# *Stand Up For California!*
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**June 2, 2014**

VIA Email and First Class Mail

Amy Dutschke, Regional Director
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**RE: Comments on Final Environmental Impact Statement (FEIS) of Proposed Los Coyotes Band of Cahuilla and Cupeno Indians (Tribe) 23.1 Acre Fee to Trust Transfer and Casino Hotel Project, City of Barstow, San Bernardino County, California.**

Dear Regional Director Dutschke,

The following comments are submitted on behalf of *Stand Up For California! (SUFC)* [1] and the *Barstow Christian Ministerial Association (BCMA).*[2] The proposed project and preferred alternative consist of: 1) placing approximately 23.1 acres in the City of Barstow into federal trust status for the benefit of the Tribe; 2) issuance of a Two-Part Determination relevant to the fee-to-trust application; 3) approval of a gaming management contract and associated agreements; and 4) development of a casino with approximately 57,070 square feet of gaming floor, a 100-room hotel, and associated facilities. Both the gaming facility and the hotel would be open 24 hours-a-day, seven days-a-week. A total of 1,405 parking spaces would be provided. We thank you for the two-week extension to June 2, 2014, to submit comments on this FEIS.[3]

As an initial matter, we note that the FEIS includes no comments received from the State or local governments, including tribal governments, regarding the fee to trust application and the request for a two-part determination. If a Notice of Application has not been issued, as required by the Bureau of Indian Affairs (BIA) Fee-to-Trust Handbook, we ask that a Supplemental EIS be prepared after that process is complete, in order to incorporate the comments submitted and to

[1] *Stand Up For California!* is a nonprofit benefit corporation that acts as a statewide community watchdog on gambling and gambling related impacts.
[2] *Barstow Christian Ministerial Association* is a coalition of 40 churches with more than 5000 members in the City of Barstow.
[3] http://www.loscoyoteseis.com/documents/noa/NOA_Extension.pdf

allow the public an opportunity to comment on those submissions. We also note that Section 20 of the Indian Gaming Regulatory Act (IGRA) provides, in relevant part, that the prohibition on gaming on after-acquired lands shall not apply when "the Secretary, *after consultation with … appropriate State and local officials, including officials of other nearby Indian tribes,* determines that a gaming establishment … *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." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). Before "detriment to the surrounding community" can be determined, BIA must solicit, and a Supplemental EIS must consider, the comments of all local governments, including tribal governments, the County of San Bernardino, and the incorporated communities of Adelanto, Apple Valley, Victorville, and Yermo, all of whose jurisdictional boundaries are within 25 miles of the proposed project site. The impacts of a project cannot be fully evaluated in the absence of information regarding jurisdictional and regulatory impacts or tax implications, which now must also take into account the Department's attempt under its new leasing regulations to exempt all non-Indian activity taking place within Indian country from generally applicable state and local taxation.

## SUMMARY OF OBJECTIONS TO FEIS

Our organizations dispute the adequacy of the FEIS's analysis in several respects. First, the FEIS is stale: a Supplemental EIS is necessary to address significant new information that has arisen since the EIS was first scoped in 2006, the Draft EIS was circulated in 2011, and even after the FEIS was issued. Second, there are serious questions about the enforceability of the mitigation measures and project parameters that the FEIS assumes as the basis of its analysis. Further, the FEIS fails to provide a reasonable range of alternatives, does not adequately consider a number of significant impacts, including impacts to air and water resources, and ignores important legal issues that undermine the basic premise of the proposed project.

## I. THE FEIS IS STALE AND REQUIRES A SUPPLEMENTAL EIS

Under the National Environmental Policy Act (NEPA) supplementation is necessary where (1) a major federal action has yet to occur, and (2) new information bearing on the ongoing major federal action raises significant questions about the ongoing action's impact on the human environment. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). An agency "[m]ay also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.5(c)(2). There is no dispute that major federal action has yet to occur—the Secretary, for example, has yet to rule on the pending two-part determination or take the 23.1 acres of land into trust. Moreover, this process is likely to take another 18 months to two years. It is imperative that the EIS be as up-to-date as possible to ensure that BIA has the appropriate information before it, as well as the Governor, who must also rely on this analysis to make a decision. As explained below, several significant new issues have arisen since BIA circulated the DEIS in 2011 and the FEIS. Accordingly, BIA must conduct supplemental NEPA review.

### A. The FEIS Relies on Out-of-Date Information

The scoping for this EIS was originally conducted in 2006, and the DEIS was not issued until July 2011. The FEIS, issued in April 2014, incorporates only a few references from 2011, only one from 2012, and none from any time later. As a result, the FEIS relies heavily on data that are out of date. For example, the traffic impact analysis, dated 2010, is based on an opening year scenario for 2013, and relies on traffic volume data from 2008. Since that time, a number of projects have been proposed that will alter traffic patterns in the area and that require consideration in the FEIS. Similarly, the air quality analysis relies on data from 2007. Yet, since 2007, levels of CO and $SO_2$ pollution have risen; population has also increased and is predicted to continue to increase (as documented in the FEIS), so the emission estimates used in the FEIS are not accurate. The FEIS claims to account for long-term emissions, but does not provide any detailed analysis for this assertion. See FEIS 4.13-9.

Socio-economic data is notably dynamic, yet the FEIS relies on population and housing data from 2010, crime data from 2006, and minority population statistics from the 2000 U.S. Census. Unemployment data is one of the most readily available and dynamic indicators of a community's economic health. Consequently, many socioeconomic analyses will present the most recent employment data. Instead, the FEIS uses unemployment data from 2010. Given California's recent economic downturn and slow recovery, the most current available unemployment data for the affected environment should be provided, and incorporated into a Supplemental EIS.

### B. The FEIS Entirely Ignores Significant New Information

Significant new information is entirely missing from the FEIS and demands a Supplemental EIS. Given Barstow's location in the Mojave Desert, water resources are particularly important, yet none of the water resources reports referenced in the FEIS are more recent than 2008. Much has occurred during this six-year period. For example, these reports do not take into consideration the historic drought conditions California is currently experiencing or the fact that drought conditions are now predicted to recur with increasing frequency, severity, and duration. Drought conditions in California have nationwide effects, including by increasing food prices throughout the country.[4] In February, food prices jumped 0.4 percent — the largest one-month increase since September 2011. Prices jumped another 0.4 percent in March and another 0.4 percent in April. According to the Bureau of Labor Statistics, fruit and vegetable prices rose even faster, at a 0.7 percent clip in April and experts expect that the price of things like avocados, broccoli, lettuce, and almonds could rise further in the months ahead. The U.S. Department of Agriculture says that the "ongoing drought in California could potentially have large and lasting effects on fruit, dairy and egg prices, and drought conditions in Texas and Oklahoma could drive beef prices up even further."

