

FORMAN & ASSOCIATES  
ATTORNEYS AT LAW  
4340 REDWOOD HIGHWAY, SUITE E352  
SAN RAFAEL, CALIFORNIA 94903

---

TELEPHONE: (415) 491-2310 FAX: (415) 491-2313

GEORGE FORMAN  
KIMBERLY A. CLUFF  
JAY B. SHAPIRO  
JEFF R. KEOHANE

GEORGE@GFORMANLAW.COM  
KIMBERLY@GFORMANLAW.COM  
JAY@GFORMANLAW.COM  
JEFF@GFORMANLAW.COM

September 7, 2010

Dale Risling  
Acting Regional Director  
Bureau of Indian Affairs  
Pacific Region  
2800 Cottage Way  
Sacramento, California 95825

Re: Final Environmental Impact Statement for the Proposed Enterprise Rancheria Gaming Facility and Hotel Fee-to-Trust Acquisition Project, Yuba County, CA

Dear Mr. Risling:

We write to you today on behalf of the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa"), a federally recognized Indian tribe, to comment on the Final Environmental Impact Statement for the Proposed Enterprise Rancheria Gaming Facility and Hotel Fee-to-Trust Acquisition Project ("EIS"). The EIS reviews the environmental impacts of the proposed decision of the Bureau of Indian Affairs ("BIA") to take land into trust in southern Yuba County for the benefit of the Estom Yumeka Maidu Tribe ("Enterprise"). The purpose of the acquisition is to allow Enterprise to construct a casino a substantial distance from its current reservation near Oroville. The casino would actually be closer to Colusa's trust lands than it would be to Enterprise's former or current trust lands. Yuba County Entertainment LLC ("YCE"), Enterprise's casino development and management contractor, currently owns the parcel on Forty Mile Road in unincorporated Yuba County ("YCE Parcel"). Because the acquisition of the land by BIA would be a major federal action with significant environmental impacts, the National Environmental Policy Act ("NEPA") requires that BIA prepare an EIS. Unfortunately, the EIS as written does not satisfy NEPA in many respects, only some of which we can address in this letter due to the constraints of time.

Although the EIS does not appear to disclose who funded its preparation, it is safe to assume that it was YCE, the owner of the Yuba parcel and Enterprise's contractor for development, and management of a future casino. (40 CFR 1506.5) The environmental contractor, Analytical Environmental Services ("AES") apparently prepared an Environmental Assessment ("EA") in support of a Finding of No Significant Impact ("FONSI"), but after receiving comments on the EA, BIA "in consultation with the Enterprise Rancheria, decided to

prepare an EIS." (70 Fed. Reg. 29363 (2005).) That is, given the significant environmental impacts of the project, BIA informed Enterprise and YCE that AES would have to prepare an EIS. A draft EIS was eventually published in March 2008, (73 Fed. Reg. 15191) and a final EIS, although dated "May 2009" was published on August 6, 2010. (75 Fed. Reg. 47618.)

## ALTERNATIVES ANALYSIS

Despite the fact that it took eight years to draft the EIS, the document does not meet the minimum requirements for an EIS. In fact, because it took so long to develop the EIS, much of the data it purports to analyze is out-of-date. Further, because Enterprise and YCE committed eight years ago to a specific casino design on a specific site, the EIS attempts to justify that choice with a restrictive purpose and need statement ("P&N") and a faulty alternatives analysis. In a further attempt to support the project as defined by Enterprise and YCE, not the BIA, the EIS even goes so far as to claim that mitigation would reduce all impacts to a level below the threshold of significance, apparently in a misguided bid to obtain a finding of no significant impact ("FONSI") from BIA.

It is a much-repeated maxim of NEPA that the alternatives analysis is the "heart" of an EIS. (40 CFR 1502.14.) An EIS must consider *all* reasonable alternatives to meet the P&N, and an EIS that does not consider all reasonable alternatives fails to comply with NEPA. The alternatives must provide "a clear basis for choice among options by the decisionmaker and the public." (*Id.*) The alternatives analysis begins with the choice of a P&N underlying the alternatives presented in the EIS. (*Id.* 1502.13.) Rather than draft a P&N directed at the BIA's congressionally mandated purposes or the needs of the Enterprise Rancheria, the EIS's P&N is drafted to essentially require the construction of a casino, the configuration proposed in 2002 ("Alternative A") in particular. (EIS 1-2 & 1-8.)

