northern United States border crossings. Interstate 5 is under-developed for commercial activity, because of the primarily agricultural nature of the area. The business opportunities for a Tribe with financial backing (or even one without backers) are limitless, however the FEIS fails to present any of those opportunities.

3-03

An FEIS does not have to consider every possible alternative but it must consider all *reasonable* alternatives and “[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”¹³ The BIA could have offered a narrower purpose and need statement, one that could have been satisfied *only* by gaming development, but it did not. The BIA’s failure to consider any non-gaming alternatives, other than the Organic Farm Alternative, which is essentially indistinguishable from the No Project Alternative, renders the FEIS inadequate and has deprived decision-makers and the public of a meaningful review throughout the process.

⁹ FEIS, at 3-9, 3-18, 3-19, 3-29, 3-37, 3-42, 3-55, 3-56, 3-62, 3-72, 3-80, 3-81, 3-82, 3-83, 3-92, 3-104, 3-106, 3-111

¹⁰ *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), amended by 867 F.2d 1244 (9th Cir. 1989).

¹¹ *Wetlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (citing *City of Carmel–By–The–Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142 (9th Cir.1995); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 192 (D.C.Cir.1991)).

¹² FEIS Appendix B, 1.

¹³ *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985); See *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), amended by 867 F.2d 1244 (9th Cir. 1989) (“Where the information contained in the initial EIS was so incomplete or misleading that the decision maker and the public could not make an informed comparison of the alternatives, revision of the EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA.”)

C. The Project and the Reduced Casino Resort Alternative are not meaningfully different alternatives.

Additionally, the proposed Project and the Reduced Casino Resort Alternatives are almost identical, the only difference being that the alternative would result in a slightly smaller scale development. The required federal actions are the same and the environmental impacts of these two options are almost indistinguishable. Throughout the FEIS, the Reduced Casino Resort Alternative and the Project are analyzed together because there is no real meaningful difference between the impacts of the Project and this alternative.

It is also unclear why the Reduced Casino Resort Alternative was analyzed over other alternatives. For example, the FEIS states that the non-gaming development alternative on the Maricopa Highway Site was eliminated from consideration because it “would result in environmental impacts similar to the gaming alternatives presented in the EIS, and socioeconomic impacts would be similar to the gaming alternatives presented in the EIS” and thus, would not meaningfully add to the range of alternatives or meet the purpose and need for the Project. It is not clear how the BIA can justify rejection of the non-gaming development on the Maricopa Highway Site because the environmental impacts are “similar” to the proposed Project but still consider the Reduced Casino Resort Alternative when the impacts are essentially the same as the proposed Project. The Reduced Casino Resort Alternative does not meaningfully contribute to the range of alternatives.

Of importance to the Tribe, there has been an ongoing concern by many California tribes regarding the potential for a newly recognized tribe, such as Tejon, to unwittingly disrupt the careful political balance of tribal gaming in California, which depends upon the exclusivity that was granted to California tribes through two ballot initiatives (Proposition 5 and Proposition 1A). Tribal exclusivity is the bedrock of tribal government gaming in California; however it can easily be lost if there is a proliferation of off-reservation gaming across the state. The tribal proponents of both Proposition 5 and Proposition 1A made a promise to the voters of California that tribal gaming would be limited to existing reservations.

While that boundary has been pushed by the fact that there were so many terminated tribes that have later had lands restored for gaming purposes, none are in an area of such high visibility. If the proposed actions are finalized and the proposed casino is built, every traveler on Interstate 5 may be impacted by the project's impacts on traffic flow along Interstate 5. No other project to date in California had the potential to impact as many people as this project. We are concerned that the high visibility of the casino along the primary artery of travel from Canada to Mexico will lead to the tipping point that ends tribal exclusivity. With the broken promise so visible, all those who are travelling from Sacramento to Los Angeles may decide to vote in favor of a new initiative that allows gaming to all operators within the state.

The fact that the FEIS does not consider a reasonable non-gaming alternatives shows that the project is not merely intended to provide an economic development engine for the Tejon Tribe, but it limits any economic development to the one form of development that could be the beginning of the end of tribal exclusivity. But this may not be a concern for Tejon, because it is able to choose a gaming site that has a constant flow of international travel on the State’s most travelled artery. They will not be harmed by a potential loss of tribal exclusivity to the same extent as other more rural tribes.

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D. The BIA did not provide an adequate analysis of the expected economic benefits that would flow to Tejon for each alternative.

Finally, the BIA gives short shrift to the economic viability of the proposed Project or any alternatives. Almost no analysis is provided as to the projected economic benefit to Tejon which is perplexing as, again, the stated purpose of the Project is to facilitate economic development and tribal self-sufficiency for Tejon. In discussing the proposed Project and the Reduced Casino Resort Alternative, the BIA concludes, without any support, that “[t]he casino resort is projected to generate millions of dollars annually for the Tribe.”¹⁴ As discussed further below, this analysis also does not consider the ongoing and future impacts of the COVID-19 pandemic.

With respect to the Organic Farm Alternative, the BIA concluded that it “would negligibly benefit the Tribe because tribal members would have access to only a small number of new jobs.”¹⁵ No analysis was provided as to the expected economic benefit to Tejon from the operation of the farm alternative. Finally, the BIA completely omitted any analysis as to the economic benefit that could be expected from constructing the casino resort at the Alternative Site or from the No Project Alternative.

3-05

If the goal of the Project is truly to facilitate economic development and tribal self-sufficiency, a comparison of the economic benefit to Tejon in the analyzed alternatives would be of paramount importance. The public is unable to make an “informed comparison” of the alternatives when the economic viability of each is unknown.¹⁶

II. Failure to Account for Effects of COVID-19

The BIA failed to take into account the ongoing COVID-19 pandemic not only as it relates to the profitability of the proposed gaming facility, but also the public health and safety of those

3-06

¹⁴ FEIS, at 3-53.

¹⁵ *Id.* at 3-55.

¹⁶ *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), amended by 867 F.2d 1244 (9th Cir.1989)).

in the surrounding community. Though this Project has been in the planning stages for some time that does not negate the BIA’s responsibility to consider the current and future impacts the pandemic will impose on high-traffic businesses, such as casinos, entertainment venues, and hotels and lodging, all of which are contemplated in the Project. Social distancing requirements may limit capacity. Heightened sanitation requirements will require more personnel, increased cleaning costs, etc.

Moreover, the pandemic will likely have lasting impacts to human behaviors as well as to the economy. Unemployment rates have skyrocketed during the pandemic and economic growth has deteriorated significantly. Virtual and other creative solutions to mass public gatherings may result in less interest and traffic to the proposed casino and resort indefinitely. The BIA must supplement the FEIS to take these issues into account in assessing whether the Project will meet the purpose and need of the Tribe.

Additionally, impacts from the pandemic will affect the analysis of the socioeconomic analysis for the Project, including the analysis of the economic and employment effects. Those sections should be revised accordingly.

Deficiencies in the Environmental Impact Analysis

A. Geology and Soils

The FEIS provides a description of the seismic conditions of the area surrounding the Mettler and Alternative Sites but fails to provide any analysis on how those conditions could potentially affect any development on the sites.