In response to the drought, farmers are pumping more groundwater resulting in depleted aquifers. A 2012 study by the Proceedings of the National Academies of Sciences found that the Central Valley's aquifers do not refill completely during wet periods and that groundwater pumping causes the ground to sink, and the aquifers don't spring back to their original capacity.

[4] http://www.vox.com/2014/5/27/5754118/will-californias-massive-drought-drive-up-food-prices

Water managers are looking to fresh water aquifers stretching from the San Fernando to the San Gabriel Valley and from Southeast Los Angeles County to the West Basin and the Santa Ana River into the Inland Empire to supply water for urban areas and agriculture, but the situation is becoming increasingly dire. But if the drought continues to 2015, the region will be deeply stressed.

The FEIS fails to address this issue in any meaningful way. The Third U.S. National Climate Assessment, issued in May 2014, which the FEIS does not consider, makes clear that the hotter, drier conditions predicted will severely stress water supplies in the desert Southwest. The Obama Administration has stated that the Third U.S. National Climate Assessment is "the most comprehensive and authoritative scientific report ever generated about climate changes that are happening now in the U.S. and further changes that we can expect to see throughout this century."[5] The report specifically notes impacts to California's water supply infrastructure. Its predictions cannot be ignored; BIA must supplement the FEIS to consider this landmark report and the impacts the continuing drought have had on the region.

Moreover, water supplies will also be limited by the Ninth Circuit's recent delta smelt decision.[6] Barstow's groundwater basin is in severe overdraft and groundwater recharge with water from the State Water Project (SWP) is critical. The Ninth Circuit's decision, however, found that operations of the SWP and the Central Valley Project jeopardize the delta smelt, and upheld the Fish and Wildlife Service's 2008 Biological Opinion on those operations. The Reasonable and Prudent Measures in that Biological Opinion will sharply reduce the amount of water supplied by the two projects to central and southern California. The FEIS' analysis of water supplies is premised on the availability of certain quantities of SWP water to mitigate the effects of the ongoing groundwater overdraft. FEIS 3.2-7. The FEIS, however, fails to consider any reduction in SWP deliveries. While the exact decrease in SWP deliveries is not yet known, this is precisely the kind of incomplete or unavailable information which much be analyzed under 40 C.F.R. 1502.22. The FEIS does not contain any such analysis for this or any other incomplete or unavailable information.[7]

Out of date information also renders the FEIS' cumulative impacts analysis inadequate. Council on Environmental Quality (CEQ) regulations for the implementation of NEPA define cumulative effects consistent with the Supreme Court's reading of NEPA in *Kleppe v. Sierra Club,* 427 U.S. 390, 413-414 (1976). "Cumulative impact" is defined in CEQ's NEPA regulations as the "impact on the environment that results from the incremental impact of the

[5] NOAA press release (May 6, 2014) available at:
http://www.noaanews.noaa.gov/stories2014/20140506_climateassessment.html.
[6] *San Luis & Delta-Mendota Water Authority v. Jewell*, No. 11-15871 (9th Cir. March 13, 2014).
[7] In particular, the FEIS freely admits that unknown cultural and paleontological resources may be excavated during construction, yet still fails to conduct the analysis required by 40 C.F.R. 1502.22. This error must be corrected in a supplemental EIS, especially since other tribes have objected to the Tribe's proposal on the grounds that Barstow is within their traditional territories, and not the Tribe's. The FEIS also admits that unknown hazardous material contamination could be discovered during construction earth-moving activities. FEIS § 4.11. The FEIS reveals that the only on-site investigation was a visual inspection of the surface, and no soil sampling was performed. FEIS § 3.11 and Appendix J. Soil contamination is often not apparent at the surface. Unless soil sampling is performed at a depth greater than 12 inches, or the expected depth of construction excavation, whichever is greater, it cannot be determined that undiscovered contamination will not be encountered. This incomplete information must be evaluated pursuant to the requirements of 40 C.F.R. 1502.22.

action when added to other past, present, and reasonably foreseeable future actions ... ." 40 CFR 1508.7. CEQ interprets this regulation as referring only to the cumulative impact of the direct and indirect effects of the proposed action and its alternatives when added to the aggregate effects of past, present, and reasonably foreseeable future actions. Thus, consideration of reasonably foreseeable future actions is essential to a proper cumulative effects analysis. The cumulative impacts analysis in the FEIS is based on a list of 46 commercial and residential development projects that were under construction or reasonably foreseeable. FEIS § 4.13.2. That list, however, was current only as of August 1, 2009. Since then, the City of Barstow has issued hundreds of building permits, including permits for at least nine new commercial buildings and one new industrial building in 2011 and 2012 alone.[8] Other foreseeable development includes a 104 acre development by Sater Oil International less than four miles away,[9] and a 965 acre development five miles away that will employ 2,000 workers in a $1.5 billion, 2.95 million square foot aluminum manufacturing facility.[10]

Of even greater importance is the reasonably foreseeable development of a *second* casino project within a mile of the proposed project. In May, the Chemehuevi Tribe publicly announced that it intends to pursue a casino gaming project in the same 40-acre location as its original proposal.[11] That tribe's original proposal was rejected, along with the original Los Coyotes proposal, in 2008 based on guidance that has since been rescinded, allowing both proposals to be considered again. The Chemehuevi informed the BIA of its intent to pursue the project as early as August 2011,[12] just after the DEIS was issued. Nonetheless, the FEIS fails to even mention the Chemehuevi proposal, much less consider the impacts of a second casino. A Supplemental EIS is necessary to evaluate all new significant information.

Given the severity of the drought, the increasing pressure on the region's aquifer, the amount of development that is currently underway, it is imperative that the FEIS adequately address these issues and comply with Administration directives to consider this critical information as part of the decision-making process.