While it may be good public relations for a casino, and may coincide neatly with those purposes on which a tribe may spend its net revenues under the Indian Gaming Regulatory Act ("IGRA"), it is not within the congressionally assigned responsibilities of the BIA to "[p]rovide employment opportunities for [the] non-tribal community," "[f]und local governmental agencies, programs, and services," or "[m]ake donations to charitable organizations and governmental operations." (EIS 1-2, 2nd bullet & 1-8, 5th & 6th bullets.) Those objectives support casino development uniquely. (25 USC 2710(b)(2)(B).)

In a feeble attempt to dress up the P&N in tribal clothing, the EIS provides a "variety" of laudable tribal goals that might be funded if the casino provides

a new revenue source that *could* be utilized to build a strong tribal government, improve existing tribal housing, provide new tribal housing, fund a variety of social, governmental, administrative, educational, health, and welfare services to improve the quality of life of tribal members, and to provide capital for other economic development and investment opportunities.

(EIS 1-2, 3rd bullet (*italics added*)). The EIS analyzes neither the "variety" of services that Enterprise "could" provide if the casino is built, nor how any of the alternatives would meet the objective of providing such services. The EIS does not address in any serious way goals of creating employment opportunities for tribal members and allowing tribal members to become economically self-sufficient. (EIS 1-2, 2nd bullet & 1-8, 4th bullet.)

Despite its prominence as a potential use of casino revenues, the EIS does not address tribal member housing as part of any alternative. Nor does EIS discuss how the alternatives would meet the objective of providing tribal housing. The failure to discuss housing is surprising given that the federal government purchased the Enterprise 2 parcel that the YCE parcel supposedly would replace for tribal housing and Enterprise used the parcel for that purpose. (EIS 1-2, 1st bullet, & 3.2.6-4.) The failure to address tribal housing also flouts the requirement under NEPA that an EIS address all reasonably foreseeable indirect and cumulative impacts of a federal action. (40 CFR 1502.16 & 1508.8.) Enterprise already owns the 63-acre parcel it intends to use for tribal member housing purposes, and it is reasonably foreseeable that it will act upon that purpose upon receipt of casino revenues. (Amended and Restated Request for a Secretarial Two-Part Determination 4-5 (March 17, 2009).) The 63-acre parcel, not the YCE parcel, would replace the loss of Enterprise 2 parcel.

In case it was not already obvious enough, the final goal of the P&N is to "[e]ffectuate the Congressional purposes set out in the Indian Gaming Regulatory Act (IGRA)," making it clear that no development other than a casino could seriously be contemplated. (EIS 1-8, 7th bullet.) Since the P&N requires building a casino, the only question that remained was its size and location.

Just as the P&N is tailored to require only one type of development, the alternatives stack the deck in favor of Alternative A, undermining the action-forcing purpose of NEPA. Since the P&N requires building a casino, only a casino alternative could satisfy the P&N. Thus, Alternatives C and E were disfavored as not meeting the P&N. Since the P&N requires generating revenue, the larger the casino, the better it fits the P&N. Thus, Alternatives B and D were discarded because, while they would meet the "need" to build a casino, they were assumed to be smaller and therefore would not meet the revenue goal. Since only Alternative A included a large casino, the EIS did not seriously propose any other alternatives for consideration. The EIS, therefore, completely failed to address the question of whether another location would have been more appropriate because the only alternative in another location, Alternative D, was a smaller casino. Being smaller, Alternative D could not address the revenue maximizing purpose of the overly narrow P&N. The reasoning behind making Alternative D a small casino is obscured by general statements about lower profits of an Oroville casino and the high expense of construction, but neither the EIS or Appendix M quantify those effects. (Appendix M, Draft Feasibility Analysis.) Evidently, the two sites would draw from a similar pool of customers because they would affect the other tribal casinos in a similar fashion. (EIS 4.7-28.) The decision to set up a mismatch between a small casino on Enterprise's reservation, Alternative D, and a large-off reservation casino on YCE's land, Alternative A, is not justified by the information in the EIS or Appendix M. The documents provide incomplete data, leaving out

