



OFFICE OF THE GOVERNOR

October 11, 2005

Via Facsimile (760) 325-4954 and U.S. Mail

Mr. Richard M. Milanovich  
Tribal Chairman  
Agua Caliente Band of Cahuilla Indians  
600 E. Tahquitz Canyon Way  
Palm Springs, California 92262

Re: Draft Environmental Impact Statement for the Agua Caliente Casino Expansion

Dear Chairman Milanovich:

We have reviewed the Agua Caliente Band of Cahuilla Indians' (Tribe) Draft Environmental Impact Statement (DEIS) for the Agua Caliente Casino Expansion, dated August 3, 2005. We thank you for this opportunity to comment on the project. From the material submitted in the DEIS, we are concerned that the Tribe has not adequately considered all of the project's potential off-Reservation impacts, and identified and discussed alternative proposals and proposed mitigation measures. We are also attempting to confirm aspects of Tribal and project site history, to confirm the appropriateness of the proposed development under the Indian Gaming Regulatory Act (IGRA). Should any concerns arise, we shall provide supplemental comments to you. Meanwhile, please consider the observations in this letter in preparing the final environmental impact statement.

Preliminarily, the following authorities and principles guide our assessment of the DEIS. As you know, section 10.8.2 of the 1999 Tribal-State Gaming Compact (Compact) requires the Tribe to prepare, prior to construction and operation of gaming related uses, an environmental impact report that assesses off-Reservation impacts that may result from the proposed action. The Tribe's environmental ordinance, enacted pursuant to Compact section 10.8.1, incorporates the National Environmental Policy Act's (NEPA) standards for preparing an environmental

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impact statement. (Tribal Ord. No. 28, Tribal Environmental Policy Act, § I(D)(4).) A key ingredient in an environmental impact statement is the discussion of steps that can be taken to mitigate adverse environmental consequences. (*Robertson v. Methow Valley Citizens Council* (1989) 490 U.S. 332, 351; see 40 C.F.R. § 1508.20.)

Implicit in NEPA's demand that an agency prepare a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 U.S.C. § 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. [Citation.] More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor the interested groups and individuals can properly evaluate the severity of the adverse effects. . . . Recognizing the importance of such a discussion in guaranteeing that the agency has taken a "hard look" at the environmental consequences of a proposed federal action, [the] regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 C.F.R. § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1502.2(c).

(*Id.* at pp. 351-352, italics added.)

**Discrepancy in Acreage of Parcel Immediately South of Existing Casino**

The DEIS indicates the casino expansion, hotel and showroom construction, and parking facility construction and expansion will be centered around a 36-acre parcel on which the existing casino sits (Casino Parcel), and an adjacent 24-acre parcel of vacant land to the south (South Parcel). (DEIS, §§ 1.2, 2.1.) When the United States took the South Parcel into trust in 2004, it was described as including 20.41 acres, more or less. (June 22, 2004, Bureau of Indian Affairs, Notice of Decision, p. 2.) The Riverside County Assessor's records indicate the parcel is 19.16 acres. We request that the Tribe consult with local authorities and specify the South Parcel's correct size to avoid any jurisdictional conflicts and more accurately define the project's physical scope.

**The Project's Purpose and Tribe's Stated Need**

The DEIS indicates the project is designed "to provide an expanded tribal governmental revenue to raise the standard of living of tribal members," and "intense competition" from other tribal gaming operations in the region "threatens the continued success and profitability of the Agua Caliente Casino." (DEIS, § 1.3.) A tribe is authorized and encouraged to pursue endeavors that may improve its economic situation but neither the Compact, IGRA, NEPA, nor any other authority, guarantees economic success. The "intense competition" justification ignores the Tribe's hugely successful Spa Resort Casino in downtown Palm Springs and the fact that the Tribe is the only tribe in California operating more than one casino. NEPA requires



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analysis of "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." (42 U.S.C. § 4332(C)(iv).) Thus, to the extent the Tribe believes competing tribal gaming operations justify the project, the final environmental impact statement should identify and describe competing regional gaming operations, as well as the Tribe's own nearby Spa Resort Casino, when discussing the project's purpose and stated need, which in turn would more appropriately frame the requisite analysis of potential cumulative off-Reservation impacts.