## II. THE FEIS RELIES ON MITIGATION MEASURES AND PROJECT PARAMETERS THAT ARE UNENFORCEABLE

### A. The FEIS Relies on Mitigation Measures that are Unenforceable

The FEIS' conclusions regarding the significance of numerous impacts is inextricably bound to the assumption that various mitigation measures will be implemented. These conclusions are unsupported if those mitigation measures are not enforceable, because there is otherwise no reason to believe that they will in fact be implemented. Without some reasonable assurance of enforceability, the actual impact of the proposed action cannot be accurately

[8] City of Barstow monthly building permit reports for Jan - Nov 2012 (apparently a mistake, the December report appears to be a duplicate of the November report), and which include information for comparable periods in 2011, are available at: http://www.barstowca.org/index.php/2012-07-08-17-33-15.
[9] See May 19, 2014, City Council minutes, available at: http://barstowcityca.iqm2.com/Citizens/Default.aspx
[10] http://www.desertdispatch.com/articles/barstow-15598-desert-facility.html
[11] Chemehuevi Tribe still looking to pursue off-reservation casino, Indianz.com (May 7, 2014) available at: http://www.indianz.com/IndianGaming/2014/027748.asp.
[12] http://www.desertdispatch.com/articles/barstow-11457-casino-chemehuevi.html

predicted, analyzed, or commented on. In addition, the public has had no opportunity to comment on the adequacy and effectiveness of specific proposed methods of enforcement for each mitigation measure. The FEIS addresses enforceability in a single blanket statement that all mitigation is enforceable because it is either 1) inherent in the project design, 2) under terms of the Municipal Service Agreement (MSA), and/or 3) required under federal or state law. FEIS 5-1. The FEIS also states that alternatives integrate regulatory requirements, terms of the MSA, and Best Management Practices (BMPs) into overall project design to minimize potentially adverse environmental effects. Id. These conclusory statements, however, are insufficient.

### 1. Federal and State Law Are Insufficient to Enforce All Measures

While mitigation measures that might be required under federal law would indeed be enforceable, no federal approvals have yet been issued. The exact nature of the mitigation required in such federal approvals or permits is therefore uncertain. Nor would such federal permits or approvals include all of the mitigation measures relied upon by the FEIS. State law, of course, would generally not apply once the proposed site is taken into trust. To the extent Tribal law is relied upon, it is subject to unilateral change by the Tribe itself, and therefore cannot be considered an independent source of authority to enforce mitigation requirements against the Tribe. In addition, tribal sovereign immunity is a significant limitation on enforcement actions; the effect on the enforceability of mitigation measures must be considered in a Supplemental EIS.

### 2. The MSA is Insufficient to Enforce All Measures

The MSA, to the extent it is enforceable, would include some, but not all, of the mitigation measures assumed by the FEIS. There are, however, significant questions regarding the effectiveness of the MSA. As an initial matter, the MSA is only enforceable by the City of Barstow. The City, of course, has a direct financial interest under the MSA in the Tribe's gaming operations, and therefore would have a conflict of interest with respect to enforcing mitigation requirements. More seriously, the MSA was entered into by the City without the necessary California Environmental Quality Act (CEQA) analysis, and is therefore invalid under California law.

#### i) The MSA Violates CEQA

The Mitigation Section (FEIS § 5) depends heavily on the Municipal Service Agreement (MSA), which was negotiated outside of a tribal state compact. While a tribe does not have to adhere to CEQA, local governments do. The City of Barstow failed: (1) to comply with CEQA prior to the City Council of Barstow performing a legislative act to enter into a binding and questionably enforceable contract with the Los Coyotes Band and Bar West LLC, (2) to provide a CEQA analysis of the proposed project, thus the public nor the city was able to identify an exhaustive list of all possible actions that should be required in the proposed Municipal Service Agreement, and (3) the city entered into an agreement binding it to several definite courses of actions that involved physical changes to the environment where the City of Barstow presently lacked the capacity to provide them. This FEIS fails to addresses the TEIR component found in some tribal state compacts. Further, because the City of Barstow failed to adhere to CEQA,

there is no state environmental report for which the Governor of California can depend upon if or when asked to concur for a two-part determination.

The Municipal Service Agreement between the Los Coyotes Band of Cahuilla and Cupeno Indians and the City of Barstow did not adhere to California environmental law, nor was it entered into in a manner that is consistent with state environment law. The process was not fair, objective or transparent. The City of Barstow as the lead agency was required to prepare or cause to be prepared and certify competition of an environmental impact report on a project as defined, that it "proposes to carry out or approve that may have a significant effect on the environment as defined, or to adopt a negative declaration of its findings that the project will not have that effect." The obligation of the City of Barstow is only exempted from CEQA for the execution of an intergovernmental agreement in tribal state compact ratification language. For example: "…pursuant to the express authority of, or as expressly referenced in the tribal state gaming compact ratified by this section". [13] The MSA is therefore void, and cannot be relied upon in the FEIS.

### 3. Examples of Unenforceable Mitigation Relied Upon by the FEIS

Some mitigation measures have no plausible means of enforcement. To detail just a few examples, mitigation measures to reduce greenhouse gas (GHG) emissions are intended to ensure compliance with State law (indeed, Table 5-1 is titled "Compliance with State emission reduction strategies"), but of course, those measures will not be enforceable under State law once the proposed site has been taken into trust. Measures to mitigate impacts to birds that have special status under State law are not enforceable unless those birds are also protected under the federal ESA or MBTA. FEIS § 5.4(1)-(4). The FEIS purports that archeological discoveries "shall be subject to" Section 106 of the National Historic Preservation Act, but this statute applies by its own terms only to federal agencies, not tribes. FEIS § 5.5. Conclusory statements and blanket assurances that all mitigation measures are enforceable are insufficient to determine whether specific measures are enforceable, and therefore whether the proposed enforcement mechanisms, if any, are adequate and effective. Conclusions regarding the significance of impacts that rely on these mitigation measures are therefore unsupported by the record. See, e.g., FEIS § 4.4 (Biological Resources), 4.5 (Cultural and Paleontological Resources), § 4.13 at 4.13-13 and 4.13-28 (GHG emissions).

## B. The Alternatives Considered are Unenforceable

More fundamentally, the entire FEIS is premised on the enforceability of the different alternatives considered, yet there is no explanation of how that is true. It is irrelevant that certain mitigation measures are "inherent in the project design" if the project design is itself unenforceable, if there is no mechanism to force the Tribe to adhere to the project design for the alternative chosen. The FEIS portrays Alternatives A and B as distinct actions, yet the federal actions involved for each are the same: a two-part determination that tribal gaming on the

[13] The ratification statutes of tribal state compacts provided an exemption from CEQA for local governments negotiating agreements under a tribal state compact. On June 2011 Assembly Bill 2010 authored by Assembly Member Chesbro in ratifying the Upper Lake Rancheria tribal state compact and on October 2, 2011, Assembly Bill 1418 authored by Assembly Member Hall to ratify the Pinoleville Rancheria tribal state compact.

proposed site would be in the best interests of the Tribe and not detrimental to the surrounding community; acquisition of the proposed site in trust for the benefit of the Tribe; and approval of a gaming management contract. The only difference in the alternatives is what the Tribe does afterwards -- build a large casino or a smaller one -- which is not a federal action at all. The FEIS does not explain how the Tribe would, or even could, be required by BIA to build the alternative chosen in the Record of Decision (ROD). In other words, the FEIS does not explain how if Alternative B, the proposed action and identified Preferred Alternative, is chosen in the ROD, the Tribe would be precluded from actually building Alternative A or an even larger casino. Without such an explanation, it is entirely uncertain what the actual effects of the proposed federal actions will be, and there is no way to comment on the adequacy or effectiveness of any proposed enforcement mechanism.