For example, the White Wolf fault is approximately 240 ft from the Mettler Site and 392 ft from the Alternative Site and was active as recent as 1952 when the Kern County earthquake of 1952 occurred and caused “immense and widespread” damage.¹⁷ That earthquake killed 12 people, injured 18, and caused at least \$50 million in property damage. Hundreds of buildings in Kern County were damaged and slumping and surface ruptures were documented. Despite this history, and the close proximity of the White Wolf fault to the Mettler Site, the FEIS merely states that it “is classified as quaternary and active within the last 1.6 million years (California Geological Survey [CGS], 2018a), indicating a potentially active fault.” No mention is made of the risks that this fault poses to the Project or the analyzed alternatives.

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3-07

¹⁷ California Institute of Technology, Southern California Earthquake Data Center, Kern County Earthquake, <https://scedc.caltech.edu/significant/kern1952.html> (Last Accessed Nov. 12, 2020).

Moreover, the Mettler and Alternative Sites are within 2 to 4 miles of multiple other faults including the Wheeler Ridge fault zone, a portion of which is an Earthquake Hazard Zone (“EHZ”), the Pleito fault zone, a portion of which is also an EHZ, and several unnamed historic faults. Despite the risks posed by these faults, the FEIS simply concludes that, because the Mettler and Alternative Sites are not themselves within EHZs, and because development would be subject to the California Building Code (“CBC”), development of the Project would have no adverse effects related to seismic hazards.¹⁸ At a minimum, the BIA should review the latest research regarding seismic risks in this area and provide a feasibility study explaining how the constraints in the CBC due to these seismic risks would impact the feasibility of the proposed Project.

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B. Water Resources

As the FEIS recognizes, the Mettler Site is within a 100-year floodplain and thus subject to Executive Order 11988 (“EO 11988”). Under EO 11988,

[i]f an agency has determined to, or proposes to, conduct, support, or allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplains. If the head of the agency finds that the *only practicable alternative* consistent with the law and with the policy set forth in this Order requires sitting in a floodplain, the agency shall, prior to taking action, (i) design or modify its action in order to minimize potential harm to or within the floodplain, consistent with regulations issued in accord with Section 2(d) of this Order, and (ii) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain.¹⁹

3-08

The Maricopa Highway Site is not within a floodplain and is a practicable alternative to the Mettler Site.²⁰ The BIA provides no reasoning as to why the Maricopa Highway Site was not chosen for this reason alone.

C. Biological Resources

There is no analysis of the potential water bodies affected by construction and development of the Project. The FEIS identifies three agricultural ponds and a man-made drainage ditch as the “aquatic habitats” at the Metter Site and a single agricultural drainage ditch

3-09

¹⁸ FEIS, at 3-9:10.

¹⁹ EO 11988, § 2(a)(2).

²⁰ *Id.* at 3-11.

at the Maricopa Highway Site. These identifications were made during an “informal assessment” during site visits. No further explanation is provided as to who conducted the informal assessment or whether the United States Army Corps of Engineers were involved or consulted. Instead, the BIA simply concludes that neither site had water bodies whose features would subject it to federal jurisdiction under the Clean Water Act. No description is given as to what features any of these water bodies lacked or how they were assessed. Moreover, no mention is made at all as to the impact that construction and development will have on the Tecuya Creek, which is less than 500 ft from the site, or whether the creek has features that would subject it to the Clean Water Act.

3-09
(Cont.)

D. Cultural and Paleontological Resources

The BIA concludes that, based on records search results and field surveys, “there is low potential for previously unknown archaeological resources that could be encountered during ground-disturbing activities” at the Mettler Site.²¹ However, this fails to take into account the responses from two tribes identified by the California Native American Heritage Commission (“NAHC”) as having additional information about cultural resources at both sites.²² Specifically, the Kern Valley Indian Community stated that “they know the area is sensitive for cultural resources and construction should be monitored.” The Kitanemuk & Yowlumne Tejon Indians stated that “[t]hey have seen the Draft EIS and have general concerns as the area is sensitive for cultural resources.”²³ Similar comments were made at the public hearing. The BIA did not explain why it discounted these tribes’ concerns regarding cultural resources at the sites. Public records searches and field surveys do not tell the entire story. Traditional tribal knowledge is a valuable source of information on where cultural resources may be located. The BIA’s ambivalence to the concerns expressed by these tribes is troubling and the BIA should provide more information for how it reached its conclusions.

3-10

Additionally, the FEIS only contains a single-sentence response from both of these tribes. If there is additional responsive information from the tribes with insight into the cultural resources in the area that is not confidential, those responses should be included in the FEIS to allow the decision makers and public an informed and meaningful review.

The mitigation measures outlined in the event of inadvertent discovery of archaeological or paleontological resources are inadequate. If such resources are discovered, the NAHC should be notified so that it can provide notice to all tribes and individuals who may have an interest in

3-11

²¹ *Id.* at 3-42.

²² *Id.* at 3-40.

²³ *Id.* at 3-41.

those resources. These tribes and individuals should be consulted prior to any proposed relocation or analysis.

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(Cont.)

E. Hazardous Materials

The hazardous materials section fails to quantify the amount of hazardous chemicals to be stored on-site. For example, the FEIS states that the casino resort will have diesel storage tanks for emergency generators, liquid chlorine, liquid muriatic acid, or dry granular sodium bisulfate for the casino pool and wastewater treatment facility, and fertilizers and pesticides for landscape maintenance and the remaining agricultural land on the Mettler Site. The FEIS simply states that the quantities of these chemicals would be “relatively small,” but provides no context for what this means. The quantity of hazardous chemicals stored on site is essential to assessing any obligations under the Resource Conservation and Recovery Act (“RCRA”). The FEIS fails to address any permitting or mitigation requirements that may be necessary under RCRA.

3-12

III. Outstanding NEPA Requirements

As outlined above, NEPA requires federal agencies to assess (1) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (2) any irreversible and irretrievable commitments of resources.²⁴ Discussion of these two requirements is completely absent from the FEIS.

3-13

TEJON IS NOT ELIGIBLE TO PARTICIPATE IN THE TRUST ACQUISITION PROCESS UNDER THE INDIAN REORGANIZATION ACT

Under the Indian Reorganization Act of 1934 (“IRA”), the Secretary of Interior may acquire lands into trust for “any recognized Indian tribe now under Federal jurisdiction,” which “refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”²⁵ Currently, the DOI considers this provision of the IRA to cover only “tribes who were brought under federal jurisdiction in or before 1934 by the actions of federal officials clearly dealing with the tribe on a more or less sovereign-to-sovereign basis or clearly acknowledging a trust responsibility, and who remained under federal authority in 1934.”²⁶ Tribes never recognized by the federal government in or before 1934 and tribes who were recognized prior to 1934 but no longer remained under federal jurisdiction as of 1934 are

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²⁴ 42 U.S.C. § 4332(c).

²⁵ 25 U.S.C. §§ 5108, 5129; *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

²⁶ Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor, Determining Eligibility under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act of 1934 (Mar. 5, 2020).

excluded.²⁷ Even if Tejon was a recognized Indian tribe at some point, it falls into this latter category as it was not under federal jurisdiction as of 1934.

The Secretary issued a four-step procedure for determining whether a tribe is eligible to participate in the trust acquisition process under the IRA.²⁸ If a tribe meets the standard set out in a step, the inquiry is complete and the tribe is eligible. If a tribe cannot meet any of the steps, they are ineligible. In the first step, the DOI determines whether Congress passed legislation after 1934 making the IRA applicable to the tribe. No such legislation was passed for Tejon.