#### Reasonable Range of Alternatives

NEPA's implementing regulations require an agency issuing an environmental impact statement to "[r]igorously explore and objectively evaluate all reasonable alternatives," "[d]evote substantial treatment to each alternative considered in detail," "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency," and "[i]dentify the agency's preferred alternative." (40 C.F.R. § 1502.14(a)-(c), (e).) Consideration of alternatives is "the heart of the environmental impact statement." (40 C.F.R. § 1502.14.) "The 'existence of a viable but unexamined alternative renders an environmental impact statement inadequate.'" (*Morongo Band of Mission Indians v. Federal Aviation Administration* (9th Cir. 1998) 161 F.3d 569, 575, quoting *City of Angoon v. Hodel* (9th Cir. 1986) 803 F.2d 1016, 1020.)

The DEIS categorizes several alternative concepts that the Tribe rejected due to their stated inability to effectively meet the project's purpose and need. The DEIS includes alternative locations, configurations and sizes. (DEIS, § 3.2.) The specificity with which the DEIS describes each alternative concept varies, but could be characterized as generalized. Federal regulations, however, require more, including rigorous exploration and objective evaluation of reasonable alternatives, and substantial, detailed treatment of each alternative so reviewers may evaluate their comparative merits. (See 40 C.F.R. § 1502.14(a)-(b).) We believe the DEIS is deficient in this respect. The general categorization of rejected alternative concepts precludes a "hard look" at the project's environmental consequences. (See *Robertson, supra*, 490 U.S. at p. 350.) Similarly, the DEIS's assertion that alternative hotel sizes are economically infeasible is unsupported. Indeed, the DEIS ignores comments from the City of Rancho Mirage suggesting the Tribe consider spreading the project out into a series of two-story buildings like the 512-room Westin Mission Hills Resort hotel, or the 450-room Marriott Rancho Las Palmas, which would be much more compatible with existing and planned land uses in the community. The DEIS also fails to include any discussion about possible alternative commercial developments on the project site. The final environmental impact statement should identify and discuss in detail a more reasonable range of alternatives to enable the reviewer to compare the project's merits.

#### Geology and Soils

The DEIS indicates the project is not located within an earthquake fault zone; however, seismic activity that could result in severe ground shaking is identified as the primary geologic hazard at the project site. (DEIS, § 3.1.2.) The DEIS suggests proposed mitigation measures are

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intended "to provide reasonable life safety from a major earthquake" (*ibid.*), but fails to define "reasonable life safety," or explain how the standard factored into its analysis.

#### Biological Resources

The DEIS confirms that the project site contains habitat for two sensitive wildlife species—the flat-tailed horned lizard and the Coachella Valley fringe-toed lizard—and one sensitive plant species—the Coachella Valley milk-vetch. (DEIS, § 3.2.1.) The DEIS, however, claims the Endangered Species Act (ESA) does not apply to Indian land. (*Ibid.*) In support, the DEIS cites Secretarial Order No. 3206, entitled *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, for the general proposition that federal public land laws do not apply to Indian lands. (*Ibid.*) The Order's binding effect is questionable.

Indeed, controlling Ninth Circuit authority indicates general federal laws apply to Indian tribes absent a definitely expressed exemption. (*Donovan v. Coeur d'Alene Tribal Farm* (9th Cir. 1985) 751 F.2d 1113, 1115-1116.) In other words, the court has "not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them." (*Id.* at p. 1116.)

There are, however, three exceptions to this principle. A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

(*Ibid.*, citing *United States v. Farris* (9th Cir. 1980) 624 F.2d 890, 893-894.) Congress has not expressly exempted Indian tribal land from application of the ESA, nor has any court found tribes are entitled to an exception to the general rule. Until either occurs, we proceed under the assumption that the ESA applies.

Section 7(a)(2) of the ESA requires all federal agencies "to insure that any action authorized, funded, or carried out by such an agency is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the destruction of critical habitats. (16 U.S.C. § 1536(a)(2).) The DEIS confirms the project will result in a "small reduction of the remaining habitat for the three sensitive species discussed above." (DEIS, § 3.2.2.) The Tribe should comply with the ESA to insure the identified sensitive species' habitats are preserved.