Moreover, it is far from clear that such an enforcement mechanism even exists. No two-part determination has ever been qualified by specific project design parameters, nor is it apparent from the statutory language that the legal authority exists to so qualify a two-part determination, much less to bring an enforcement action for any violation of such a qualification. Similarly, it is not clear that trust acquisitions can impose title restrictions regarding the size of gaming facilities or otherwise limit gaming development on the land acquired to a specific project design. Indeed, any attempt to do so by BIA would raise significant concerns under the Federal trust responsibility to Indian tribes. Finally, approvals of gaming management contracts by the National Indian Gaming Commission are governed by specific statutory standards, none of which include the imposition of mitigation measures or otherwise make a particular project design alternative enforceable. Any post-hoc assertion that "the ROD is enforceable" will be similarly unavailing, because NEPA is a procedural statute only, and a ROD has no enforceable force in and of itself.

### C. The Range of Alternatives is Inadequate

NEPA requires consideration of a reasonable range of alternatives to *federal* action. But without enforceability, the different alternatives examined in the FEIS are merely different scenarios that may or may not play out from the almost infinite range of actions the *Tribe* might take once the proposed federal actions have been taken. For example, in terms of BIA's actions, the reservation campground alternative is no different than the no action alternative: neither involves any federal determination, approval, or action of any kind. It is entirely up to the Tribe to decide whether to build a campground, or not; no action by BIA is required in either case. The reservation casino alternative similarly requires no action by BIA. The real alternatives to BIA action considered in the FEIS therefore collapse into just one action alternative and the compulsory "no action" alternative: BIA will either take the suite of actions (two-part determination and acquisition into trust) necessary to allow gaming at the Barstow site, or not. This is not a reasonable range of alternatives.

The "heart" of an EIS is its alternatives discussion, which must "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts." 40 C.F.R. §§ 1502.1, 1502.14. "The existence of a viable but unexamined alternative renders an [EIS] inadequate." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (quoting *Morongo Band of Mission Indians v. Fed. Aviation Admin*., 161 F.3d 569, 575

(9th Cir. 1998)). As explained above, BIA has really only considered one action alternative. One option is not a "range of alternatives," much less a reasonable range sufficient "to permit a reasoned choice," *Presidio Golf Club v. Nat'l Park Serv*., 155 F.3d 1153, 1160 (9th Cir. 1998). At a minimum, a reasonable range of alternatives must include an off-reservation location, other than the Barstow area, that is within the Tribe's traditional territory, and commercial non-gaming alternatives at these sites (which would involve taking land into trust, but not a two-part determination). Further, the additional site must not be in a location that allows non-gaming alternatives to be rejected out of hand, as was done without justification for the Barstow site.

**1. The Alternatives are Based on an Incomplete Purpose and Need**

The deficiency in the range of alternatives considered originates from a flawed purpose and need statement, which violates NEPA. NEPA regulations provide that an EIS's purpose and need statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. The purpose and need statement is critical because it shapes the scope of the entire review: "The stated goal of a project necessarily dictates the range of 'reasonable' alternatives . . . ." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp*., 123 F.3d 1142, 1155 (9th Cir. 1995) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 192 (D.C. Cir. 1991)). To meet NEPA requirements, an action agency must first reasonably and fairly define the project's purpose. *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) (citing *Citizens Against Burlington*, 938 F.2d at 195−96). The agency, rather than the project proponent, must "tak[e] responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes." *Colo. Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999).

Thus, to craft a legally acceptable statement, an agency cannot simply refer to an applicant's preferences only; it must also take into account its own statutory mandate. "Statutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives." *New York v. Dept. of Transp*., 715 F.2d 732, 743 (2d Cir. 1983). The "statutory objectives" relevant here are the dual findings that the Secretary must make before seeking gubernatorial concurrence: that (1) gaming is beneficial to the Tribe and (2) not detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(a). In accordance with this statutory purpose, the FEIS's purpose and need must incorporate both the need to promote the Tribe's economic development, self-sufficiency, and self-government and the need to avoid detriment to the surrounding community.

Here, BIA's purpose and need statement included the Tribe's economic objectives, but failed entirely to reference BIA's statutory mandate under 25 U.S.C. § 2719(b)(1)(a). See FEIS § 1.2 (Purpose and Need). Nothing in the purpose and need statement refers to BIA's obligation to avoid detriment to the community, and its failure to do so is plain error. This exclusive focus on the Tribe's economic interests, to the exclusion of BIA's statutory duty to avoid detriment to the surrounding community, explains how BIA ended up with an FEIS that considers only one action alternative -- gaming development in the Tribe's preferred location of Barstow. Even the slightest consideration of the duty to avoid detriment to the surrounding community would have

resulted in at least one other action alternative (an off-reservation site not in the Barstow area) being considered.

### 2. The Purpose and Need Misinterprets IGRA

This error is compounded by the extraordinary statement that, "The overlapping purposes of the IRA [Indian Reorganization Act] and the IGRA confirm that *Congress intended* the BIA to foster tribal self-government and self-determination, *through acquisition of land in trust for gaming*." FEIS § 1.2, p. 1-3 (emphasis added). This statement confirms that BIA's understanding of its role under IGRA is radically skewed in favor of off-reservation gaming, and absurdly suggests that the IRA, which Congress passed in 1934, decades before anyone envisioned the rampant tribal gaming the nation now has, was to be used for proliferate gaming far beyond a tribe's aboriginal lands. This interpretation fails to acknowledge that the two-part determination is a *special exception* that places a heavy emphasis on community impacts when a tribe seeks to develop gaming off-reservation near a market it would prefer to be in, but is not otherwise legally entitled to be in. This bias in favor of off-reservation gaming, in turn, contributes to the decision to evaluate what is in reality only one action alternative -- a predetermined decision to take the proposed site into trust for gaming. Recent testimony by Assistant Secretary-Indian Affairs Kevin Washburn confirms that off-reservation fee to trust acquisitions for gaming are rarely granted, and rightly so: in the 25 years since the passage of IGRA, only eight such acquisitions have been made.[14] What Assistant Secretary Washburn did not mention is that three of those eight acquisitions were taken by the current Administration, which announced a legally questionable new policy on June 14, 2011, that dramatically changed long-standing practice and loosened the standards under IGRA. Of the five remaining acquisitions, three were pursuant to the settlement of protracted litigation in the 1990s, and the remaining two acquisitions, in 2005, were within the tribes' historic territory (in the case of Fort Mojave, just three miles from the reservation).