Second, the DOI determines whether “the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such.”²⁹ Presumptive evidence includes evidence that Section 18 elections were held, Section 16 constitutions were approved, Section 17 charters were approved and issued, treaty rights guaranteed by a treaty entered into by the United States and ratified before 1871, the Tribe was listed in the DOI’s 1934 Indian Population Report, the United States took efforts to acquire lands on behalf of the tribe in the years leading up to 1934, and inclusion in Volume V of Charles J. Kappler’s Indian Affairs, Laws and Treaties.

Tejon does not have sufficient evidence to meet these requirements either. Though Tejon did enter into a treaty with the United States in 1851, the treaty was never ratified by the United States Senate and so never became effective.

Tejon will argue that the United States took efforts to acquire lands on behalf of the Tribe in the years leading up to 1934 but those efforts ceased in 1924. Most of Tejon’s aboriginal lands at the Tejon Ranch were privately held by non-tribal members by 1867.³⁰ The Tule River Reservation was established by Executive Order for several tribes, including Tejon, in 1873 and some members of Tejon moved there but others stayed on the Tejon Ranch.³¹ The DOI attempted to purchase the Tejon Ranch for the remaining tribal members in 1914, 1915, 1920, and 1924 but was unsuccessful.³² In 1916, the DOI issued an order to withdraw 880 acres of land for the Tejon members still living on the Tejon Ranch while the United States pursued one of these lawsuits but the members never moved to the withdrawn acres, the withdrawal was temporary while the United States pursued the lawsuit, and the land was unsuitable for practical

3-14
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²⁷ *Id.* at 29.

²⁸ Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL Division of Indian Affairs, Procedure for Determining Eligibility for Land-into-Trust under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act (Mar. 10, 2020).

²⁹ *Id.* at 2.

³⁰ Arlinda F. Locklear, V. Heather Sibbison, Lawrence S. Roberts, and Suzanne R. Schaeffer, The Tejon Indian Tribe – Request for Confirmation of Status, 11 (June 30, 2006).

³¹ Memorandum from Assistant Secretary Indian Affairs to Regional Director, Pacific Region, and Deputy Director, Office of Indian Services, Reaffirmation of Federal Recognition of Tejon Indian Tribe, 5 (April 24, 2012).

³² *Id.*

use.³³ Ultimately, the lawsuit was unsuccessful because Tejon had failed to the present the land claim as required under the California Claims Act.³⁴ The Supreme Court affirmed the decision in 1924 finding Tejon’s title to the lands had been effectively extinguished.³⁵ From then on, Tejon continued to reside on the Tejon Ranch with the agreement of the private owners.³⁶

In 2012, the DOI confirmed this history. In a reaffirmation decision, the Assistant Secretary of Indian Affairs stated that “[b]y the mid-1930’s, the Government had ceased its efforts to secure land for the Tribe due to an apparent compromise such that, for the time being, the Tribe was ‘content’ living at Tejon Ranch for nominal rent. While the Federal Government halted its attempts to purchase the land at Tejon Ranch, it continued to monitor the situation in which the Tribe was permitted to live on the privately owned territory.”³⁷ Thus, the Tribe was not under federal jurisdiction from at least 1924.

Under the third step, the DOI determines if the tribe was recognized in or before 1934 *and* remained under jurisdiction in 1934.³⁸ Presumptive evidence of recognition includes ratified treaties still in effect in 1934, tribe-specific Executive Orders, and tribe-specific legislation, including termination legislation enacted after 1934, which acknowledges the existence of a government-to-government relationship with a tribe at the time it is enacted.³⁹ Tejon does not have this evidence. Moreover, the reaffirmation issued by the Assistant Secretary of Indian Affairs in 2012 confirms that Tejon was never recognized and did not remain under federal jurisdiction in 1934.

Finally, if a tribe cannot produce evidence satisfying any of the previous steps, the DOI “assesses the totality of an applicant tribe’s non-dispositive evidence to determine whether it is sufficient to show that a tribe was ‘recognized’ in or before 1934 and remained ‘under federal jurisdiction’ through 1934.”⁴⁰ Tejon cannot present any other evidence showing it was recognized in or before 1934 or remained under federal jurisdiction through 1934.

Additionally, Tejon has not presented evidence that the members seeking to have the United States take the land at issue into trust are genuine representatives of the Tribe. When the Assistant Secretary of Indian Affairs reaffirmed Tejon in 2012, he did so while bypassing the formal recognition procedures. When the Inspector General reviewed the decision, he found

³³ Locklear, *supra* note 30 at 14-15. Memorandum from Bo Sweeney, Assistant Secretary, to the Secretary of the Interior, at 2 (Nov. 7, 1916); 27 Fed. Reg. 7,636 (Aug. 2, 1962). The withdrawal order was revoked in 1962.

³⁴ *United States v. Title Ins. & Trust Co.*, 288 F. 821, 824 (9th Cir. 1923).

³⁵ *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 483 (1924).

³⁶ Locklear, *supra* note 30 at 16.

³⁷ Reaffirmation of Federal Recognition of Tejon Indian Tribe, *supra* note 31 at 6.

³⁸ Procedure for Determining Eligibility for Land-into-Trust under the First Definition of “Indian” in Section 19 of the Indian Reorganization Act, *supra* note 28 at 6.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 8.

that there could be 10 other groups with ancestral claims to the Tejon that were not included in the process.⁴¹ Additionally, in bypassing the formal process, tribal members were not identified.

Ultimately, there is insufficient evidence for the DOI to conclude that Tejon was a “recognized Indian tribe now under Federal jurisdiction” when the IRA was passed in 1934. They have lived on private lands with little to no federal involvement since 1924. Thus, the DOI lacks authority to acquire lands into trust for Tejon.

3-14
(Cont.)

GAMING DEVELOPMENT ON PROPOSED LANDS WILL BE DETRIMENTAL TO TACHI AND THE SURROUNDING COMMUNITY

Pursuant 25 U.S.C. § 2719, gaming on lands acquired in trust by the Secretary after October 17, 1988, is prohibited unless one of the enumerated exceptions is met. The exception asserted for the Project here allows gaming on such lands if:

“the Secretary, after consultation with the Indian tribe and appropriate State and local officials, *including officials of other nearby Indian tribes*,⁴² determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, **and would not be detrimental to the surrounding community**, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.”

3-15

Under this exception, gaming can occur on off-reservation trust lands if and only if the Secretary, after consultation with appropriate State and local officials, including officials of nearby tribes, makes a determination that a gaming establishment would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community.

The FEIS describes the economic impact the Project will have on surrounding communities, including Tachi. Specifically, within the Competitive Effects Analysis, the Innovation Group reported “the proposed Tejon development would derive visitation from population centers in Southern and Central California. As the following table shows, only two of the tribal casinos in Southern and Central California are within a two-hour drive from the proposed Tejon

⁴¹ U.S. Department of the Interior, Office of Inspector General, Investigative Report of the Tejon Indian Tribe, 3 (Jan. 9, 2013)

⁴² Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. However, a local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

sites.” One of those two casinos is Tachi Palace Casino.⁴³ The Report goes on to provide a map of Tejon Casino’s market area, which not only overlaps with Tachi’s market area, but literally encompasses Tachi.⁴⁴

The Innovation Group then compares the competitive impact on other casinos: “Innovation Group has estimated the impact Tejon would have on other tribal casinos within the two-hour Tejon market area. The table below summarizes the anticipated decline in revenues at the nearest competitive facilities, based on the gravity model comparing the two forecast model results to the future baseline.