Independent of the ESA, Secretarial Order No. 3206 contemplates the Tribe will engage in government-to-government collaboration and communication to foster species conservation. The purpose of Secretarial Order No. 3206, signed by the Secretaries of the Interior and Commerce Departments on June 5, 1997, is to clarify the responsibilities of Interior and

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Commerce Department entities when actions taken under the authority of the ESA and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of tribal rights. The tribes participated in preparing the Order but did not acknowledge the ESA applies to Indian land. By participating in the Order's development, the tribes sought to ensure that tribal sovereignty received full and fair recognition in the implementation of the ESA. Both the federal government and tribal representatives acknowledged that species conservation could be best achieved through government-to-government collaboration and communication rather than through litigation.

To that end, the Order provides considerable deference to tribal conservation management plans for Indian lands. The Departments recognized that Indian tribes value and take responsibility for managing their lands and resources. Deference will be given to those tribal conservation plans that speak to tribal land and resource management, and address the conservation needs of listed species. In other words, if a tribe has a conservation plan that addresses the Departments' concerns for a particular listed species—even if it was not specifically developed for that species—the plan will receive deference. There is no expectation or requirement for a tribe to develop an alternative plan.

In this instance, there is no indication that, even though the DEIS confirms the project will result in sensitive habitat reduction, the Tribe has discussed the project with the Fish and Wildlife Service. If the Tribe believes the Secretarial Order precludes ESA application, it should discuss in detail the efforts it has undertaken to establish a working relationship with the federal government to implement a mutually beneficial natural resource program for the identified sensitive species, including the results of such collaboration.

While the DEIS identifies a 1997 "Conservation Agreement" with the Fish and Wildlife Service that addresses allowable impacts to the flat-tailed horned lizard, an "Interim Agua Caliente Tribal Habitat Conservation and Management Plan" for the Coachella Valley frog-toed lizard, and a "Rangewide Management Strategy" for the flat-tailed horned lizard, no details are provided, making it difficult for the public to competently evaluate the proposed mitigation measures. The DEIS also fails to quantify the confirmed habitat reduction (described only as "small"), or explain how such a reduction may impact the identified species on and off the Reservation. The final environmental impact statement should fully disclose the direct and cumulative effects associated with habitat conversion and elimination of on-site sensitive species.

Moreover, the proposed mitigation relies primarily on the payment of unspecified development fees to an unknown recipient to purchase land for "Target Acquisition Areas" to which the sensitive species will presumably be relocated. There is, however, no discussion about whether the supposed relocation will reduce potential biological resource impacts to less than significant levels. The mitigation measures also suggest the flat-tailed horned lizards will be relocated outside the construction zone, but there is no accounting of when, where, and in what manner the species will be relocated. The final environmental impact statement should analyze

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the direct and indirect effects of such relocation efforts, particularly if they will occur off-Reservation.

#### Drainage and Water Quality

The DEIS confirms stormwater discharge from the project site, both during construction and operation of the proposed project, may pollute off-site receiving surface waters. (DEIS § 3.3.2.) The DEIS, however, fails to identify whether such impacts will reach off-Reservation water sources. During project construction and operation phases, the Tribe should implement a water quality monitoring program to ensure that on-site impoundments of wastewater do not discharge pollutants outside the Reservation into State waters, including surface and ground waters, in concentrations that violate Colorado River Basin Plan standards.

#### Transportation and Circulation

The traffic and circulation analysis in the DEIS largely assumes a new interchange at Interstate 10 and Bob Hope Drive—just north of the project site and outside Reservation boundaries—will be completed by 2009. (DEIS, § 3.4.1.) The DEIS should not rely on such conditions; it should also analyze traffic conditions that would occur if construction of the new interchange is delayed or never occurs. Without such analysis, the DEIS underestimates the project's potential direct and indirect traffic impacts on and off the Reservation.

The DEIS also limits its traffic analysis projections to the year 2009. To provide a more accurate accounting of cumulative traffic impacts, the analysis should consider future traffic volumes of adjacent jurisdictions cited in their respective general plans, in addition to the anticipated traffic generated by the proposed uses. This is especially true given the DEIS's recognition that the project would likely "hasten development" "on adjacent lands under the jurisdiction of both the Tribe and the City of Rancho Mirage" along the south side of Ramon Road, which is the northern Reservation boundary. (DEIS, § 3.7.2.) Indeed, the DEIS acknowledges "adjacent lands within the City of Rancho Mirage could also feel the effect of increased development pressure subsequent to Phase I casino expansion." (*Ibid.*) The final environmental impact statement should consider the cumulative traffic impacts from this project as well as anticipated commercial development both on and off the Reservation. (See 42 U.S.C. § 4332(C)(iv).)

