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Picayune Rancheria of Chukchansi Indians

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS, a federally-recognized Indian Tribe,

Petitioner and Plaintiff,

v.

EDMUND G. BROWN, JR., in his capacity as Governor of the State of California, CALIFORNIA DEPARTMENT OF TRANSPORTATION, CALIFORNIA DEPARTMENT OF FISH AND GAME, COUNTY OF MADERA, CITY OF MADERA, and DOES 1 through 50, inclusive,

Respondents and Defendants.

NP FRESNO LAND ACQUISITIONS LLC, a California limited liability company,

Real Party in Interest.

Case No.

PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This action involves the failure of respondent and defendant Edmund G. Brown Jr., Governor of the State of California ("Governor"), to comply with the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq.*, when, on August 30, 2012, he issued his official concurrence approving the proposal by the North Fork Rancheria of Mono Indians ("North Fork Tribe" or "Tribe") to develop a massive *off-reservation* casino and hotel resort complex approximately 40 miles away from the Tribe's existing rancheria lands near the town of North Fork. As described herein, the Governor's action, in effect, was the official action by which the State of California approved the de-annexation of its territory, so that it may be taken into federal trust for the Tribe for the purpose of establishing the off-reservation casino/hotel resort complex.

2. Petitioner and plaintiff Picayune Rancheria of Chukchansi Indians ("Picayune Tribe") brings this petition for a writ of mandate to require the Governor to void, rescind, and set aside his concurrence, and to seek preliminary and permanent injunctive relief to halt implementation of the North Fork Tribe's casino/hotel resort and all State and local actions taken in furtherance thereof until the Governor properly complies with CEQA.

PARTIES

3. Petitioner and plaintiff Picayune Tribe is a federally-recognized Indian Tribe located in Coarsegold, California, which is in Madera County. The Picayune Tribe owns and operates its on-reservation Chukchansi Gold Resort and Casino, a class III gaming facility, on its rancheria lands, which is located approximately 30 miles from the site of the proposed casino/hotel resort. Ancestors of the Picayune Tribe used and occupied lands within the vicinity of the proposed project and the Picayune Tribe continues to have a cultural connection to the area. The majority of the Picayune Tribe's members live in Madera County, and the Picayune Tribe provides governmental services throughout the County. Several members of the Picayune Tribe have homes within the vicinity of the site of the proposed casino/hotel resort. Thus, the Picayune Tribe has a strong interest in maintaining a quality environment in Madera County, including on the site of the proposed casino/hotel resort, as demonstrated by the tribe's establishment of a tribal environmental department, the numerous grants that the tribe has received to improve the quality of the environment and the wide range of

environmental issues in which the tribe has become involved. The Picayune Tribe also has a strong interest in having State law enforced to protect the environment.

4. Respondent and defendant Edmund G. Brown, Jr. is Governor of the State of California. He is sued in his official capacity only. The Governor's approval of the proposed casino/hotel resort on behalf of the State will allow the North Fork Tribe to construct and operate its proposed casino/hotel within the State of California.

5. Respondent and defendant California Department of Transportation ("Caltrans") is the state agency responsible for improving transportation mobility across California. Among other things, Caltrans is responsible for approving alterations or improvements to California's highways, including State Route 99, which runs adjacent to the casino/hotel resort complex.

6. Respondent and defendant California Department of Fish and Game is responsible for managing California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public. The development of certain off-site infrastructure for the casino/hotel resort would require the approval of the Department of Fish and Game.

7. Respondent and defendant County of Madera is a general law county located in central California. The proposed casino/hotel resort complex is located in southwest Madera County. On August 16, 2004, Madera County and the Tribe signed a memorandum of understanding whereby the Tribe agreed to provide compensation to the County to purportedly mitigate potential and perceived impacts of the proposed casino/hotel resort.

8. Respondent and defendant City of Madera is a general law city located in southwest Madera County, approximately seven miles south of the proposed casino/hotel resort complex. On October 18, 2006, the City of Madera and the Tribe signed a memorandum of understanding whereby the Tribe agreed to provide compensation to the City to purportedly mitigate potential and perceived impacts of the proposed casino/hotel resort.

9. Real party in interest NP Fresno Land Acquisitions LLC is a California limited liability company and is the current owner of the property for the proposed casino/hotel resort complex, which property would be placed into federal trust for the Tribe.

10. Petitioner is ignorant of the true names and capacities of respondents and defendants sued as Does 1 through 50, inclusive, and therefore sues these respondents and defendants by fictitious names. Petitioner will request leave to amend this Petition and Complaint to allege their true names and capacities when ascertained. Petitioner is informed and believes the respondents and defendants sued as Does 1 through 50 were responsible in some manner for the damages alleged in this Petition and Complaint.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to its general subject matter jurisdiction, as well as section 1085 of the California Code of Civil Procedure and section 21168.5 of the California Public Resources Code.