Congress included Section 20 in IGRA to limit the expansion of gaming off-reservation. The expansion of off-reservation gaming was a concern not just for states, but also for the Departments of Justice and the Department of the Interior. See Robert N. Clinton, Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty? 42 AZSLJ 17, 57−72 (Spring 2010) (discussing the state and federal concerns that expanding gaming outside of traditional reservation lands would increase conflicts between states and tribes). In 1985, Congress considered H.R. 3130, which Nebraska Representative Douglas Bereuter introduced to prohibit the granting of trust status to non-Indian lands for gambling activities unless the tribe obtained State and local approval. H.R. 3130, 99th Cong., § l(b), reprinted in Indian Gambling Control Act: Hearings on H.R. 1920 and H.R. 2404 Before the Comm. on Interior and Insular Affairs, Part II, 99th Cong., 1st Sess. 18 (1985). Representative Bereuter explained that extending trust status to land not contiguous to Indian reservations "would create ill feelings . . . in areas where relationships are already strained." Id. at 18. The Departments of the Interior and Justice presented a plan to restrict gaming to the reservations proper and trust lands where the tribe

[14] Testimony of Kevin K. Washburn, Assistant Secretary for Indian Affairs, to the House Subcommittee on Indina and Alaska Native Affairs, Oversight Hearing on "Executive Branch Standards for Land-in-Trust Decisions for Gaming Purposes" available at.http://naturalresources.house.gov/uploadedfiles/washburntestimony09-19-13.pdf.

resides as a community and exercises governmental authority because of their own concerns about the off-reservation expansion of gaming. Id. at 52.

The 100th Congress considered two bills that reflected the intent of Representative Bereuter's earlier bill to defer to the views of the affected state and local communities when gaming on newly acquired lands was proposed. S. 1303, for example, waived the prohibition on gaming if the tribe "obtains the concurrence of the Governor of the State, and the governing bodies of the county or municipality in which such lands are located." S. 1303, 100th Cong., 1st Sess. § 4(b) (1987), reprinted in Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Select Comm. on Indian Affairs, 100th Cong., 1st Sess. 46-47 (1987). The second bill, S. 555, was substantially similar to S. 1303, but was ultimately what Congress adopted as part of Section 20. S. Rep. No. 446, 100th Cong., 2d Sess. 32 (1988).

The clear intent behind the provision was to ensure that off-reservation gaming would be a rare exception allowed under only the highly limited circumstances that there be no detriment to the surrounding community. As the Principal Deputy Assistant Secretary of Indian Affairs testified before Congress in 2004:

> Our review indicates that the role of the Secretary under section 20(b)(1)(A) is limited to making objective findings of fact regarding the best interests of the tribe and its members, and any detriment to the surrounding community. Therefore, while the trust acquisition regulations provide broad discretion, Section 20(b)(1)(A) does not authorize the Secretary to consider other criteria in making her two-part determination, thus limiting her decision-making discretion to that degree.

Testimony of Aurene M. Martin, Principal Deputy Asst. Sec., Indian Affairs, Dept. of the Interior at the Oversight Hearing Before the Committee on Resources U.S. House of Representatives Concerning Gaming on Off-Reservation, Restored and Newly-Acquired Lands (July 13, 2004) (emphasis added).

Thus, this is not a case where the Secretary has the discretion to determine that acquisition is appropriate even if the impacts on the local government are negative because of other considerations. In this sole instance, Congress restricted the Secretary's authority to allow gaming only upon an objective finding that there will be no detriment. He must make an initial, independent determination that gaming will not be detrimental to the local community, which must withstand APA review. The Secretary does not conduct a balancing test—the statute plainly requires the Secretary to determine both that gaming is in the best interests of the tribe "and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). If the Secretary determines that gaming would be detrimental to the surrounding community, the Governor's concurrence is irrelevant—Indian gaming cannot be authorized. And in making this determination, the Secretary must consult with and defer to the views of the local governments, as no one knows better what is beneficial or detrimental to the surrounding community than the local governments. As the Supreme Court has repeatedly recognized, land use is fundamentally a local issue. Where a federal statute requires that a federal official to consult with local

governments to determine whether a federal action will adversely affect the local governments, a finding by the federal official that contradicts the views of the local governments would presumptively be arbitrary and capricious, and not in keeping with the IGRA's model of cooperative federalism.

### 3. New Alternatives Must be Based on a Revised Purpose and Need

In short, BIA's purpose and need statement asserts only the Tribe's preferences, not IGRA Section 20's statutory objectives, and reveals a bias in favor of taking off-reservation land into trust for purposes of gaming as routine, instead of a rare exception. Subjugating statutory objectives to the preferences of the project applicant violates NEPA, see *New York,* 715 F.2d at 743, and prevents the NEPA analysis from addressing those issues that are key to one of the two determinations the Secretary must make. The purpose and need statement must be revised to reflect the Secretary's obligation to avoid detriment to the surrounding community, and a new set of alternatives must be considered in response to the correct purpose and need. Specifically, no set of alternatives is adequate unless a concern for avoiding detriment to the surrounding community is reflected in off-reservation alternatives that include at least one location other than the community targeted by a tribe's proposal, i.e., in this case, outside of the Barstow community.

Thus, by ignoring its statutory mandate to avoid detriment to the community in drafting the purpose and need statement and by focusing solely on the Tribe's proposal to develop class III gaming on the Barstow site, BIA committed errors that fundamentally compromise the entire EIS and violate NEPA. BIA impermissibly drafted the purpose and need statement so as to dictate only one outcome: a high-density casino-resort at the Barstow site, which was the project initially proposed and now is the "preferred option." Development of a casino in Barstow cannot be the only real action alternative considered to address the "underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13.

Furthermore, even if Alternatives A and B were enforceable, they would not represent a reasonable range of alternatives: as the FEIS reveals, the environmental impacts of the two proposals are very similar overall (largely because both alternatives involve development of the entire site). See generally FEIS § 4. This further confirms that the alternatives were chosen with only the Tribe's economic interests as a factor, and not with BIA's statutory mandate to avoid detriment in mind. Indeed, the FEIS states in Section 2.4.2 (Comparison of Environmental Consequences), "Based on the considerations discussed above, Alternative B is the alternative that best meets the purpose and need of the Tribe as it is *the most cost efficient*." Only as an afterthought does the FEIS mention that Alternative B would result in fewer environmental effects. Alternatives that do not present BIA with a real choice do not fulfill BIA's obligations under NEPA.