Table 13: Substitution Effect on Regional Competitors 2024

	Eagle Mountain Relocated	Tachi Palace
Preferred Program (A1)	-27.8%	-13.7%
Reduced Intensity (A2)	-25.7%	-12.6%

The largest impacts would be experienced by the nearest casino, the relocated Eagle Mountain casino.” Tachi Palace Casino would be the second most impacted according to the report. “These impacts are due to the large capture rate for the subject property of the visits derived from the Bakersfield area within the primary market.”⁴⁵

Revenues from the Tachi Palace Casino are the primary source of funding for tribal governmental functions and to fund critical services to Tribal members. For example, the revenue from Tachi Palace goes directly to the Tribe’s general fund, which supports housing for tribal members, funds social services, education, environmental protection, fire safety, information technology, public safety,) and tribal programs (e.g. elders center, early education, education and recreation programs).

The FEIS states the “purpose” of the Project is “to facilitate tribal self-sufficiency, self-determination, and economic development.”⁴⁶ However, the Project directly undermines Tachi’s purpose in creating Tachi Palace Casino which is also to facilitate tribal self-sufficiency, self-determination, and economic development. Moreover, the lack of a non-gaming alternative does

⁴³ P. 10 of Appendix I-U of Final Impact Statement.

⁴⁴ *Id.* at P. 17.

⁴⁵ *Id.*

⁴⁶ FEIS at 1-1.

not give Tejon the opportunity to explore non-gaming enterprises that could bring substantial revenues to the Tribe without potentially undermining the delicate balance of tribal government gaming across the State of California.

This is especially appalling considering the lack of a reasonable non-gaming alternative, and lack of reasoning as to why the Reduced Casino Resort Alternative was analyzed over other alternatives. The FEIS states that the non-gaming development alternative on the Maricopa Highway Site was eliminated from consideration because it “would result in environmental impacts similar to the gaming alternatives presented in the EIS, and socioeconomic impacts would be similar to the gaming alternatives presented in the EIS” and thus, would not meaningfully add to the range of alternatives or meet the purpose and need for the Project. But such alternatives could provide a mechanism for economic development for Tejon without directly, immediately, and significantly impacting surrounding gaming tribes, such as Tachi, and without the possibility of creating an opening for non-tribal gaming interests to overturn tribal exclusivity.

3-15
(Cont.)

Moreover, as discussed above, the lack of comparison of the economic benefit to Tejon in the analyzed alternatives is critically important considering the detrimental economic impact the Project will have on Tachi. Again, the public is unable to make an “informed comparison” of the alternatives when the economic viability of each is unknown.⁴⁷ The EIS demonstrates that if the Project includes gaming, Tachi will be economically impacted, yet the FEIS provides no reasonable non-gaming alternatives and does not compare the economic benefit of each to Tejon.

As such, the Project does not meet the exceptions under IGRA to allow for gaming on the land propose under the Project as it is detrimental to Tachi and surrounding communities.

THE NIGC SHOULD NOT VALIDATE THE MANAGEMENT CONTRACT

There are three prongs to the NIGC management contract approval process, all of which can proceed simultaneously. Each prong must be completed entirely before the management contract can be approved by the NIGC Chairman. These prongs include: (1) legal and financial review of the management contract and all “collateral” documents, including financing agreements; (2) compliance with the National Environmental Policy Act (NEPA); and (3) finding of suitability of all companies and individuals with a direct or indirect financial interest in the

3-16

⁴⁷ *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), amended by 867 F.2d 1244 (9th Cir.1989)).

management contract. For these reasons stated above, the BIA has not complied with the spirit of NEPA, as it failed to assess a reasonable range of alternatives or the environmental impact of the proposed Project. The NIGC cannot approve any gaming management contract until the FEIS is supplemented and the BIA adequately explains the environmental impacts of the proposed Project and why it is preferable over other economic development alternatives.

3-16
(Cont.)

For the reasons discussed above, the analysis provided in the FEIS is deficient and should be supplemented accordingly.

If you have any questions or concerns regarding these Comments please contact us at your earliest convenience.

Sincerely,



Leo Sisco
Tribal Chairman



Comment Letter 4

From: Mary Lou Martinez <u2girl1969@gmail.com>
Sent: Wednesday, October 21, 2020 5:38 PM
To: Broussard, Chad N <Chad.Broussard@bia.gov>
Subject: [EXTERNAL] FEIS Comments, Tejon Indian Tribe Casino project

This email has been received from outside of DOI - Use caution before clicking on links, opening attachments, or responding.

Hello,

I had asked a while back about the water use and have yet to hear from anyone. Can you confirm where the casino will be getting their water source from please? Apparently they have been in communication with the Arvin-Edison water company but they do not control the water in that area. The water comes from the Mettler Water Board and my understanding is that they have not been in contact with the tribe or the casino? This is of great concern, obviously because it will affect the town of Mettler's water source in multiple ways. Thank you.

María Martínez

Sent from my iPhone

4-01



Amy Dutschke
Regional Director
Bureau of Indian Affairs
Chad Broussard
Environmental Protection Specialist
Pacific Region
2800 Cottage Way
Sacramento, CA 95825

December 7, 2020

Re: Stand Up for California! Comments on Tejon FEIS

Dear Ms. Dutschke & Mr. Broussard:

By letter dated November 23, 2020, and posted on its website, *Stand Up For California!* (“Stand Up”) has commented on the Tejon Indian Tribe’s (“Tribe”) FEIS proposed tribal casino. <https://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/tejon-tribe/nov-23-2020-stand-up-for-california-comments-on-tejon-tribes-feis/view>. Many of the comments relate to environmental issues and will be addressed as part of administrative proceedings on the FEIS. However, one comment made by Stand Up is based upon a serious distortion of tribal history and requires a direct, tribal response.

In its letter, Stand Up asserts that the Tribe has a “right to reside and conduct gaming at the Tule River Reservation...” The suggestion is that the Tule River Reservation was set aside for the Tribe, creating rights for the Tribe and an obligation to place the Tribe’s casino there. It is important that the Tribe be very clear in rejecting this proposition - the Tribe has, and claims, no right to the Tule River Reservation. This appears to be a cynical ploy on the part of Stand Up to manufacture differences between the Tribe and the Tule River Tribe where none exists. For the reasons set out below, the Bureau of Indian Affairs (“BIA”) must also unequivocally reject this proposition.

The United States has historically and consistently acknowledged modern-day Kern County as the Tribe’s home, not the Tule River Reservation.¹

The United States first asserted its authority with respect to and jurisdiction over the

¹This summary of the Tribe’s history is taken from the BIA’s analysis and conclusion that the Tribe was under federal jurisdiction in 1934 and, as a result, eligible for land-into-trust under the Indian Reorganization Act. *See* BIA Notice, Land Acquisitions - Tejon Indian Tribe, 85 Federal Register 55471 (Sept. 8, 2020).