12. Venue is proper in this Court because the injury has occurred, and will continue to occur, in the County of Sacramento. The Governor's decision effectively cedes state sovereignty over the Madera site, which sovereignty is exercised in Sacramento County. Furthermore, several of the respondents and defendants, Governor Brown, Caltrans, and the Department of Fish and Game, reside in Sacramento.

13. Petitioner has performed any and all conditions precedent for filing the instant action and has exhausted any and all available administrative remedies to the extent required by law.

14. Petitioner has no plain, speedy or adequate remedy in the ordinary course of the law unless this court grants the requested writ of mandate to require the Governor to comply with his duties and set aside his approval. In the absence of such remedies, the siting, construction and operation of the proposed casino/hotel resort at the Madera site will occur in violation of law.

15. If the Governor's concurrence is not set aside, and if Respondents are not ordered to cease all activities in support of the proposed casino/hotel resort, Petitioner will suffer irreparable harm from which there is no adequate remedy at law in that, contrary to the requirements of state law, the North Fork Tribe will be authorized to construct and operate its proposed casino/hotel resort without adequate CEQA environmental review and without the evaluation and imposition of feasible alternatives and/or mitigation measures.

FACTUAL BACKGROUND

16. The North Fork Tribe seeks to develop a casino/hotel resort on approximately 305 acres of *off-reservation* land in Madera County, California (the "Madera Site"). The Madera Site is located on land that is presently privately-owned in southwest Madera County, just north of the City of Madera and adjacent to State Route 99. The site is mostly flat agricultural land, including dry land crops, vineyards, and orchards. A historic alignment of Schmidt Creek transects the property from the southeast corner of the site diagonally to the northwest. The site also contains seasonal wetland depressions. The Madera Site is located approximately 40 miles from the North Fork Tribe's 80-acre existing rancheria, which is held in trust for its benefit by the United States.

17. The casino/hotel resort that the North Fork Tribe proposes to site, construct and operate at the Madera Site would consist of, among other things:

- a main gaming hall, with a casino floor of approximately 68,150 square feet that would include up to 2,500 gaming devices, table games, and bingo, and retail space, banquet/meeting space, and administrative space;
- food and beverage services, that would consist of fifteen food and beverage facilities, including a buffet, six bars, three restaurants, and a five-tenant food court;
- a multi-story hotel with 200 rooms, a pool area and a spa; and
- approximately 4,500 spaces for parking, including a multi-level parking structure.

18. As discussed below, development of the proposed casino/hotel resort would cause numerous potentially significant adverse environmental effects.

The Federal Approval Process

19. Under federal law, a tribe seeking to have the federal government place land into trust for the tribe for the purpose of developing a casino must comply with two sets of legal requirements: those imposed by the Indian Reorganization Act, 25 U.S.C. § 465 and its implementing regulations at 25 C.F.R. Part 151 ("IRA"), and those imposed by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA").

20. First, the IRA authorizes the Secretary of the Interior to acquire and hold lands in trust for Indian tribes in the name of the United States.

21. Second, the IGRA provides a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. Under Section 20 of IGRA, 25 U.S.C. § 2719, tribes are prohibited from engaging in any gaming activities on land acquired after October 17, 1988 unless the land satisfies certain criteria. One criterion, commonly referred to as the "two-part determination," requires the Secretary to determine, prior to taking the land into trust for the Indian tribe, that it would be in the best interest of the tribe to establish gaming on such land and, second, that establishment of gaming on such land would not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).

22. Section 20 of the IGRA further requires that, in addition to the Secretary making a favorable two-part determination, the Governor of the state in which the land is located must "concur" with the Secretary's two part determination. If the Governor fails to concur, or ask for an extension of time, within one year from the Secretary's favorable two part determination, the project will not move forward.

23. Neither federal law nor state law authorizes the Governor to avoid or otherwise abdicate applicable state procedural and substantive law requirements when issuing a concurrence under IGRA. In other words, the Governor must, consistent with state law requirements, determine that the proposed gaming establishment on the newly acquired lands would be in the best interest of the applicant Indian tribe and its members and that the proposed gaming activities would not be detrimental to the surrounding community.

24. Because the Secretary of the Interior's approval of trust acquisitions constitutes a major federal action, the Department of the Interior must also comply with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Pursuant to NEPA, before the proposed site may be taken into trust, the Department of the Interior must complete an environmental study and issue findings. In circumstances when the proposed federal action has the potential to significantly affect the quality of the human environment, the Secretary must prepare an environmental impact statement before approving the federal action.

The Tribe's Proposal to Acquire Off-Reservation Land for a Casino/Hotel Resort

25. On March 5, 2005, the North Fork Tribe submitted a request to the Department of the Interior to acquire the presently privately-owned Madera Site for purposes of the Tribe establishing an off-reservation casino/hotel resort complex.

26. On October 27, 2004, the Department of Interior commenced the required NEPA process by publishing a *Notice of Intent to Prepare an Environmental Impact Statement* in the Federal Register.