### 4. Alternatives Must Consider the Probability of Expansion

Finally, future expansion of the proposed project is also a possibility that the FEIS does not consider. There is no enforceable measure preventing the Tribe from building a casino on the proposed site, and then later seeking to have adjoining land taken into trust to expand

operations. There is, however, reason to believe that this is entirely likely to happen. County assessor maps reveal that the Tribe's gaming management contractor (Barwest LLC) owns, in addition to the 23.1 acre site of the proposed project, an additional *85 acres* in parcels contiguous to the 23.1 acre site.[15] There is also an additional Joint Venture Agreement held by the Los Coyotes Band of Cahuilla and Cupeno Indians dated April 6, 2001, and includes projects with the Costanoan Rumsey Carmel Indian Tribe and the Harris, Delorean-Sawyer and Smith Law Firm. There is no mention of this joint agreement or the additional adjoining parcels in the FEIS. The potential for future gaming expansion must be considered in revised alternatives in a Supplemental EIS to avoid improper segmentation of the required NEPA analysis.

## III. THE FEIS FAILS TO ADEQUATELY CONSIDER SIGNIFICANT IMPACTS

### A. Air Quality Impacts Are Inadequately Addressed

As a preliminary matter, the United States Environmental Protection Agency (USEPA) regulations require that the conformity analysis be based upon *"the latest and most accurate emission estimation techniques available."* The FEIS relies on data collected in 2004, 2008 and 2010. The most current version of the motor vehicle emissions model specified by the US EPA and available for use in preparation of revision of State Implementation Plans (SIPs) in California was approved by the US EPA in March 2013. The latest and most accurate emission estimation technique available must be used and the results evaluated in a Supplemental EIS.

As described in Section 4.3, two of the four alternatives ("A" and "B") require Clean Air Act conformity determinations, based on exceedances of de minimis levels of emissions associated with the Proposed Project's operations. The conformity determination, however, is not complete. The FEIS indicates that the conformity determination is "ongoing," and references Appendix P to the FEIS ("Draft General Conformity Determination for the Barstow Casino-Hotel Complex Project"). This conformity analysis, including the process for public comment on the draft and EPA review, should have been completed before the FEIS was published so as to enable an analysis of environmental consequences sufficient to inform the public and agency decision makers. See EPA, General Conformity Training Manual at 1.3.4.2 ("At a minimum, at the point in the NEPA process when the specific action is determined, the air quality analyses for conformity should be done."). Because the conformity determination is incomplete, the FEIS cannot report how the Project will address those operational emissions found to exceed de minimis levels. We know only that "it is anticipated that conformity will be shown through the purchase of offset emission credits." FEIS at 4.3-6, 4.3-7; see also 40 CFR 93.158 (a)(2).

The conformity regulations specify that, although emission credits can be used to offset a project's associated emissions, the conformity determination must specify the "process for implementation and enforcement of such measures". See 40 CFR 93.160(a). The Draft Conformity Determination fails to describe how either of these requirements would be met, indicating only that purchases will be made prior to operation of the Proposed Project. Appendix P at 6. Moreover, a conformity determination cannot be made until the Tribe commits in writing to implement the offset credit program. See 93.160(b). The Draft Conformity

[15] Parcel numbers 0428-171-73, -56, -54, -57

Determination merely asserts the Tribe's willingness to commit to offsets through certification or binding agreement. Appendix P, at 6.

It is impossible to assess the air quality impacts of the Proposed Project prior to the completion of the conformity determination. For that reason, a Supplemental EIS must be prepared after the final conformity regulation has been prepared and made available for public comment. The fee to trust application must therefore be denied unless and until the BIA complies with the Clean Air Act. The BIA has the affirmative responsibility to ensure compliance with the Clean Air Act's conformity determination before any final decision to take land into trust for a gaming acquisition.

### B. Traffic Impacts Are Inadequately Addressed

The traffic study provided in Appendix H by AES is dated 2010. Section 7.1.1 discusses casino trip generation. The report prepared by David Evans and Associates used the Shingle Springs 2002 study to determine trip generation. The Shingle Springs Rancheria is located in El Dorado County, California. The Shingle Springs Rancheria is located on Highway 50, a major highway connecting Sacramento/South Lake Tahoe and Nevada casinos. The County of El Dorado, in a letter to the California Transportation Commission dated August 21, 2002, made it very clear that the draft EIR/EA that depended on the Shingle Springs prior EA was *"fatally flawed."* The County identified two quasi-judicial administrative appeals and one federal lawsuit filed challenging the adequacy of the environmental review of the project and specifically the traffic study.

The Shingle Springs Miwok in that case had to build an 18 million dollar interchange to serve the 381,250 square foot facility, a 250 room high rise hotel, a 3000 car high rise parking structure, 1500 employees, 227, cubic yards of grading in asbestos Laden soils, more than 4 tons of per day garbage generated and at least 100,000 gallons per day demand for drinking water and wastewater disposal. *The casino could not be built without the access of the interchange*. The County of El Dorado filed a NEPA lawsuit on the same day as they sent this letter to challenge a "*fatally flawed"* EIR.[16]

- This FEIS must evaluate the impacts of special event traffic including weekend and evening peak hours for the casino and hotel complex. Evaluate the cumulative impacts given other event venues in the area such as the Out-Let Stores.

- Evaluate the impacts of commute traffic generated by employees of the casino or the potential new aluminum manufacturing plant currently being negotiated, that do not reside in the immediate area of the casino and how that traffic will affect the casino project when it is operating as well as being constructed.

- Identify how transit access or junket bus operations will be operated as part of the property.

[16] Letter dated August 21, 2002 from El Dorado County to Cal Trans, available at: http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/shingle-springs/Aug.%2021%2C%202002%20el%20Dorado%20County%20to%20Cal%20Trans.pdf

- Evaluate traffic safety issues related to the project including access to private property in the area of the project.

- Evaluate the emissions of criteria pollutants from the expected casino traffic and construction activities and compare to the Regional thresholds.