such information as the amount of net revenue payable to YCE under both alternatives, the cost of building the casinos, and similar considerations. Further, the reasons for sizing Alternative D depend on the unquantified speculations comparing the costs of a larger Alternative D with Alternative A. (Technical Memorandum attached as Appendix D to Appendix M of the EIS.) Further, the economic studies that justify the choice of alternatives were commissioned *after* the decision by Enterprise to build a casino on the YCE parcel, and make clear that the only question was how large to make that casino. It does not appear that BIA played a role in the choice of alternatives.

Appendix M was completed in 2006 based upon statistics from 2005 and earlier. It analyzes what it calls the projected "cannibalization" of other tribal casino businesses by an Enterprise casino. (E.g., Appendix M at 129.) YCE's contractors analyzed the economics of a casino well before the economic downturn that began in earnest in 2008, and made rosy projections of economic activity in 2009. In addition to being out-of-date, the study relies upon conjecture rather than data. (E.g., Appendix M at 128 ("Colusa likely focuses its marketing efforts on different markets").) Appendix M acknowledges the importance of fixed expenses, such as "debt service and development/management fees," to Enterprise. (Appendix M, p. 130.) Appendix M does not disclose those fees, and although the development and management agreement apparently was intended to be included as Appendix B, it is not included. (EIS, p. 2-6.) Appendix M argues the opposite point of view with regard to tribes other than Enterprise, however. It asserts counterfactually that "[a]fter payments to partners and debt owed, the difference in revenue [caused by an Enterprise casino] distributed to the tribe is arguably negligible." (Id. p. 129.) Because the economic analysis underpinning the choice of alternatives is faulty it invalidates the choice of alternatives, which were chosen to compel the conclusion that only Alternative A met the P&N.

Appendix M also purports to address the Environmental Justice ("EJ") impacts of the Project. The question under NEPA is what the environmental effects of the Project are expected to be. Under EJ policy, the BIA must analyze whether the proposed action has a disproportionately high and adverse impact on human health and the environment in minority or low-income communities or Indian tribes. (See, e.g., EO 12898 (1994); CEQ, Environmental Justice, 16 (1997).) The socioeconomic analysis in the EIS and Appendix M focused almost entirely on the purely economic impacts of the Project, not the impacts on the human environment as required by NEPA. While such impacts must be considered, they are not the thrust of the analysis under NEPA.

The EIS carries over this error in reasoning to the evaluation of the effects on the other Indian tribes that have casinos that Enterprise's casino will, in the words of Appendix M, "cannibalize." (E.g., Appendix M, p. 129.) The EIS pretends that the question is simply whether the Enterprise casino would put any of the other local casinos out of business. (EIS 4.7-26.) Under the EJ policy and NEPA, however, the question is what the impact will be on the human environment and whether it will be disproportionately high and adverse upon a low-income or minority communities or Indian tribes. Since the negative economic impacts will be concentrated entirely on a single minority group, Indians, and on tribes, it is inherently suspect.

Any of the environmental impacts that one would expect to arise from the "cannibalization" of other tribes' casino business would fall disproportionately on those communities. Indian communities have long suffered high levels of preventable diseases, accidents, and social ills. The EIS, however, does not address whether "cannibalizing" the casino business of other tribes may lead to an increase in those impacts. It only looks at social impacts of an Enterprise casino on the larger community in the immediate vicinity of the two proposed casino sites, and entirely fails to analyze whether an Enterprise casino would have EJ impacts on the other Indian communities to which BIA also owes a fiduciary duty. Instead of admitting that "cannibalizing" the tribal casino market may have environmental effects that would fall disproportionately on Indian communities or tribes, the EIS sets up a straw man that posits that the question is whether it discriminates *between* tribes. (EIS 4.7-26 ("reductions \*\*\* would not be directed at any one Tribe").) The EIS concludes that because it assumes that all casinos would remain in operation "a disproportionate and adverse effect would not occur \*\*\* and a less than significant impact would result." (Id.)