5-01

Tribe in the unratified Treaty of 1851. Had this treaty been ratified, it would have done two things: First, it would have set aside a reservation for the Tribe of approximately 763,000 acres; and Second, it would have extinguished aboriginal title to a larger area outside the reservation. C. Royce, *Indian Land Cessions in the United States* (GPO 1899), Part 2 at 782. The boundaries of the proposed reservation, designated as Royce Area 285, are roughly coterminous with those of modern day Kern County. See Figure 2-1, Regional Location, App. E, FEIS. Even though the treaty was never ratified, the first BIA agent to manage federal affairs with the Tribe promised the Tribe in 1853 that they would remain settled in their aboriginal home within the would-be reservation. Succeeding superintendents continued to note the presence of Tribe in the area and the Tribe's strong desire to remain in the area. The BIA relocated other tribes to the area it called the Tejon Reservation but, by 1864, the area was no longer able to support all the tribes that had been relocated there.

At the same time, doubts continued regarding the underlying ownership of the would-be Tejon Reservation because of outstanding Spanish grants. Over time, several of these grants were consolidated into what is known today as the Tejon Ranch. Nonetheless, the Tribe remained, even though its numbers had diminished, and the BIA continuously exercised supervisory authority over the Tribe. In 1916, BIA Special Agent Terrell visited the Tribe, still located in its traditional territory, to assess its condition and reported to the Commissioner that a permanent home should be secured for the Tribe, one free of outstanding claims.² Towards that end, Terrell visited other sites in the company of the Tribe's leader at the time, Chief Lozada, to attempt to find a suitable place to relocate the Tribe. At the end of the trip, it became plain to Terrell that relocation of the Tribe was out of the question. As he reported to the Commissioner, some means must be found to secure the Tribe in its "beloved Tejon Valley" where they had always lived and where "[t]heir dead as far back as they know are sleeping their last sleep within their every day [sic] sight." Letter, John Terrell to Commissioner of Indian Affairs, 1 (Sept. 21, 1916).

Very soon thereafter, the United States took a series of steps to secure the Tribe in its historic territory. First, the United States withdrew 880 acres from the public domain, a tract located just north of the Tribe's primary settlement at the time, "for the use of the El Tejon Band of Indians, Kern County, California." Order, Approving request to withdraw land from the public domain for the El Tejon band of Indians (Nov. 9, 1916). Second, the United States made repeated overtures to the Tejon Ranch to purchase a portion of the Tribe's historic territory for the Tribe's permanent occupation, overtures that were rejected by the Ranch.

Most significantly, the United States filed a lawsuit in 1920 to assert the Tribe's continuing aboriginal title to 5,364 acres in and around the settlement in Kern County still occupied by the Tribe. In its complaint, the United States asserted that the Tribe held aboriginal title to that and a larger area, which had never been extinguished by the United States and which

² This public land remained withdrawn until 1962, when the United States restored it to the public domain. The Tribe had never relocated to the parcel because it was "steep hillside grazing land of poor quality without water." Letter, Leonard Hill Area Director, to Commissioner, Bureau of Indian Affairs (Sept. 29, 1961). Once again, then, the Tribe refused to relocate.

the Tribe had never vacated. Ultimately, the United States lost the suit when the Supreme Court ruled that aboriginal title had been waived by the Tribe’s failure to assert the claim under the 1851 California Claims Act. *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 481 (1924). But the suit plainly establishes that the Tribe remained in occupation of its aboriginal territory long after the creation of the Tule River Reservation in 1873, located in Tulare County, California. *See* I Kapp. 830, Jan. 9, 1873.

In short, the entire course of the Tribe’s history with the United States reflects the historical reality that the Tribe’s homeland was and is Kern County, in close proximity to the Mettler Property also in Kern County and that is the subject of the FEIS and the Tribe’s trust application.³ The executive order that created the Tule River Reservation does not identify the Tribe as an intended beneficiary, the Tribe did not relocate to the Tule River Reservation, and the United States continuously acknowledged Kern County as the Tribe’s territory both before and after creation of the Tule River Reservation.⁴

The Tribe and the Tule River Tribe are distinct, federally recognized tribes governed by distinct constitutions and with distinct membership.

The Tribe and the Tule River Tribe are recognized by the United States as distinct Indian tribes. Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 85 Federal Register 5462 (Jan. 6, 2020), at 5465 (“Tejon Indian Tribe”) & 5466 (“Tule River Indian Tribe of the Tule River Reservation”). There is nothing to even hint that the Tribe has any interest in the Tule River Reservation, explicitly identified as associated with the Tule River Tribe. The two tribes are also governed by different tribal constitutions which reflect their distinct history and citizenship.

The Interior-approved Tule River Constitution asserts jurisdiction over the “confines of the Tule River Reservation, situated in Tulare County, State of California, as created by the executive orders of January 9 and October 3, 1873, and of August 3, 1878...” Available at <https://narf.org/nill/constitutions/tuleriverconst/constitution.html#2>. Further, the Tule River Constitution limits membership in the tribe to those members and descendants from the official roll of January 1, 1935. *Id.*, Article II.

By contrast, the Tribe asserts jurisdiction over “all lands as may be hereafter acquired by

³ Stand Up’s suggestion that the Tribe’s preference for location in Kern County is inappropriate plainly runs counter to established federal policy. The regulations governing gaming on newly acquired lands includes a conclusive presumption of an historic connection to a proposed acquisition for gaming for parcels located within the boundaries of a reservation in an unratified treaty, if the application is an initial reservation or restored lands exception. 25 CFR Part §§ 292.2, 292.6 & 292.12. Were the Tribe’s application for either of these exceptions, the location of the Mettler Parcel in Kern County would be the end of the historic connection issue. In fact, were the Tribe to venture outside Kern County, Stand Up would undoubtedly accuse the Tribe of “reservation shopping.”

⁴ For this same reason, the BIA has designated Kern County as the Tribe’s on-or-near-reservation service area for the delivery of federal services. *See* 82 Federal Register 22846 (May 18, 2017).

or for the Tejon Indian Tribe.” Article III, Tejon Indian Tribe Constitution, available at [https://tejon.libraries.wsu.edu/system/files/atoms/file/Constitution and Bylaws - Amended July 18 2015.pdf](https://tejon.libraries.wsu.edu/system/files/atoms/file/Constitution%20and%20Bylaws%20-%20Amended%20July%2018%202015.pdf). There is no asserted jurisdiction over or any other reference to the Tule River Reservation. In addition, the Constitution limits membership to the descendants of individuals appearing on the census compiled by Special Indian Agent Terrell in 1915, a census that is obviously different from the 1935 Tule River census. *Id.*, Article IV.

Conclusion

As is so often the case with Stand Up’s objections, there is no basis in fact, history or reality for its conclusion that the Tribe should be obliged to consider the alternative of siting its proposed casino on the Tule River Reservation. The proposed Mettler acquisition is very close to the Tribe’s actual historical territory and the BIA should proceed with finalizing the EIS without regard to this Stand Up objection.

5-01
(Cont.)

Sincerely,



Octavio Escobedo, Chairman
Tejon Indian Tribe

cc: Paula Hart, Director, OIG

ATTACHMENT 3

Mitigation Monitoring and Enforcement Plan

TEJON INDIAN TRIBE TRUST ACQUISITION AND CASINO PROJECT

MITIGATION MONITORING AND ENFORCEMENT PLAN

Mitigation Monitoring Overview

This Mitigation Monitoring and Enforcement Plan (MMEP) has been developed to guide mitigation compliance before, during, and after implementation of the Bureau of Indian Affairs' (BIA's) Preferred Alternative (Alternative A1). The mitigation measures described below in **Table 1** were developed through the analysis of potential impacts within the Final Environmental Impact Statement (EIS). As specified in **Table 1**, the compliance monitoring and evaluation will be performed by the Tejon Indian Tribe (Tribe), the United States Fish and Wildlife Service (USFWS), the California Department of Fish and Wildlife (CDFW), the Bureau of Indian Affairs (BIA), Kern County Coroner, and the United States Environmental Protection Agency (USEPA) as indicated in the description of each measure. The MMEP provides:

- Requirements for compliance of the mitigation measures specifically created to mitigate impacts;
- List of responsible parties; and
- Timing of mitigation measure implementation.