Last but far from least, the traffic study is dated 2010. This study is outdated and does not reflect current available data. The freeway segment volumes from Cal Trans used numbers from 2008. This report, as the 2002 ER for trip generation, and the out dated 2008 Cal Trans freeway segment volumes presents a FEIS that is *"fatally flawed."*

Finally, traffic noise impacts are also not properly addressed. The FEIS concludes that neither alternative A nor B will result in significant adverse effects to the noise environment. FEIS 4.10-5 and -6. For alternative A, this conclusion is reached from a predicted 69.4 CNEL dBA at 50 feet from the roadway, attenuated at twice that distance to the nearest sensitive receptor by 4 to 6 dBA, to what the FEIS calculates is 64.4 dBA, which is lower than the 65 CNEL noise standard. The correct arithmetic, of course, is that 69.4 dBA reduced by 4 to 6 dBA is 63.4 - 65.4 dBA, which at the high end of the range does in fact exceed the noise standard of 65 dBA. A significant adverse noise impact will therefore result, which the FEIS does not admit.

### C. Water Resource Impacts Are Inadequately Addressed

As discussed above, water throughout California is a scarce resource that must be properly managed. The FEIS discusses the Tribe's use, but not a management plan that encompasses the off-trust lands community or the affected water basins. Lahontan Water Basis encompasses 33,131 square miles. Water usage in the Barstow area can affect the pristine waters of the Lake Tahoe area. The report prepared by Analytical Environmental Services (AES) is dated 2007. This report does not take into consideration the significant and historic drought conditions California is currently experiencing or the fact the drought projections are forecasted to last for the next 10 years. The proposed project is located in the Mojave Desert; the fact that the EIS fails to address these overarching concerns clearly renders the EIS inadequate. Our Governor has requested volunteer conservation measures, but warned potential required measures may be in our states future. Some of our cities have already adopted stringent standards for water usage. Yet the EIS ignores these issues entirely. Indeed, the construction phase of the casino requires the watering down of the areas twice daily in order to preserve air quality. How much and where in the analysis is the total volume of water listed for this usage? How do these measures comport with gubernatorial directives?

Careful consideration of the relationships between *water quality and water quantity* must be considered for planning activities. The FEIS assumes that city water supplies are assured and does not consider pollution threats to that supply. Projects must be considered in light of their actual potential beneficial uses, and water quality problems associated with human activities. The unincorporated community of Hinkley is approximately 14 miles or less from the proposed Los Coyotes project. The community is commonly associated with the Pacific Gas and Electric legal case with California's EPA. The legal case identified a higher than normal cancer rate and

established an ongoing cleanup of contamination of ground water from *hexavalent chromium* that continues today. This contamination appears to be a widespread problem and not necessarily isolated to the small community of Hinkley. While that pollution plume has been generally migrating west, it has moved unpredictably and it is feared that increased groundwater pumping in the Barstow area could cause the plume to migrate towards Barstow. The FEIS does not consider any possibility that the local water supply could be affected. A Supplemental EIS is necessary to consider recent threats to the water supply of the City of Barstow from perchlorate,[17] nitrate,[18] and hexavalent chromium[19] contamination. These recent developments regarding incidents of contamination demonstrate that the information regarding these and potentially other sources of contamination is not completely known, and therefore must be evaluated as required by 40 C.F.R. 1502.22 (Incomplete or Unavailable Information).

The City of Barstow is currently negotiating an agreement with Scuderia Development of Irvine for a 1.5 billion dollar aluminum manufacturing plant. This will introduce as many as 2,000 high skilled jobs into the community. The Tribe's report dated 2007 does not reflect the current and projected increases in population and consequential demands for water or possible future water shortages due to drought, global climate change and contamination of some water supplies by toxic substances. The FEIS fails to consider this foreseeable future action and provide analysis for the increase in water use, traffic and air quality impacts. Major decisions regarding water usage by the local and regional water boards have the potential to be compromised due to the nature of tribal sovereignty and trust land status. In addition, the Chemehuevi Tribe recently announced its intent to proceed with their original proposal for a 40 acre casino in the immediate vicinity of the proposed project.

### D. Socioeconomic Impacts Are Inadequately Addressed

The proposed fee to trust acquisition of the 23.1 acres affects landowners, businesses and local and state governmental entities. The creation of federal trust lands for the Los Coyotes Band of Cahuilla and Cupeno Indians of Cahuilla and Cupeno Indians causes a loss of revenue to local and state general funds. Activity on the tribal land will be exempt from local and state taxation. The Tribe will neither pay corporate income tax on its profits nor collect state and local sales taxes on goods and services that are purchased and used or consumed only on the 23.1 acres. The tribal enterprise will not be required to pay state and local sale taxes on products it uses at the casino resort, including both big ticket items (slot machines and gaming tables, hotel furniture, ovens and other kitchen appliances, etc.) and ongoing purchases (cleaning products, office supplies, worker uniforms). In addition, a Supplemental EIS is necessary to consider the effect of recently promulgated leasing regulations that exempt all non-Indian activity taking place within Indian country from generally applicable state and local taxation. 25 C.F.R. 162.017 (77 Fed. Reg, 72440, Dec. 5, 2012).

[17] Desert Dispatch, Report reveals extent of perchlorate plume (April 16, 2010), available at: http://www.desertdispatch.com/articles/report-12788-reveals-barstow.html.
[18] Barstow City Council Agenda (selection of groundwater remediation contractor)(April 7, 2014) available at: http://barstowcityca.iqm2.com/Citizens/Detail_LegiFile.aspx?MeetingID=1896&ID=1574.
[19] Desert Dispatch, More Hinkley homes in toxic plume's path (August 5, 2013) available at: http://www.hinkleygroundwater.com/more-hinkley-homes-in-toxic-plumes-path/.

The FEIS failed to consider the fiscal impact to the State of California. Federal Indian policy that provides tax exemptions will significantly impact the local and regional tax revenues thus affecting public services. The dollars spent at the proposed casino come at the expense of other consumer spending within the state. Net State and local tax revenues are certain to decline. Additionally, as a result of the 2010 decision by the Ninth Circuit Court, *Rincon v. Schwarzenegger*, in which the Court ruled that revenue sharing with the state was an impermissible tax. There can be no revenue share to the state general fund in a tribal state compact between California and any tribe. Thus, future compacts cannot recoup the significant annual loss of revenues to the State.

This raises a significant question regarding the legality of the mitigation in the Municipal Service Agreement (*See*-Appendix D section 13) if it is consistent with the Indian Gaming Regulatory Act. The Municipal Service Agreement provides for a 4.3% gaming revenue share payment of the net win. This is not a payment of in lieu of sales tax or property tax.[20] This is a payment that will be made to the City of Barstow in addition to all other payments provided for in the agreement. The calculation of the net win will include both Class II and Class III electronic games of chance. It would appear the Tribe is willing to make whole the City of Barstow but not the loss of revenue to local merchants and other businesses or to the State of California tax payers. This appears as undue influence of a gaming interest on the elected officials of the City of Barstow. Moreover, there is substantial question whether these provisions are legal under IGRA, which potentially means that the Tribe could challenge the provisions leaving nothing for the City in the future. Notably, there has been no approval of the MSA as required by 25 U.S.C. § 81.