The sloppy analysis also extends to the claim that a new casino would not increase adverse social impacts such as problem gambling and crime. The EIS does not explain the inherent contradiction of the claim that the casino will increase the size of the casino market while not increasing the number of persons with gambling problems. (EIS, p. 4.7-10 & Appendix M, p. 130.) Under the EIS's own logic, either exposure to gambling and therefore gambling addiction will potentially rise, causing a significant impact that must be analyzed, or the market will not expand, undermining the basis for Alternative A. Nor does it explain how donating an arbitrary amount of money to a charity will offset the problem that supposedly does not exist. (EIS, p. 4.7-11.) Nor does the EIS explain why crime, simply because it is directed against casino patrons and the casino does not affect the community whose laws are violated by those crimes and that enforces those laws. (Id.)

## AIR QUALITY ANALYSIS

The analysis of the Clean Air Act misunderstands the regulatory framework that applies to the current reservation and that would apply to the off-reservation land if BIA takes it into trust. In contrast to the many pages the EIS spends on local air pollution regulation regimes, it discusses the fact that those agencies do not have permitting authority on trust lands only briefly in the context of the reservation. (EIS 3.2.4-14.) The impression is given that the Feather River Air Quality Management District ("FRAQMD") will retain the authority to issue permits to the new trust lands. Although the EIS points out that the Butte County Air Quality Management District ("BCAQMD") does not have the authority to issue permits, the extensive discussion of its authority, and the paucity of information on the EPA's regulatory scheme, gives the impression that BCAQMD has some authority within the reservation. Without that information, BIA cannot evaluate the air quality impacts of the alternatives.

The Clean Air Act ("CAA") requires that all federal agencies ensure that their actions conform to the applicable State Implementation Plan ("SIP") even for areas, such as trust lands not subject to the SIP. The EIS treats this requirement as a mechanical exercise, simply checking

off whether the emissions are below the so-called de minimis levels in the federal regulations. Neither NEPA nor the CAA may be applied in such an irrational manner. BIA must discuss how it will ensure conformity with the California SIP in light of the fact that the YCE property lies within the Yuba City nonattainment area ("NAA") for PM2.5. (40 CFR 81.305.) The YCE property lies within the Yuba City ozone maintenance area, which was formerly an ozone NAA, and sandwiched between the Chico and Sacramento Metropolitan NAAs. EPA has classified the Sacramento Metropolitan NAA as severe for ozone. (*Id.*) Further, as evidenced by the fact that the site is within the former ozone NAA, the area has high levels of ozone. Based upon the monitoring data for Yuba City and surrounding areas, EPA may soon designate the area as an ozone NAA because monitors within it have exceeded the 2008 ozone standards. (CARB 2006-09 monitoring data (2010).)

The limited conformity review included in the EIS does not adequately analyze whether BIA's action will conform to the California SIP. Because the YCE property lies within the Yuba City ozone maintenance area, EPA has set the de minimis threshold for ozone precursors -- NOx and VOCs -- at 100 tons per year ("tpy"). (40 CFR 93.153.) Because the YCE property lies within the PM2.5 NAA, EPA has set the de minimis threshold for PM2.5 and its precursors -- NOx, SO2, and VOC or ammonia -- at 100 tpy as well. (*Id.*) The VOC or ammonia threshold only applies *if* those compounds are found to be significant precursors of PM2.5 formation. (*Id.*) The NOx and SO2 threshold, however, applies unless those compounds are found *not* to be significant precursors. (*Id.*) The EIS asserts that the PM2.5 emissions from Alternative A will conform to the SIP because they will remain below the de minimis threshold. (EIS 4.4-12.) The EIS does not give the figures that would support that assertion, however. Based on Table 4.4-3, it appears that NOx emissions may exceed the de minimis threshold of 100 tpy. That would breach the de minimis threshold for both the ozone maintenance area and the PM2.5 NAA and require offsets or other actions by BIA to conform to the California SIP. (*E.g.*, 40 CFR 93.158.) The fact that the EIS requires the reader to do his own calculations based on incomplete information by itself requires that BIA rewrite and republish the air quality sections of the EIS. If NOx emissions exceed the de minimis threshold, then BIA must rewrite the EIS and comply with the requirements of 40 CFR Part 93, and to offset the project's emissions or conform to the California SIP by some other means.