Where applicable, mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as the Record of Decision (ROD).

TABLE 1
MITIGATION MONITORING AND ENFORCEMENT PLAN

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
1. Geology and Soils			
<p>A. The project shall comply with the NPDES Construction General Permit from the USEPA for construction site runoff during the construction phase in compliance with the CWA. A SWPPP shall be prepared, implemented, and maintained throughout the construction phase of the development, consistent with Construction General Permit requirements. The SWPPP shall detail the BMPs to be implemented during construction and post-construction operation of the selected project alternative to reduce impacts related to soil erosion and water quality. The SWPPP BMPs shall include, but are not limited to, the following.</p> <ol style="list-style-type: none"> 1. Existing vegetation shall be retained where practicable. To the extent feasible, grading activities shall be limited to the immediate area required for construction. 2. Temporary erosion control measures (such as silt fences, fiber rolls, vegetated swales, a velocity dissipation structure, staked straw bales, temporary re-vegetation, rock bag dams, erosion control blankets, and sediment traps) shall be employed for disturbed areas. 3. To the maximum extent feasible, no disturbed surfaces shall be left without erosion control measures in place. 4. Construction activities shall be scheduled to minimize land disturbance during peak runoff periods. Soil conservation practices shall be completed during the fall or late winter to reduce erosion during spring runoff. 5. Creating construction zones and grading only one area or part of a construction zone at a time shall minimize exposed areas. If practicable during the wet season, grading on a particular zone shall be delayed until protective cover is restored on the previously graded zone. 6. Disturbed areas shall be re-vegetated following construction activities. 7. Construction area entrances and exits shall be stabilized with large-diameter rock. 8. Sediment shall be retained onsite by a system of sediment basins, traps, or other appropriate measures. 9. Petroleum products shall be stored, handled, used, and disposed of properly in accordance with provisions of the CWA [33 USC 1251 to 1387]. 10. Construction materials, including top soil and chemicals, shall be stored, covered, and isolated to prevent runoff losses and contamination of surface and groundwater. 	<p>Tribe USEPA</p>	<p>Planning Phase Construction Phase</p>	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
11. Fuel and vehicle maintenance areas shall be established away from all drainage courses and designed to control runoff. 12. Sanitary facilities shall be provided for construction workers. 13. Disposal facilities shall be provided for soil wastes, including excess asphalt during construction and demolition. 14. Other potential BMPs include use of wheel wash or rumble strips and sweeping of paved surfaces to remove any and all tracked soil.			
B. Contractors involved in the project shall be trained on the potential environmental damage resulting from soil erosion prior to construction in a pre-construction meeting. Copies of the project SWPPP shall be made available at that time. Construction bid packages, contracts, plans, and specifications shall contain language that requires adherence to the SWPPP.	Tribe	Construction Phase	
2. Water Resources			
A. Wastewater shall be fully treated to at least a tertiary level using MBR or SBR technology.	Tribe	Operation Phase	
B. The on-site WWTP shall be staffed with operators who are qualified to operate the plant safely, effectively, and in compliance with all permit requirements and regulations. The operators shall have qualifications similar to those required by the Operator Certification Program for municipal WWTPs.	Tribe	Operation Phase	
C. Water shall be treated onsite to USEPA standards prior to reuse or discharge into percolation ponds. Percolation ponds and reuse facilities shall be closely monitored by a responsible engineer. Periodic monitoring of the wastewater facility shall ensure the wastewater system is operating safely and efficiently.	Tribe	Operation Phase	
D. Groundwater sampling and analysis shall be performed regularly and all drinking water shall be treated to SDWA standards.	Tribe	Operation Phase	
E. Prior to construction of the on-site wells, the USEPA shall be consulted in the early stages of establishing the well system. Furthermore, baseline monitoring of the groundwater shall be submitted to the USEPA prior to public water usage.	Tribe USEPA	Planning Phase Construction Phase	
F. The on-site wells shall be positioned as to avoid to the maximum extent possible adverse effects on the established wells and surface water features within a 1-mile radius of the Mettler Site while optimizing groundwater usage onsite, such as avoiding the percolation pond's cone of influence. A groundwater study shall be conducted in order to achieve this objective.	Tribe	Planning Phase	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
G. To avoid potential adverse influences on the on-site potable water supply, potable water transmission pipes shall not be located within the percolation pond's cone of influence.	Tribe	Planning Phase	
3. Air Quality (Operation)			
A. The Tribe shall purchase 111.83 tons of NOx emission reduction credits (ERC) and 18.48 tons of ROG ERCs for Alternative A1, as specified in the Final General Conformity Determination included in Appendix Z . Because the air quality effects are associated with operation of the facility and not with construction of the facility, real, surplus, permanent, quantifiable, and enforceable, ERCs shall be purchased prior to the opening day of the facility. ERCs shall be purchased in accordance with the 40 CFR 93 Subpart B, conformity regulations. With the purchase of ERCs, the project would conform to the applicable SIP and result in a less than adverse effect to regional air quality. As an alternative to or in combination with purchasing the above ERCs, the Tribe has the option to enter into a Voluntary Emission Reduction Agreement (VERA) with the SJVAPCD. The VERA would allow the Tribe to fund air quality projects that quantifiably and permanently offset project operational emissions.	Tribe	Planning Phase	
B. Prior to operation of the potential future development on the Mettler Site as described in Table 3.14-2 , the Tribe shall purchase 11.42 tons of NOx ERCs and 10.03 tons of ROG ERCs for Alternative A1, as specified in the Final General Conformity Determination included in Appendix Z . Because the air quality effects are associated with operation of the facility and not with construction of the facility, real, surplus, permanent, quantifiable, and enforceable, ERCs would be purchased prior to the opening day of the facility. ERCs shall be purchased in accordance with the 40 CFR 93 Subpart B, conformity regulations. With the purchase of ERCs, the project would conform to the applicable SIP and result in a less –than-adverse effect to regional air quality. As an alternative to or in combination with purchasing the above ERCs, the Tribe has the option to enter into a VERA with the SJVAPCD. The VERA would allow the Tribe to fund air quality projects that quantifiably and permanently offset project operational emissions.	Tribe	Planning Phase	
4. Biological Resources			
San Joaquin Kit Fox (<i>Vulpes macrotis mutica</i>)			
A. Potential dens shall be visibly marked by a qualified biologist into an exclusion zone with a 100 foot buffer. No staging of materials or equipment, construction personnel, or other construction activity shall occur within the setback areas. The avoidance buffer shall be maintained until either the completion of construction, or the proper destruction of the den as described below. The USFWS guidelines for avoidance and minimization shall be followed.	Tribe	Planning Phase Construction Phase	
B. A qualified biologist shall conduct a pre-construction survey to assess potential presence of this species two calendar weeks to 30 calendar days prior to commencement of ground disturbance. A report summarizing the findings of the survey shall be sent to the USFWS within five days of completion of any pre-construction surveys. If the construction activities stop on the site for a period of five days or more, then an additional pre-construction survey shall be conducted no more than 48 hours prior to the start of construction. If no San	Tribe USFWS	Planning Phase Construction Phase	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
<p>Joaquin kit foxes or potential dens are found during the pre-construction survey, then no further action is required regarding this species.</p>			
<p>C. If any San Joaquin kit fox potential dens are identified on the Mettler Site during the pre-construction survey or during construction activities (potential dens are defined as burrows at least 4 inches in diameter which open up within 2 feet), the USFWS shall be notified immediately and no construction activity shall occur within 100 feet of the potential den. An exclusionary zone shall be implemented as described in Measure A.</p> <p>Potential den entrances shall be monitored with trail cameras for three consecutive days, or dusted for three consecutive days to register track of any San Joaquin kit fox present. If no activity is identified, potential dens may be destroyed by careful excavation followed by immediate filling and compacting of the soil. If activity is identified, a buffer zone of 250 feet shall be maintained around the den until the biologist determines that the den has been vacated. The den would be considered vacant when three days of den entrance dusting or trail camera monitoring results in no sign of the species, at which point only a 100-foot buffer becomes necessary. Should destruction of such a vacated natal den be necessary, USFWS shall be contacted, and the appropriate take permit issued. Where San Joaquin kit foxes are identified, the provisions of the USFWS's published <i>Standardized Recommendations for Protection of the San Joaquin Kit Fox Prior to or During Ground Disturbance</i> (2010) shall apply for den destruction and on-going operational recommendations.</p>	<p>Tribe USFWS</p>	<p>Planning Phase Construction Phase</p>	
<p>D. A qualified biologist shall conduct habitat sensitivity training related to San Joaquin kit fox for project contractors and shall monitor construction during initial grading activities within the Mettler Site. Under this program, workers shall be informed about the presence of the species and their habitat, and that unlawful take of the animal or destruction of its habitat is not permitted. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about: (1) the life history of the San Joaquin kit fox; (2) the importance of habitat requirements for the species; (3) sensitive areas including those identified onsite, and (4) the importance of maintaining the required setbacks and detailing the limits of the construction area. Documentation of this training shall be maintained on the site.</p>	<p>Tribe</p>	<p>Planning Phase Construction Phase</p>	
<p>E. The standards of the USFWS publication include provisions for educating construction workers regarding the San Joaquin kit fox, keeping heavy equipment operating at safe speeds, and checking construction pipes for species occupation during construction and similar activities.</p>	<p>Tribe</p>	<p>Planning Phase Construction Phase</p>	
<p>Blunt-Nosed Leopard Lizard (<i>Gambelia sila</i>)</p>			
<p>F. A pre-construction survey for the blunt-nosed leopard lizard shall be performed by a qualified biologist within the 30 days prior to construction activities to establish the presence of species onsite. The survey shall occur during the months of April through October to avoid surveying during peak hibernation months when the species is inactive. Should blunt-nosed leopard lizards be observed, the USFWS shall be contacted to determine appropriate removal or avoidance measures. The survey methods shall be consistent with the Approved Survey Methodology for the blunt-nosed leopard lizard by the CDFW.</p>	<p>Tribe USFWS</p>	<p>Planning Phase</p>	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