The traffic analysis also examines supposed peak hour volumes during days and times that may not accurately reflect true conditions. For instance, the freeway analysis must not only consider impacts on the "typical weekday" but also on the weekend, as well as during special events and holiday traffic.

The DEIS suggests the Tribe may contribute, on a fair share basis, to the implementation of certain traffic mitigation measures. (DEIS, § 3.4.3.) Reference to a single contribution in an unspecified amount does not provide a complete discussion of possible mitigation measures. The Tribe should propose and discuss in detail mitigation measures to resolve reasonably

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predictable direct and indirect off-Reservation impacts that have potentially significant cumulative effects. (Compact, § 10.8.2.) This includes analysis and possible mitigation for accelerated roadway deterioration caused by increased traffic flow at all points surrounding the project site. The Tribe should address the seemingly reasonable mitigation measure suggested by the City of Rancho Mirage to fund roadway maintenance through a bed tax. The DEIS also fails to identify or discuss the reasonably predictable impact that increased traffic has the potential to impair emergency response time on and off the Reservation. The final environmental impact statement should address these concerns.

#### Air Quality

The Tribe has voluntarily agreed to comply with Southern California Air Quality Management District (SCAQMD) and City of Rancho Mirage air quality regulations for the project. (DEIS, § 3.5.1.) The State, however, is concerned by the DEIS's confirmation that even with the implementation of mitigation measures, operations air emissions for harmful carbon monoxide, volatile organic compounds and nitrogen oxides (the common precursors of ozone, the most pervasive regional air quality problem), and respirable particulate matter would all remain well above SCAQMD thresholds and would be significant. (DEIS, § 3.5.2.) We encourage the Tribe to work with local authorities to develop more effective mitigation measures for adverse air quality impacts.

#### Public Safety

The DEIS does not appear to adequately address the project's off-Reservation impacts to public safety services. For instance, the DEIS describes the resources and personnel that would be dispatched to a "typical response to a fire." (DEIS, § 3.10.1.) Not only is "typical response" not defined, but the assessment is based on an unsubstantiated premise; a fire in a high-rise hotel, with no other structure near the project registering nearly as tall, cannot fairly be characterized as commanding a "typical response." Indeed, without any other high-rise structures in the area, it is unknown whether there are sufficient adequately trained personnel and necessary equipment to contain a fire in the hotel. The final environmental impact statement should address this issue in greater detail, as the Compact precludes the Tribe from offering class III gaming in a facility that is constructed or maintained in a manner that endangers public health or safety. (Compact, § 6.4.2(c).) The final environmental impact statement should also detail the provisions the Tribe has made for emergency vehicle access and availability throughout the project area.

More importantly, the DEIS fails to adequately discuss how the proposed use will impact law enforcement and emergency services to surrounding off-Reservation communities. For instance, city officials indicate they operate with limited law enforcement and emergency services resources. The city is one of several municipalities that contract with the county to provide services. Should police, fire or emergency services be required on a large scale at the Tribe's hotel, retail center, or during entertainment events, the contracted cities will experience a

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shortage in those services. Increased casino, hotel and retail patrons without a corresponding increase in public safety equipment and personnel have the potential to impair emergency response time on and off the Reservation. Essentially, a commercial project of this magnitude—which officials describe as the largest in the City of Rancho Mirage—creates a vacuum with no provision for additional resources to ensure adequate coverage to the contracted municipalities. This defect in the DEIS is underscored by the absence of any discussion regarding criminal statistical information for the existing casino and the Spa Resort Casino. The final environmental impact statement should evaluate in detail the cumulative impacts on law enforcement services.

The DEIS suggests the Tribe's donations to local police and fire departments are factors in mitigation. (DEIS, § 3.10.3.) While laudable, the donations are not guaranteed. The DEIS also claims the Tribe's contributions to the Indian Gaming Special Distribution Fund (SDF) as an offset. (*Ibid.*) SDF distributions are not guaranteed, however, and are generally limited to projects approved by the Tribe. (See Gov. Code, §§ 12012.85, 12715.)

Here, the DEIS gives rather perfunctory treatment to mitigation measures, which ultimately precludes a proper evaluation of the true scope of the project's impacts both on- and off-Reservation. (See DEIS, § 3.10.3.) It does not address the project's drain on public safety services to off-Reservation communities during the proposed use. These negative impacts cannot be avoided if the proposal is implemented, therefore the final environmental impact statement should identify and evaluate appropriate mitigation measures.