Under NEPA, BIA must analyze the impact of its activities on the State's ability to meet its goals to clean up the air in the Sacramento, Chico, and other nearby areas under NEPA. (See, e.g., 40 CFR 1502.16(c) & 1508.27(b)(10).) The FRAQMD is in nonattainment for both ozone and PM10. While the Sacramento area severe NAA begins just a few miles south of Alternative A, it is well understood that air pollutants, particularly ozone, do not respect jurisdictional boundaries. Just because BIA has not monitored ozone concentrations on-site is no logical reason to assume that the air quality in the Alternative A location varies significantly from that of the nearby air quality monitors in Nevada, Placer, Sacramento, Sutter, Yolo, and Yuba Counties. That is true particularly since the site is closer to the air monitors that support the nonattainment designation of the Sacramento Metropolitan Area than it is to the Yuba City monitor, which soon may support designation of Yuba County as a NAA.

The EIS uses the FRAQMD thresholds of significance for ROG, NO<sub>x</sub>, and PM<sub>10</sub>. During the operational phase of a project, the threshold is 25 lbs/day for ROG and NO<sub>x</sub>, and 80 lbs/day for PM<sub>10</sub>. The same standards apply in the construction phase, except that an annual threshold of 4.5 tpy is added for ROG and NO<sub>x</sub>. Although the information is not provided in any intelligible manner, it appears from the EIS that ROG and NO<sub>x</sub> emissions from construction may be double the thresholds of significance on a daily and annualized basis. During operations, the emissions will be more than 14 times the threshold of significance for ROG, more than 26 times the threshold of significance for NO<sub>x</sub>, and nearly 8 times the threshold of significance for PM<sub>10</sub>. The fact that the EIS does provide the information, but requires that the reader calculate the figures is reason enough for rejecting the EIS analysis of air quality impacts.

Despite the exceptionally large amount by which the air quality impacts of Alternative A would exceed the threshold of significance, the EIS asserts that mitigation will reduce the impacts to a less-than-significant level. There is no indication that mitigation will cut emissions of ozone precursors in half during construction, much less, that it will reduce them to one-twenty-sixth of their projected levels during operations. The proposed mitigation is unquantified and it does not provide for any identifiable, verifiable, or enforceable mitigation. None of the air quality mitigation measures has a significant effect on emissions except "Measure II." (EIS 5-13.) Measure II is not real mitigation, however, because it relies upon a laundry list of potential mitigation measures, one or more of which Enterprise supposedly "will" implement. (EIS 5-12.) What the EIS gives on one page, it unobtrusively takes away on the next. The EIS acknowledges that Enterprise may not implement any of them if it finds them infeasible. (EIS 5-13.) Under NEPA, however, BIA must identify and describe mitigation measures, not merely put them off to a later decision, particularly one outside of the responsibility of the lead agency. The EIS, however, still attempts to credit Alternative A as not having a significant impact on the environment due to air pollutants. In fact, according to the EIS, mitigation would eliminate *all* of the significant adverse effects of *all* alternatives. (EIS, Section 5.) Such mitigation, like the mitigation identified to avoid air quality impacts from criteria pollutants, is generally unquantified and unenforceable, such as the measures aimed at reducing greenhouse gases.

## **BIOLOGICAL RESOURCES ANALYSIS**

Although the EIS identifies several endangered species and species of concern, it does not account for the effect of Alternative A on all of them. The EIS contains only a letter from the US Fish & Wildlife Service ("FWS") concluding *informal* consultation with BIA on the vernal pool crustaceans and giant garter snake. The letter from FWS predates the *draft* EIS by three years, and was based on the EA prepared in 2004. (Appendix H.) The fact that FWS consulted informally on an EA instead of the later EIS demonstrates that the BIA had not yet acknowledged that the project would have significant environmental impacts requiring preparation of an EIS. Because of the passage of time, and the fact that the FWS did not have the benefit of reviewing the presumably expanded analysis in the EIS, BIA should reinstate consultation with FWS. Moreover, in the intervening five years the state of knowledge concerning endangered species in the area has greatly expanded, particularly with regard to the delta smelt.