27. The Department of Interior initially issued a Draft Environmental Impact Statement in February 2008 and later issued a Final Environmental Impact Statement in February 2009 (collectively, the "EIS"). The EIS identified a number of potentially significant environmental impacts that the proposed development and operation of the casino/hotel resort complex could cause, including, but not limited to:

- Construction activities, such as grading, excavation and travel on unpaved surfaces, could lead to significant construction related emissions, including particulate matter emission;
- Operational activities could result in emissions of reactive organic gases (ROG) and nitrogen oxides (NOx) at levels more than twice the thresholds of significance established by the San Joaquin Valley Air Pollution Control District;
- Operational activities could also generate significant greenhouse gas emissions contributing to global climate change;
- Traffic congestion at intersections in the vicinity of the casino/hotel resort could result in significant, localized carbon monoxide impacts (rural residences);
- Construction and operational activities could generate noise levels that would significantly affect nearby sensitive receptors;
- Improper operation of an onsite wastewater treatment plant could generate significant odors and represent a nuisance to nearby residences;

- Bus and diesel truck travel to and from the gaming facility, especially in loading areas, could result in significant concentrations of toxic air contaminants;
- Development of the project could displace habitats and cause significant impacts to wildlife species, including Swainson's hawk (a California-threatened species), hoary bat (a California species of concern), and burrowing owl (a California species of concern);
- Vegetation removal activities associated with project construction could significantly affect active migratory bird nests;
- Discharges from the onsite wastewater treatment plant could adversely impact Schmidt Creek and downstream aquatic habitat;
- Runoff from over 45 acres of new impervious surfaces, including the casino, other buildings, parking lots, and internal roads, has the potential to cause significant downstream flooding;
- Groundwater pumping for domestic use, emergency supply, and fire protection could lower the water table and adversely impact nearby groundwater wells;
- Traffic generated by the casino/hotel resort complex could cause unacceptable levels of service to five freeway segments, one roadway segment, and ten intersections; and
- The new resident population created by new employees moving to Madera County and the City of Madera could increase demands on law enforcement, judicial, and correctional services.

28. To address these and other potentially significant impacts, the EIS identifies a number of monetary payments that the Tribe would make to various state and local agencies. For example, to address potentially significant transportation impacts, the EIS states that the Tribe shall place funds "in an escrow account for use by the governmental entity with jurisdiction over the road to be improved so that the entity may design . . ., obtain approvals/permits for, and construct the recommended road improvement. . . ." Of course, after the Madera Site has been placed into federal trust, the applicable state and local public agencies, including the City of Madera, Madera County, and Caltrans, will have

no further legal authority over the project site itself and will have no significant ability to shape the size or characteristics of the casino/hotel resort complex to address potentially significant traffic impacts.

29. Similarly, to address potentially significant impacts on governmental services (fire protection, law enforcement, schools), the EIS states that the Tribe has agreed, pursuant to memoranda of understanding with the City of Madera and Madera County, to provide certain funding to the local jurisdictions. This funding, however, would not fully cover the anticipated cost of the governmental services. For example, the total capital costs for fire protection demanded by the casino/hotel resort would be between $2.7 and $3.5 million. However, pursuant to a memorandum of understanding with Madera County, the Tribe has agree to provide less than $2 million for constructing and equipping a fire station. Although the EIS recommends that the Tribe provide additional funding, there is no assurance that such funding will cover the shortfall or fully mitigate the impacts on governmental services.

30. The EIS also states that certain state or local permitting requirements may apply to the casino/hotel resort complex depending on which of various development options the Tribe decides to pursue. For example, one option that the Tribe may select for wastewater treatment is to construct an off-site pipeline to connect to the City of Madera's sewer system. The EIS acknowledges that the pipeline could require a Section 1600 permit from the California Department of Fish and Game. *See* Fish & Game Code § 1600. Additional permits and approvals would likely be required from the City of Madera, Madera County, and/or Caltrans. While these agencies would usually consult and rely on a CEQA document prepared by the lead agency, here no such document has been prepared.

31. By letter dated September 1, 2011, Larry Echo Hawk, Assistant Secretary for Indian Affairs, informed Governor Brown that he had made a favorable "two-part determination," on behalf of the Secretary pursuant to authority delegated to him, as required by IGRA section 20(b)(1)(A), and requested that, pursuant to applicable state laws, Governor Brown approve, by his concurrence, the siting and development of the proposed casino/hotel resort complex at the Madera Site.

32. Assistant Secretary Echo Hawk's 2011 letter included findings supporting the two-part determination. Like the EIS, these findings identified a number of potentially significant

environmental impacts that could result from the development of the North Fork Tribe's casino/hotel resort.

Governor Brown's Approval

33. Notwithstanding that the Governor had been repeatedly informed of such potentially significant environmental impacts by Petitioner and by others, on August 30, 2012, in a letter to the Secretary of the Interior, Governor Brown approved the siting and development of the casino/hotel resort complex by indicating his official concurrence that the Madera Site should no longer be subject to the laws of California and applicable state and local authorities and instead should be placed in trust for the North Fork Tribe for the purpose of developing the complex. Governor Brown failed to address or analyze any environmental issues in his approval letter to the Secretary of the Interior. Notably, had the Governor refused to provide this approval (or failed to respond to the Secretary's favorable two part determination), his refusal or failure to act would, under the federal statute, have terminated all further federal and state consideration of the project and thereby would have avoided any and all environmental impacts associated with the proposed casino/hotel resort complex.