The creation of new Indian lands for an off-reservation casino creates a significant loss of property taxes, loss of sales tax and other revenues resulting in a net decrease in State General Fund revenues. Off-reservation gaming is a statewide issue. This directly affects the state's ability to provide or maintain social service programs that many Californians (no matter where they live in state) have come to rely upon.

The FEIS erroneously assumes that the casino will be staffed by the region's currently unemployed, as opposed to in-migration of new workers. Although casino construction and operation can mean job creation and growth, that is not always the case. Of the 16 regressions run in an Illinois study, only three municipalities showed a statistically significant increase in employment or decrease in unemployment.[21] The same regressions indicated that for every job created, local businesses lost one or more jobs. Id. Another study, conducted by the New York Times found that 27 out of 57 counties analyzed experienced a net job loss. Id.
The relationship between casinos and job creation is a more complicated question than the EIS suggests:

> The relationship between casinos and employment involves the location of the casino and the required skill level of its work force.

[20] The Tribe was authorized to operate 2,250 electronic gaming devices. The Tribe was to pay the State General Fund 16% of gaming revenue on $100 million dollars, calculated on both class II and class III gaming devices. Should the revenue exceed 100- 200 million dollars the percentage increased to 20% over 200 million dollars the Tribe was to pay the state of California 25% gaming revenue share on the net win.
[21] http://www.picapa.org/docs/Plan_Reports/2008_2012_plan.pdf

> The general premise is that casinos increase employment because a casino's operation requires labor and this labor will come from the local area, thus reducing local unemployment. The question to ask is not only whether casinos decrease unemployment, but also for whom they decrease unemployment. Most casino jobs require some skill, be it accounting, dealing cards, security, or other expertise. If a casino is planning to move to a rural area that has a relatively less-skilled work force, the casino probably will draw skilled labor from outside of the area.[22]

It may be the case that there is sufficient skilled labor in the Barstow region, but that issue has not been explored, so there is no basis for assuming that to be the case. The FEIS is deficient on this important issue and must be revised.

## IV. THE PROPOSED SITE SHOULD NOT BE TAKEN INTO TRUST

This proposed project includes an off-reservation acquisition for gaming. Thus the 25 C.F.R. 151 regulations require that the Secretary shall consider the location of the land relative to state boundaries and the distance from the boundaries of the Tribe's reservation as that distance increases. *The proposed project site is approximately 150 miles[23] from the Tribe's reservation established under the authority of the Act of January 12, 1892, (26 Stat. 712-714 c.65).* Executive Order No. 1914, dated April 13, 1914 transferred land from the Cleveland National Forest to the Los Coyotes Reservation. This is a significant distance from the Tribe's established reservation.

The FEIS analysis requires a *Carcieri* Review of the Tribe. The Tribe has no significant historic or modern connection to the lands chosen for the casino development. The 1888 Senate Report No. 74, 50th Congress, 1st. Session, is very clear about the location of the Los Coyotes Indian Village. It goes on to say, *"Here is a village of eighty four souls living in a mountain fastness which they so love they would rather die than leave it, but where the ordinary agencies and influences of civilization will never reach, no matter how thickly settled the regions below may come."* There is no mention of any other location in which this tribe has continuously resided since time memorial. The 1888 survey was a thorough report and did not identify any Indians residing in, near or around the area of the present day location of the City of Barstow. The Tribe has resided in Northern San Diego County for more than 126 years that demonstrates significant historical presences. It would be a long walk, over several days carrying supplies for survival from the Los Coyotes Reservation in San Diego County to the City of Barstow in historic times since tribes did not have or keep horses prior to the arrival of the Spanish.

Finally, any decision to take land into trust in the Barstow area must analyze the competing claims of tribes that assert that Barstow is within their aboriginal territories, as well as that of any acknowledgment petitioner groups that may have similar claims.

[22] http://research.stlouisfed.org/publications/review/04/01/garrett.pdf
[23] https://www.google.com/#q=Distance+from+Warner+Springs+to+Barstow+CA[google.com]

## V. A TWO-PART DETERMINATION IS PREMATURE

The Secretary of the Interior's determination must reflect the process for a land acquisition specific for gaming and verify completion of the requirements to consult with the state, state agencies, other local political subdivisions and affected tribal governments of the proposed off-reservation casino. However, the nature of a governor's concurrence is very different. The governor of a state has a constitutional obligation to ensure that state laws are enforced and that gambling policy ensures the welfare of the public and the good operation of government free from corruption.

- Is the proposed off-reservation casino consistent with state gaming policy?
- Has California environmental law been adhered too?
- Has the local government entered into an intergovernmental agreement in a manner that is consistent with State environmental law, was the process fair, objective and transparent?

Governor Brown has already been faced with two very controversial off-reservation casino projects in which he has concurred. Those projects like this one will create new sovereign authority over land that has been under the authority of the State of California since 1850. Without doubt, this creates a significant change in the human environment – including impacts in areas affecting social well-being, law enforcement, and a host of other government and state agency services and environmental impacts for the sole purpose of a casino that will undermine our States current gaming policy.

As a result of the Governor's prior concurrence legal challenges against the proposed casinos are currently pending in both federal and state court. In the state cases, the question of whether the Governor of California had the authority under California law to concur in the Secretary's two- part determination to take the land into trust has already been through Superior Court and is currently before the Court of Appeals. There is no doubt this case will reach to the California Supreme Court. This case will directly affect this proposed fee to trust transaction.

Moving this application and FEIS is pointless until there is a determination by the Courts *if* the Governor of California has the authority to concur in a two-part determination.

## CONCLUSION

As set forth above, the FEIS is flawed and an insufficient basis on which to predicate a final decision. In addition to having numerous inconsistencies and deficiencies, the document must be supplemented in order to address changed circumstances. Enforceability must be addressed in a Supplemental EIS. Finally, the FEIS's purpose and need statement must be corrected and the range of alternatives expanded to include other site alternatives. For all of the above reasons, *Stand Up For California* and *Barstow Christian Ministerial Association* believe the FEIS to be "fatally flawed" and ask that you take a hard look and deny the requested fee-to-trust application and Two-Part Determination.

Sincerely,

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