The EIS briefly acknowledged that six fish species listed under the Endangered Species Act may exist in the vicinity. (EIS 3.1.5-18.) In fact, the federal government has listed only five of the identified fish species as threatened or endangered under the Endangered Species Act. The National Marine Fisheries Service ("NMFS"), which has jurisdiction over anadromous fishes, listed winter-run Chinook salmon as threatened in 1990 and as endangered in 1994. (55 Fed. Reg. 46515 (1990); 59 Fed. Reg. 440 (1994).) NMFS listed three other species as threatened well before the draft EIS: Central Valley steelhead in 1998, Central Valley spring-run Chinook salmon in 1999, and the North American green sturgeon in 2006. (63 Fed. Reg. 13347 (1998); (64 Fed. Reg. 50394 (1999); (71 Fed. Reg. 17757).) NMFS classified Central Valley fall/late fall-run Chinook salmon as a "species of concern," and thus subject to analysis under NEPA. (64 Fed. Reg. 50394 (1999).) FWS listed delta smelt as threatened in 1993. (58 Fed. Reg. 12854.) In addition, FWS is considering whether to relist the Sacramento splittail. (75 Fed. Reg. 20547 (2010).)

Acknowledging that the nearby rivers are essential survival of the listed species, NMFS and FWS designated critical habitat for all of them. (*See*, 58 Fed. Reg. 33212 (1993); 59 Fed. Reg. 65256 (1994); 65 Fed. Reg. 7764 (2000); 70 Fed. Reg. 52488 (2005); 74 Fed. Reg. 52300 (2009).) All of the critical habitat designations preceded publication of the draft EIS except for the green sturgeon critical habitat, which preceded the final EIS. Critical habitat for all five listed species includes the Sacramento River. The critical habitats of the salmonids and green sturgeon also include the Feather, Yuba, and Bear Rivers, among others.

The EIS must analyze the direct, indirect, and cumulative impacts on at least the delta smelt, green sturgeon, and the four salmonid species. The EIS excuses its failure to consider the effect on the six fish species on the ground that they "do not have the potential to occur within the study area, as the only aquatic habitats within the study area are agricultural irrigation ditches and canals or receive water supply from these ditches or canals." (EIS 3.1.5-18.) The EIS gives no flow or observational data to support the assumption that none of the six identified fish species would occur in the canals and ditches that surround the two properties. Further, the EIS must evaluate not just the direct effects of an action within the metes and bounds of the parcels where the project is proposed, but also the direct and reasonably foreseeable indirect and cumulative impacts outside of the parcels, in this case, downstream. The EIS must examine the potential effects of the project on the six identified fish species in both the waters adjacent to the YCE and WWTP properties, if applicable, and the rivers and creeks into which those waters eventually flow.

The danger posed to fish species, particularly the anadromous species, by canals and ditches is so great that screening their points of diversion and their drains is a major component of the federal government's recovery strategy for the listed fish species. (*See, e.g.*, 70 Fed. Reg. 37160 (2005); 65 Fed. Reg. 42422 (2000); NMFS, Fish Screening Criteria for Anadromous Salmonids (1997).) The EIS does not discuss whether the SYWD canal is screened to prevent salmon and other fish from entering the canal system.



The EIS acknowledged that natural and artificial waterways surround both the YCE and WWTP properties, although it does not explain how they are connected. The South Yuba Water District's ("SYWD's") canal carries water from the Yuba River to the vicinity. The SYWD canal branches at the northeast corner of the WWTP property. One branch flows southeasterly along the northeast edge of the WWTP property. A drain from the canal creates a creek that meanders across the southeast corner of the property for 1500 feet creating 1.66 acres of seasonal wetlands. (EIS 3.1.5-11) The other branch of the SYWD canal flows west along the short northern edge of the WWTP property, along the route of the proposed wastewater pipeline, and then the southern edge of the YCE property. (Appendix I, Figures 5b & 5c.) The EIS does not reveal where it terminates, but it appears to end in Kimball Creek west of Forty Mile Road.