34. The Governor issued his August 30, 2012 decision without first formally reviewing and considering the potential environmental impacts of the project, without preparing and/or considering an environmental study as required by CEQA, without providing pertinent California state and local agencies and the general public with an opportunity to participate in the CEQA environmental review process, and without ensuring that all feasible mitigation measures would be applied to the proposed development and implemented in order to avoid or minimize the potentially significant environmental impacts of the casino/hotel resort complex.

35. Governor Brown issued his August 30, 2012 decision despite the petitioner Picayune Tribe's request that, before approving the siting, construction and operation of the proposed casino/hotel resort at the Madera Site, the State and/or the Governor's office prepare an environmental impact report complying with CEQA. Specifically, in an August 10, 2012 letter, the Picayune Tribe advised the Governor that he must "consider an environmental document that meets CEQA requirements" before making his determination. Five days later, on August 15, 2012, the Picayune Tribe sent the Governor a second letter setting forth additional reasons why the Governor must comply

with CEQA. The Tribe's two letters to the Governor are attached hereto and incorporated by reference. The Governor never responded to these letters and failed to comply with his obligations under CEQA.

FIRST CAUSE OF ACTION

Violation of CEQA – Public Resources Code § 21000 et seq.

36. Petitioner re-alleges and incorporates herein by reference the allegations contained in paragraphs 1 through 35, above as if fully set forth herein.

37. CEQA was enacted to ensure the long term protection of the environment and be the guiding criterion in public decisions. Pub. Res. Code § 21001(d). Pursuant to CEQA, the state's policy is to "require governmental agencies *at all levels* to develop standards and procedures necessary to protect environmental quality" and further to "require governmental agencies *at all levels* to consider qualitative factors as well as economic and technical factors and long-term benefits and costs in addition to short-term benefits and costs, and to consider alternatives to proposed actions affecting the environment." Pub. Res. Code §§ 21001(f) and (g). The CEQA process is intended to protect not only the environment, but also informed self government.

38. In approving the siting and development of the casino/hotel resort complex at the presently privately-owned Madera Site, the Governor was required to comply with CEQA. The Governor's office was not exempt from CEQA requirements.

39. When California courts are confronted with the question of whether CEQA applies to a particular decision or action by a particular agency or official, the California Supreme Court long ago declared that CEQA must be interpreted so as to afford "the fullest possible protection to the environment within the reasonable scope of the statutory language." In construing CEQA's reach with respect to all levels of state and local government, the Supreme Court has further declared that CEQA's purpose is "not to generate paper, but to compel *government at all levels* to make decisions with environmental consequences in mind."

40. The Governor's determination constitutes an "approval" of a "project" that, under CEQA, must be the subject of the CEQA environmental review process. The CEQA Guidelines broadly define "approval" as a "decision by a public agency which *commits* the agency *to a definite course of action in regard to a project* intended to be carried out by a person . . . ." CEQA Guidelines

§ 15352(a). The Governor's determination here is an "approval" under CEQA because it is the final state action that is required before a definite course of action can ensue – *i.e.*, official authorization by the State of California to allow the federal government to take the land into trust so that a very sizable gaming/hotel resort complex may be developed on what is now off-reservation land. Once the Governor's determination is promulgated, future CEQA environmental review of the proposed development complex is thereafter foreclosed, because the site will then become qualified to be taken into trust by the Secretary of the Interior for on-reservation gaming. Moreover, once the Madera site becomes reservation land, the Government Code exempts the later negotiation and approval of a tribal-state gaming compact from CEQA environmental review. Gov't Code §§ 12012.5(f) and (g).

41. CEQA broadly defines "project" as "an activity which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." Pub. Res. Code § 21065. The CEQA Guidelines provide that "project" means "the whole of an action," and "refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies." CEQA Guidelines §§ 15378(a) and (c). The Governor's approval of the siting of the North Fork Tribe's casino/hotel resort on off-reservation land at the Madera Site was a project approval that is subject to CEQA because his approval will cause potentially significant direct and indirect physical changes to the environment.

42. Consequently, the broad reach of CEQA applies to the Governor's determination, and until the Governor complies with the provisions of CEQA, his determination that allows development of the casino/hotel resort is in direct violation of state law, and is void.

43. Despite several requests, the Governor's office has refused to provide a reason or rational as to why the Governor failed to comply with CEQA in issuing his determination.

44. Any further actions by Respondents to permit, approve, or otherwise authorize the siting, construction, or operation of the proposed casino/hotel resort complex and any improvements related thereto, without first considering and taking into account an adequate environmental document and without imposing all feasible mitigation measures as described in that environmental document, violates CEQA.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief from Respondents as follows:

1. That the Court issue a writ of mandate ordering the Governor to set aside his August 30, 2012 concurrence decision and mandating that the Governor comply with CEQA before making any further decisions regarding the proposed casino/hotel resort.