#### Visual Quality

The City of Rancho Mirage General Plan speaks to a low-density, low-rise resort residential community. Voters recently passed a measure that generally limits building heights to one story or 20 feet. (Rancho Mirage Muni. Code, § 17.20.100.) Buildings taller than 20 feet must have increased setbacks of two feet for every foot of additional height. (*Ibid.*) Nonetheless, the DEIS suggests the construction of a 16-story hotel in a region dominated by low-rise buildings will result in minimal visual impact. (DEIS, § 3.11.2.)

Preliminarily, we observe the DEIS reports the hotel tower will be either 14 or 16 stories tall (compare DEIS §§ 2.1 with 3.7.1 and 3.11.2), but there is no indication of its length, width, or footprint area. In any event, the DEIS acknowledges views in the immediate project vicinity are dominated by the existing casino facility. (DEIS, § 3.11.1.) The final environmental impact statement should evaluate the project's cumulative effects in combination with the recognized dominant visual impact created by the existing gaming facility.

The DEIS also suggests the majority of views to the project site from passing cars are relatively short in nature due to motorists' travel speeds, and the number of sensitive residential and recreational viewers within the project vicinity is limited. (DEIS, § 3.11.1-3.11.2.) The DEIS provides no qualitative or quantitative statistical information to support these conclusions, which ignore the fact that Bob Hope Drive is the principal access road to the City of Rancho



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Mirage from Interstate 10, and the DEIS's own findings that the project will generate more than 170,000 vehicle trips per week.

The DEIS also fails to discuss visual impacts of the proposed five-story parking structure with any appreciable detail, including its specific location, physical dimensions or footprint area. Similarly, the DEIS offers no specific information regarding the retail center, other than its approximate square footage and that it would be "relatively low in scale and would mirror the expanded casino and showroom facility." (DEIS, § 3.11.2.) The final environmental impact statement should provide more detailed qualitative and quantitative analyses regarding these overlooked sub-developments.

#### Population and Housing

The DEIS suggests the construction activities for the entire project will generate about 750 full-time construction jobs, and adequate housing within the surrounding cities should be available during the construction period. (DEIS, § 3.12.2.) The DEIS confirms the jobs will be relatively low skill sector service jobs (*ibid.*), in which case the final environmental impact statement should identify and discuss low-income affordable housing, instead of relying exclusively upon conclusions about the hotel and rental housing markets in the area. The discussion is particularly critical given the surrounding area's recognized affluence and probable shortage on low-income housing. The final environmental impact statement should also provide quantitative and qualitative analyses to support the DEIS's conclusion that the existing unemployed labor pool in the surrounding communities could readily fill the temporary construction positions. (See DEIS, § 3.12.2.)

#### Consultation with Local Governments

Prior to commencement of a project, the Compact requires the Tribe to consult with the local board of supervisors or city council, and if requested by the local officials, the Tribe must meet with them to discuss mitigation of significant adverse off-Reservation environmental impacts. (Compact, § 10.8.2(a)(4).) The DEIS indicates the traffic and circulation analysis considered certain policies of Riverside County and the City of Rancho Mirage (DEIS § 3.4.1), but there is no indication whether the Tribe has made any efforts at this time toward compliance with the Compact provision cited above. If the Tribe has not already done so, it should meet with local public officials to discuss the project and its off-Reservation impacts in greater detail.

#### Conclusion

As indicated, we have several concerns with the DEIS. We request that the Tribe fully address the direct, indirect and cumulative impacts that may result from the proposed project. We further request that the Tribe discuss in detail a reasonable range of alternatives and include complete discussions of mitigation measures in its final environmental impact statement. It is our understanding that the Department of Toxic Substances Control, the Department of Conservation, the Governor's Office of Emergency Services, and the Department of

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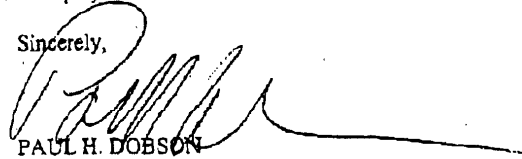
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Transportation have also submitted comments on the DEIS; we hope that the Tribe considers and addresses those comments in the final environmental impact statement.

Thank you for the opportunity to comment on the project.

Sincerely,



PAUL H. DOBSON  
Acting Legal Affairs Secretary