G. Access gates shall remain closed during periods of inactivity and have at least a 6-inch curtain in contact with the soil surface anchored by hay bales and sand bags. A designated individual shall check for blunt-nosed leopard lizards under vehicles and equipment such as stored pipes before the start of the work day. If the species is discovered, the vehicle or equipment shall not be moved until the animal has exited on its own. Pipes and other den-like structures should be capped at both ends until just before use to prevent potentially occurring blunt-nosed leopard lizards from being trapped.	Tribe	Construction Phase	
H. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about blunt-nosed leopard lizards, including life history information, habitat requirements, and appropriate response to potential observations. The qualified biologist shall monitor construction during initial grading activities. Documentation of this training shall be maintained onsite.	Tribe	Planning Phase Construction Phase	
I. Should blunt-nosed leopard lizards or other federally listed species be detected within the construction footprint at any point during construction or monitoring, grading activities shall halt, and the USFWS shall be consulted. No grading activities shall commence until USFWS authorizes the re-initiation of grading activities.	Tribe	Construction Phase	
Tipton Kangaroo Rat (<i>Dipodomys nitratooides nitratooides</i>)			
J. A pre-construction survey for Tipton kangaroo rat presence shall be conducted between two weeks and 30 calendar days before the start of ground-disturbing activities. A qualified biologist shall survey for Tipton kangaroo rat signs, such as scat, burrows, tail drag marks, and tracks. Should a confirmed observation of a Tipton kangaroo rat occur, the USFWS shall be contacted to determine if relocation procedures are necessary. The presence of a Tipton kangaroo rat shall be assumed if positive signs for any Tipton kangaroo rat are observed due to the difficulty of species-level identification without live trapping.	Tribe USFWS	Construction Phase	
K. Should an active burrow be observed onsite, a 50-foot buffer shall be marked around the burrow entrance by the qualified biologist with high-visibility fencing. Should the active burrow be within the project footprint, the USFWS shall be contacted to determine the appropriate removal or avoidance measures.	Tribe	Planning Phase Construction Phase	
L. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about Tipton kangaroo rats including life history information, habitat requirements, and appropriate response to potential observations. The qualified biologist shall monitor construction during initial grading activities. Documentation of this training shall be maintained onsite.	Tribe	Planning Phase Construction Phase	
Burrowing Owl (<i>Athene cunicularia</i>)			
M. A qualified biologist shall conduct a pre-construction survey for burrowing owls within the 30 days prior to construction activities to establish the status of this species on the site. If ground-disturbing activities are delayed or suspended for more than 30 days after the pre-construction survey, the site shall be resurveyed. If burrowing owls are detected on or within approximately 500 feet of the site, a qualified biologist shall be consulted to develop measures to avoid “take” of this species prior to the initiation of any construction activities.	Tribe	Planning Phase Construction Phase	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
Burrows observed onsite shall additionally be treated as potential burrowing owl dens and handled as outlined in the mitigation measures for burrowing owls. These measures include establishing appropriate buffers, and may require additional monitoring by a qualified biologist before destruction if burrowing owls are observed during pre-construction surveys.			
N. Prior to construction activities, a qualified biologist shall instruct and distribute informational materials to construction personnel about: (1) the life history of the burrowing owl; (2) the importance of habitat requirements; (3) sensitive areas including those identified onsite, and (4) the importance of maintaining the required setbacks and detailing the limits of the construction area. Documentation of this training shall be maintained onsite.	Tribe	Planning Phase Construction Phase	
Migratory Birds			
O. Should ground-disturbing activities occur during the general nesting season (February 1 to September 15), a pre-construction nesting bird survey shall be conducted by a qualified biologist no more than 14 days prior to the start of ground-disturbing activities. Areas within 500 feet of ground-disturbing activities shall be surveyed for active nests.	Tribe	Planning Phase	
P. Should an active nest be identified, an avoidance buffer shall be established based on the needs of the species identified and pursuant to consultation with CDFW and/or USFWS if necessary prior to initiation of ground-disturbing activities. Avoidance buffers may vary in size depending on habitat characteristics, project-related activities, and disturbance levels. Avoidance buffers shall remain in place until the end of the general nesting season or upon determination by a qualified biologist that young have fledged or the nest has failed.	Tribe CDFW USFWS	Planning Phase	
5. Cultural and Paleontological Resources			
H. A qualified professional archaeologist shall complete pre-construction surveys of the off-site impact areas, documenting and assessing any resources encountered. If the find is determined to be significant by the archaeologist, then an appropriate course of action shall be implemented prior to construction in the vicinity of the find. Possible actions may include recordation, archaeological testing/data recovery, development of a Treatment Plan, or other measures. All significant archaeological materials recovered shall be subject to scientific analysis, professional curation as appropriate, and documentation prepared by the archaeologist according to current professional standards.	Tribe	Planning Phase	
B. In the event of inadvertent discovery of prehistoric or historic archaeological resources during construction-related earth-moving activities, all work within 50 feet of the find shall cease until a professional archaeologist meeting the qualifications of the Secretary (36 CFR 61) can assess the significance of the find. The BIA and the Tribe shall be notified immediately, and all such finds shall be subject to procedures for post-review discoveries without prior planning pursuant to 36 CFR § 800.13. If the find is determined to be significant by the archaeologist, BIA, and/or Tribe, then the process in Mitigation Measure A shall be followed.	Tribe BIA	Construction Phase	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
C. In the event of inadvertent discovery of paleontological resources during construction earth-moving activities, all work within 50 feet of the find shall cease until a qualified professional paleontologist can assess the significance of the find; the BIA shall also be notified. All such finds shall be subject to Section 101 (b)(4) of NEPA (40 CFR §§ 1500-1508). If the find is determined to be significant by the paleontologist, then representatives of the BIA shall meet with the paleontologist to determine the appropriate course of action, including the development of an Evaluation Report and/or Mitigation Plan, if necessary. All significant paleontological materials recovered shall be subject to scientific analysis, professional curation, and a report prepared by the professional paleontologist according to current professional standards.	Tribe BIA	Construction Phase	
D. If human remains are discovered during ground-disturbing activities on Tribal lands, all work within 100 feet of the find shall cease immediately and the Tribe, BIA, and County Coroner shall be notified immediately. No further disturbance shall occur until the Tribe, BIA, and County Coroner have made the necessary findings as to the origin and disposition of the remains. If the remains are determined to be of Native American origin, the provisions of Native American Graves Protection and Repatriation Act shall be applied.	Tribe BIA County Coroner	Construction Phase	
6. Transportation/Circulation			
Opening Year 2023			
A. Stevens Drive/Maricopa Highway Intersection: Install a traffic signal and provide an exclusive WB left-turn lane on Maricopa Highway at Stevens Drive, or install a roundabout, based on the recommendations of an ICE study, with an associated fair share contribution of 100% for Alternative A1.	Tribe	Construction Phase	
B. Maricopa Highway/S. Sabodan Street: Install a traffic signal with an associated fair-share contribution of 100% for Alternative A1 and the following geometry. SB – Construct the north leg of the intersection and provide one left-turn lane and one right-turn lane in the SB direction and one NB lane. WB – One left-turn lane, one thru lane, and one right-turn lane. EB – One left-turn lane, one thru lane, and one shared thru/right lane. NB – One left-turn lane and one shared thru/right lane. Alternatively, install a roundabout, based on the recommendations of an ICE study.	Tribe	Construction Phase	
Cumulative Year 2040			
C. Maricopa Highway/I-5 SB Ramps Intersection: Contribute a fair share of 14% for Alternative A1 towards providing an exclusive WB left-turn lane on Maricopa Highway and installing a traffic signal or a roundabout with or without a loop ramp, based on the recommendations of an ICE study.	Tribe	Planning Phase	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
D. Maricopa Highway/I-5 NB Ramps Intersection: Contribute a fair share of 26% for Alternative A1 towards providing an exclusive EB left-turn lane on Maricopa Highway and installing a traffic signal or a roundabout with or without a loop ramp, based on the recommendations of an ICE study.	Tribe	Planning Phase	
E. SR-166 to NB I-5 Ramp Merge: Contribute a fair share of 52% for Alternative A1 towards providing a 1,000-foot auxiliary lane on I-5 NB mainline at the merge.	Tribe	Planning Phase	
7. Public Services			
A. The Tribe shall be responsible for a fair share of costs associated with any relocation of existing SoCalGas and PG&E facilities to accommodate the proposed development and traffic improvements. Appropriate funds shall be made available to conduct any necessary relocation and to construct any system upgrades required by the project.	Tribe	Planning Phase	
8. Hazardous Materials			
A. Workers and supervisors should be trained in Valley Fever locations, symptoms, and methods to minimize the risks of contracting Valley Fever before commencing work. This includes a “Valley Fever Training Handout,” and a set schedule of educational sessions. The following documentation shall be assembled and retained by the Tribe. <ol style="list-style-type: none"> 1. A sign-in sheet of training participants, including names, signatures, and dates 2. A written flier or brochure that includes educational information on the health effects of exposure to Valley Fever 3. Training on methods that may be able to prevent Valley Fever Infection 4. A demonstration to employees on how to use personal protective equipment, such as respiratory masks, in order to reduce potential exposure to <i>C. immitis</i> spores. This protective equipment should be readily available for employees to use during work hours. Proof of this training can consist of printed materials, DVD, photographs, and/or digital media files. 	Tribe	Planning Phase	
B. The Tribe shall develop a Valley Fever Dust Management Plan that addresses possible <i>C. immitis</i> spores and mitigations for potential infections from <i>C. immitis</i> spores. The plan should encompass a program to assess the possible exposure to <i>C. immitis</i> spores from construction activities and to outline appropriate safety precautions that would be implemented, as appropriate, to reduce the risk of exposure to spores from <i>C. immitis</i> . The plan shall include the following: <ol style="list-style-type: none"> 1. When performing soil-disturbing related tasks, workers should be positioned upwind or crosswind when possible. 	Tribe	Planning Phase	