2. That the Court enjoin Respondents from approving any activities related to the siting, construction, or operation of the proposed casino/hotel resort at the Madera Site, or taking any actions in support thereof, until the casino/hotel resort has been subject to legally sufficient CEQA review.

3. That the Court grant Petitioner its costs of suit and its reasonable attorneys' fees including out-of-pocket disbursements.

4. That the Court grant such other and further relief as it finds just and proper.

Dated: November 30, 2012

AKIN GUMP STRAUSS HAUER & FELD LLP

By Carlyle W. Hall, Jr. /aa
Carlyle W. Hall, Jr.
Attorneys for Petitioner and Plaintiff Picayune Rancheria of Chukchansi Indians

VERIFICATION

I, Dr. Karen Wynn, an enrolled member of Picayune Rancheria of Chukchansi Indians ("Picayune Tribe"), declare as follows:

I am the Treasurer of the Picayune Tribe, which is a petitioner and plaintiff in this action. I have read the foregoing Petition and Complaint and know its contents. The facts alleged in the Petition and Complaint are true of my own knowledge and belief, except as to those matters alleged on information and belief, and as to those matters I believe them to be true.

Executed this 29th day of Nov 2012, at Coarsegold, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

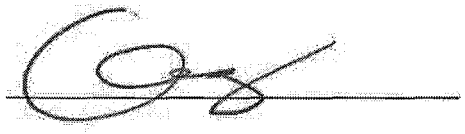

EXHIBIT 1

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August 10, 2012

The Honorable Jerry Brown
Governor of California
State Capitol
Sacramento CA 95814
Attention: Jacob Appelsmith, Senior Advisor

Re: The Governor's Concurrence in the Proposed North Fork Rancheria of Mono Indians Off-Reservation Casino Project Must Be Based on An Environmental Document That Complies with CEQA.

Dear Governor Brown:

On behalf of our client, the Picayune Rancheria of the Chukchansi Indians (Picayune Rancheria), we respectfully request that you consider the important legal issues raised by this letter about the complete failure of the agency decision making process to date to follow the California Environmental Quality Act ("CEQA") (Public Resources Code sections 21000 et seq.) and the need for you to consider an environmental document that meets CEQA requirements before you decide whether to concur in the Secretary of the Interior's September 1, 2001 Determination. The Secretary's Determination approved the North Fork Rancheria of Mono Indians of California's ("North Fork") development of extensive casino gaming activities and related resort facilities at a 305-acre site in the unincorporated area of Madera County ("the Madera site"). If you concur with the Secretary's Determination, the Secretary will then take steps to have the Madera site taken into trust status for North Fork and become Indian lands for purposes of the Indian Gaming Regulatory Act. Thus, your concurrence in the Secretary's Determination will effectively allow the Madera site to become Indian lands and to be developed into the proposed casino complex, whereas your refusal to concur will terminate further federal and state consideration of the project.

Under these circumstances, there is no question that CEQA compliance must be an important part of your decision. Decision-making regarding whether to allow presently *off-reservation* fee land (as here) to become a part of a sovereign tribal nation where it can then be developed for gaming or other uses with little control by state government, is vastly different from the more typical decision that you and other state officials commonly confront regarding *on-reservation* gaming activities proposed to take place on already-existing tribal sovereign lands, when you and the State Legislature have limited power or ability to control gaming and other uses.

In the fee-to-trust application presently pending, your decision is essentially the *sine qua non* of whether gaming development will be permitted on the Madera site that has little or no connection to the North Fork tribe's historical lands. North Fork is proposing to acquire and develop the new site simply because it perceives that location as a profitable one on which to locate a large gaming establishment. As described in our previous letters and elsewhere in the administrative record, Picayune Rancheria would be greatly impacted by the North Fork tribe's proposed off-reservation casino development at the Madera site.

Among other adverse impacts, according to the figures developed by the North Fork tribe's own economic consultant (the Innovation Group) using pre-2008, pre-recession data, Picayune Rancheria would experience a decline of at least, 20.4 percent in gross revenues from its existing on-reservation casino located approximately 30 miles from the proposed Madera site, as the new casino "cannibalizes" the area's and the Picayune Rancheria's existing gaming market.[1] Picayune Rancheria believes that the Innovation Group figures substantially understate the adverse economic impacts the proposed North Fork off-reservation casino would have on its existing on-reservation casino and that a more realistic projection in the current economy would be closer to a 50% decline in the existing casino's revenues. Nonetheless, accepting those Innovation Group figures for the sake of argument, they translate into a projected loss of 570 full time employees (including about 100 Picayune Rancheria members), or almost half of the Picayune Rancheria casino's 1,300 full time employees. Our previous correspondence has described how the proposed off-reservation casino project's adverse socioeconomic impacts may also result in placing Picayune Rancheria's casino close to violating its loan covenants with its investors, and, in a worst case scenario, could lead to a default. It would certainly restrict Picayune Rancheria's ability to distribute future casino revenues to its tribal government and community.