Natural and artificial channels, including the SYWD canal, carry runoff from the area to the Kimball Creek in the north and Best Slough in the south. They flow through tributaries to the Feather River. The Feather River joins the Sacramento River, which eventually flows to the San Francisco Bay and the Pacific Ocean. Most of the YCE property drains northwesterly toward Kimball Creek, about 800 feet to the north. (EIS 3.1.3-1 & 3.1.5-6.) The remainder of the property evidently flows southerly to the SYWD canal along with drainage from neighboring property. (EIS 3.1.3-1.) Ditches within and adjacent to the WWTP property convey runoff, although the EIS is vague about their destinations. (EIS 3.1.5-6, -11 & -12.) Runoff from the WWTP property apparently flows to Best Slough. (EIS 3.1.5-11.) The EIS acknowledges the existence of several wetlands on the properties under the jurisdiction of the US Army Corps of Engineers. In order for the Corps to have jurisdiction over the wetlands, they must have a significant hydrological connection to navigable waters of the US, such as the Sacramento River.

The connection between the Yuba River through the vicinity of the project to the Bear and Feather Rivers compels the analysis of the potential for direct effects on the six identified fish species. Further, the EIS must also discuss the impact of the project on downstream habitats. Critical habitat for the listed species begins only about 4.5 miles from the project. Kimball Creek and Best Slough flow into the Bear River which is designated critical habitat for the listed salmonids, the Feather River, which is designated critical habitat for listed salmonids and the green sturgeon, and the Sacramento, which is designated critical habitat for the listed salmonids, green sturgeon, and delta smelt.

An appendix noted the indirect and cumulative impacts on downstream habitats. (Appendix H 29-30.) The EIS did not analyze them as required by NEPA, however. The EIS acknowledged that the Bear River is an impaired river listed under Section 303(d) of the Clean Water Act. (EIS 3.1.3-7.) The EIS fails to discuss the fact that the Feather and Sacramento Rivers are also highly impaired by diazinon and chlorpyrifos caused by agricultural runoff and urban runoff/storm sewers. State and federal regulatory agencies have established total maximum daily loads for the rivers. (State Water Resources Control Board, Clean Water Act Section 303(D) List of Water Quality Limited Segments (2002); California Regional Water Quality Control Board, Central Valley Region Resolution No. R5-2007-0034 (2007).) The EIS also fails to discuss what effect designation of the rivers as impaired and establishment of a total maximum daily load will have on the issuance of permits for the project under the Clean Water

Act. The EIS does not discuss how the project would affect the water quality of the rivers by, among other things, converting the YCE property to nearly all impervious surfaces and increasing the output of the WWTP. Nor does the EIS discuss how such discharges would affect the fish species of concern. The Central Valley Regional Water Resources Control Board, among many others, has found that endangered and threatened fish species suffer from the effects of high levels of pollutants in the rivers. (*E.g.*, Sacramento and Feather Rivers Basin Plan Amendment Final Staff Report (2007).)

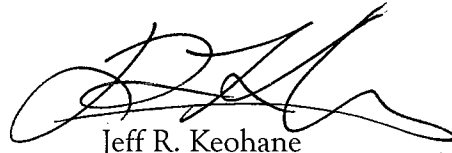
Because of the potential for significant impacts to the six identified fish species, the BIA must re-initiate consultation with FWS and initiate consultation with NMFS pursuant to the Endangered Species Act. It must also analyze the impacts on the species in the EIS itself.

### CONCLUSION

As noted above, the EIS fails to meet the mandates of NEPA because of its faulty design and because of its faulty analysis of environmental impacts. With additional time to analyze and comment on the voluminous document, we would have addressed other failings of the EIS. We note that it is incumbent upon federal agencies to consider all comments on an EIS until the agency has made its final decision. We encourage the BIA to fix the P&N and alternatives analysis with the inclusion of all reasonable alternatives, and to reexamine the biological and air quality impacts of the proposed action. The tribal governments with which BIA has a responsibility to consult and the general public could be of greater assistance, however, if the comment period on the EIS were extended for 60 days. Given the fact that the EIS has been in preparation for eight years, and the fact that years of work remain on non-NEPA aspects of the application to take YCE's off-reservation land into trust, extending the comment period to allow further assistance on the part of the public would delay action by an imperceptible amount.

Very Truly Yours,

FORMAN & ASSOCIATES



Jeff R. Keohane