Mitigation Measure	Responsible for Monitoring and/or Reporting	Timing of Implementation	Verification (Date and Initials)
<ol style="list-style-type: none"> 2. Heavy equipment, vehicles and machinery with factory enclosed cabs should be furnished with high efficiency particulate air (HEPA) filters when able and the windows should be closed. Furthermore, proof of workers being trained on the proper use of applicable heavy equipment cabs shall be retained (e.g., turning on the air conditioner before using equipment). 3. Communication methods within enclosed cabs should be provided, such as two-way radios. 4. When dust exposure is unavoidable, workers should wear approved respiration protection that covers the nose and mouth. The particulate filters should be rated at N95, N99, N100, or HEPA. 5. Separate, clean areas with hand-washing stations shall be provided for employees to eat at. 6. Equipment inspection stations shall be installed at access/egress points. At these stations, construction vehicles and equipment shall be inspected and cleaned of excess soil material as needed before being removed from the site. 7. Workers should be trained on how to recognize Valley Fever symptoms and report symptoms surmised as being Valley Fever to a supervisor when encountered. 8. A medical professional shall be consulted in order to develop a medical protocol for evaluating employees with suspected Valley Fever. 9. An information handout concerning Valley Fever shall be disseminated to the public within a 3-mile radius of the project and no less than 30 days before the commencement of construction activities. The handout shall address the following topics about Valley Fever: potential sources and causes, common symptoms, options or remedies available if an individual should experience symptoms, and the locations of where tests are available for verifying Valley Fever. 			