Notably, to date, there have only been four Secretarial Determinations in the entire history of the Indian Regulatory Gaming Act allowing acquisition of new tribal lands for the purpose of allowing gaming. Your needed concurrence here would allow such an approval to occur in our state without your first having complied with California's important state

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[1] According to the Appendix R of the federal EIS prepared by the Innovation Group for the Bureau of Indian Affairs, more than half of the revenues at the proposed off-reservation casino at the Madera site would come from reductions in revenues at the existing Picayune Rancheria on-reservation casino and other existing Indian gaming facilities operating in the market.

environmental laws, most significantly without considering an environmental document that complies with CEQA.[2]

This letter describes the legal need for your pending concurrence decision to comply with CEQA. A separate letter will detail many of the profound deficiencies in the federal environmental impact statement (EIS) prepared by the Bureau of Indian Affairs pursuant to the National Environmental Policy Act (NEPA) with respect to its possible use as an environmental document in lieu of a CEQA-prepared environmental impact report (EIR).

A. **CEQA's Broad Reach Encompasses the Governor's Concurrence At Issue Here.**

Without question, the broad reach of CEQA applies to the Governor's concurrence in the Secretary's Determination. Section 21001(d) of CEQA sets forth the Legislature's declaration that, under CEQA, it is the state's policy "to ensure that the long-term protection of the environment...shall be the guiding criterion *in public decisions*." Further, pursuant to CEQA, the state's policy is to "require *governmental agencies at all levels* to develop standards and procedures necessary to protect environmental quality" and further to "require *governmental agencies at all levels* to consider qualitative factors as well as economic and technical factors and long-term benefits and costs in addition to short-term benefits and costs, and to consider alternatives to proposed actions affecting the environment." CEQA, sections 21001(f) and (g). Implementing these broad policy declarations, the State CEQA Guidelines sweepingly provide that "CEQA applies to *governmental action*." Further, "CEQA applies in situations where *a governmental agency* can use its judgment in deciding whether and how to carry out or approve a project." CEQA Guidelines, section 15002(b).

Despite these broad statutory pronouncements, some may argue that the Governor is nonetheless not a governmental agency or a public agency that must comply with CEQA. They might contend that CEQA applies only to "public agencies" and that CEQA defines "public agency" as "any state agency, board or commission any county, city and county, city, regional agency, public district, redevelopment or other political subdivision." CEQA section 21063.

Notably, however, both the State Legislature and the "court of this state" have been expressly carved out of CEQA's application (CEQA, section 21063; CEQA Guidelines, sections

[2] The Secretary also recently approved purchase of a 40-acre off-reservation site for a proposed casino in south Yuba County. That purchase, like this one, involved a proposed casino to be located nearly forty miles from the developer-tribe's existing lands on a site with which the tribe has no apparent historic connection.

15378, 15379), but the Governor's Office has not. Further, the Legislature has commonly included the Governor within the definition of "public agency." See e.g., California Public Records Act, Gov. Code, section 6252(f) (defining "public agency" to include "every state or local agency" including all "state offices [and] officers" except the legislature and the judiciary).

When California courts are confronted with the question of whether CEQA should apply to a particular decision by a particular agency or official, the California Supreme Court long ago declared that CEQA must be interpreted so as to afford "the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Mono County Board of Supervisors* (1972) 8 Cal. 3d 247, 262. In construing CEQA's reach with respect to all levels of state and local government, the Supreme Court has further declared that CEQA's purpose is "not to generate paper, but to compel *government at all levels* to make decisions with environmental consequences in mind." *Bozung v. Ventura LAFCo* (1975) 13 Cal.3d 263, 283.

Accordingly, the Governor's concurrence determination is well within the ambit of CEQA. Further, his concurrence determination clearly constitutes the Governor's "approval" of a "project" that, under CEQA, must be the subject of the CEQA environmental review process.

- The CEQA Guidelines broadly define "approval" as "the decision by a public agency which *commits* the agency *to a definite course of action in regard to a project* intended to be carried out by a person...." (CEQA Guidelines, section 15352(a). Here, there is no question regarding whether the Governor's concurrence is an "approval," because it commits him and the entire state government to signing off on the proposed acquisition of the off-reservation site as the location of a very sizable gaming resort complex. See *City of Vernon v. Board of Harbor Commissioners* (1998) 63 Cal.App.4th 677, 688 ("the agency commits to a definite course of action...by agreeing to be legally bound to take a course of action"). Indeed, once the Governor's concurrence is promulgated, future CEQA environmental review is thereafter foreclosed, because the site will then become qualified for on-reservation gaming and the Government Code exempts the later negotiation and approval of a tribal-state on-reservation gaming compact from CEQA environmental impact review. Gov. Code, sections 12012.5(f) and (g).

- CEQA also broadly defines "project" as "an activity which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." CEQA, section 21065. The CEQA Guidelines provide that "project" means "the whole of an action," and "refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies." CEQA Guidelines, sections 15378(a) and (c). See *Azusa Land Reclamation*

Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal. App.4th 1165, 1188 ("CEQA defines a 'project' extremely broadly"); *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143 ("[a] narrow view of a project could result in the fallacy of division...that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole"). In *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, the Court described the "first principles of CEQA" that mandate a comprehensive, coordinated and transparent process in making one or more governmental decisions with potentially significant environmental impacts.

> The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it. The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, before the journey begins, just where the journey will lead, and how much they -- and the environment -- will have to give up in order to take that journey.

Id. at 271-72.

Nor has the Governor's Office somehow been expressly exempted from CEQA's requirements in making the concurrence decision. As noted above, the Legislature has expressly exempted the *later* potential negotiation and approval of an *on-reservation* state-tribal gaming compact from CEQA's broad reach. Gov. Code, sections 12012.5(f) and (g). But the Governor's *earlier* concurrence action at issue here with respect to whether an *off-reservation* site should be the location of the proposed large gaming resort has *not* been exempted from CEQA. Where the Legislature has exempted one of a series of project approval decisions from CEQA, California courts have specifically ruled that the limited exemption cannot properly be extended to cloak the rest of the decision-making activity from CEQA review. *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1230-31 (an agency must comply with "those provisions of CEQA from which it has not been specifically exempted by the Legislature"); *Western Municipal Water District v. Superior Court* (1986) 187 Cal.App.3d 1104, 1112-13 (a reviewing court must apply "close judicial scrutiny of each element" of a legislative exemption in accord with the judiciary's basic policy of "construing CEQA to afford the maximum possible protection of the environment").

B. **Under CEQA, When a Federal EIS Is Prepared Pursuant to NEPA, the State Decision-Maker May Consult and Use the EIS "In Lieu Of" and a CEQA-Prepared EIR, But Only If the EIS Fully Complies with CEQA's Requirements.**

Where a project requires both an environmental impact statement (EIS) prepared under NEPA and an EIR prepared under CEQA, CEQA encourages the preparation of a joint EIS/EIR. CEQA Guidelines, section 15222. California decision-makers may use an EIS "in lieu of" an EIR *only* if the federally prepared environmental document "complies with" CEQA and the State CEQA Guidelines. CEQA, section 21083.5. In such cases, the California decision-making authority is mandated to "consult with the federal agency" that is preparing the EIS early in the preparation process to ensure that the resulting environmental document fully complies with CEQA. CEQA, section 21083.7; CEQA Guidelines, section 15223.

Notably, to the extent that the Governor may propose to use the federally prepared EIS "in place of" an EIR here, he must first give notice that he intends to do so and that he believes that the EIS "meets the requirements of CEQA." This notice must be given to the various concerned state and local public agencies and the general public in the same manner that a Notice of Preparation of an EIR is given. CEQA Guidelines, section 15225(a).

The EIS prepared by federal officials here was clearly produced without any apparent consideration of its being used by state officials as a CEQA-compliant decision-making environmental document. For example, in the EIS's list of "Regulatory Requirements, Permits and Approvals" that are "expected to be required" for implementation of the proposed off-reservation casino project, the Governor's concurrence decision is not even listed. Nor is any other decision by any state or local official or body. See North Fork Casino EIS (the EIS), at p. 1-14. Moreover, despite the requirements of CEQA, the Governor's Office does not appear to have adopted any "objectives, criteria and procedures for implementing CEQA" with respect to the Governor's concurrence decisions. In this regard, CEQA mandates that every public agency must adopt its own "objectives, criteria, and procedures for the evaluation of projects" within its decision-making responsibilities that "shall be consistent with" CEQA and the CEQA Guidelines. CEQA, section 21082. Consequently, it is not surprising that the EIS prepared here falls far short of being a legally adequate environmental document that complies with CEQA.

As explained earlier, the wide variety of important and obvious defects in the EIS as a CEQA decision-making document will be addressed in a separate letter.

Very truly yours,

Carlyle W. Hall, Jr.
Attorney for Picayune Rancheria of the Chukchansi Indians

EXHIBIT 2

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August 15, 2012

The Honorable Jerry Brown
Governor of California
State Capitol
Sacramento CA 95814
Attention: Jacob Appelsmith, Senior Advisor

Re: Although the Governor's Concurrence in the Proposed North Fork Rancheria of Mono Indians Off-Reservation Casino Project Must Be Based on An Environmental Document That Complies with CEQA, the Federal EIS Prepared Here Falls Far Short.

Dear Governor Brown:

On behalf of our client, the Picayune Rancheria of the Chukchansi Indians (Picayune Rancheria), we respectfully request that you consider the important legal issues raised by this letter about the complete failure of the agency decision making process to date to follow the California Environmental Quality Act ("CEQA")(Public Resources Code, sections 21000 et seq.) and the need for you to consider an environmental document that meets CEQA requirements before you decide whether to concur in the Secretary of the Interior's September 1, 2001 Determination. The Secretary's determination approved the North Fork Rancheria of Mono Indians of California's ("North Fork") development of extensive casino gaming activities and related hotel/spa resort facilities at a 305-acre site in the unincorporated area of Madera County (the "Madera site"). If you concur with the Secretary's Determination, the Secretary will then take steps to have the Madera site taken into trust status for North Fork and become Indian lands for purposes of the Indian Gaming Regulatory Act. Thus, your concurrence in the Secretary's Determination will effectively allow the Madera site to become Indian lands and to be developed into the proposed casino complex, whereas your refusal to concur will terminate further federal and state consideration of the project.

In our recent letter, we explained how CEQA compliance must be an important part of your decision, and, if a federal environmental impact statement ("EIS") prepared pursuant to the National Environmental Policy Act (NEPA) is to be used "in lieu of" an environmental impact report ("EIR"), it must still fully comply with CEQA and the CEQA Guidelines. This letter describes many profound deficiencies in the EIS prepared by the federal Bureau of Indian Affairs ("BIA") with respect to its possible use as an environmental document in lieu of an EIR.

Preliminarily, it is important to point out that the federal BIA officials who prepared the EIS here have expressly acknowledged that they prepared it prepared on the premise that CEQA did not in any way apply to the Secretary's Determination and the Governor's concurrence. Thus, the EIS candidly states:

Neither the proposed actions nor the Tribe's proposed project constitute a "project" under CEQA and, therefore, they are not subject to the CEQA, nor does CEQA require a joint draft EIS/EIR. There is no state or local action being considered as part of the proposed project and necessary for the development of the project. Therefore, CEQA is not triggered...."

EIS, Responses to Comments ("EIS Responses"), p. 96, Response B-15.9.[1] Consequently, it is not surprising that the EIS prepared here falls far short of being a legally adequate environmental document that complies with CEQA.

A. <u>The EIS Fails to Comply with CEQA by Improperly Limiting its Analysis of a Reasonable Range of Alternatives, including a Feasible Off-Site Alternative..</u>

An EIR must evaluate a "reasonable range of alternatives to the project, or to the location of the project, that could feasibly attain most of the basic objectives of the project while avoiding or substantially lessening any of the significant effects of the project." CEQA Guidelines, section 15126.6(a)(f). The analysis must provide information in "meaningful detail" to "enable the public to understand, evaluate and respond to the agency's conclusions." *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 403-06. The EIR should include a "quantitative, comparative analysis" of the relative environmental impacts of the alternatives. *Kings County Farm Bureau v. City of Hanford* (1990) 221 CalApp.3d 692, 733-74.

The fact that an alternative may be more expensive or less profitable than the proposed project is not sufficient to show that the alternative is not feasible. *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181. When a suggested alternative is rejected as infeasible, the administrative record must contain substantial evidence of that infeasibility. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 569. A

[1] In accord with the EIS's view that CEQA did not apply, the EIS's list of "Regulatory Requirements, Permits and Approvals" that are "expected to be required" for implementation of the proposed off-reservation casino project did not even list the Governor's concurrence decision. Nor did it list any other decision by any state or local official or body. EIS, at p. 1-14.

feasible alternative is one that "can be accomplished in a successful manner within a reasonable period of time, taking into account economic, legal, social and technological factors." *Id.* at 574.

Under CEQA Guidelines, section 15126.6(a) and (f), analysis of a feasible off-site alternative is a key part of the EIR's alternatives analysis. Especially if the project proponent already owns the off-site location, the mere fact that the site may need a general plan amendment or a zone change to accommodate a proposed use does not disqualify it as infeasible. *Id.* at 573-75. See also *San Joaquin Raptor Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 735-39.

According to the EIS, the proposed project here (Alternative A) would include a proposed 247,180 square foot (SF) casino and a 224,530 SF hotel and spa with 200 rooms, and it would entail grading 200,000 cubic yards of earth on a relatively flat site with a construction cost of approximately $350 million. EIS, at p. 2-5, 2-7. The EIS analyzed in detail only one off-site alternative (Alternative D). That alternative would include a far smaller 26,001 SF casino with no hotel or spa facilities, and it would entail grading 600,000 cu. yds. of earth at a cost of approximately $41 million. EIS, at p. 2-58.

As an supposed off-site alternative, Alternative D made no sense. The EIS concludes that, for all practical purposes, the proposed Alternative D project is not financially feasible, because of Alternative D's relatively high construction costs and relatively small projected revenues. That alternative off-site casino facility would thus have "marginal potential for profitability" and would be "difficult [to] financ[e]." EIS, p. 2-83. Picayune Rancheria and others repeatedly suggested that another off-site alternative be chosen, but the EIS preparers refused. Consequently, the EIS fails to do the job that an EIS must do, which is to provide the decision-makers with a feasible off-site alternative that could better minimize adverse environmental impacts than the proposed project.

It is not clear why the EIS preparers did not examine other types of development proposals that could have feasibly been built within Alternative D's off-site location and still meet key project objectives. In this regard, it is worth noting that the North Fork Rancheria's objectives boil down to simply making money for community tribal projects and to providing jobs and other economic benefits for tribal members. EIS, p. 1-1, 1-9 to 1-10. These broad objectives are capable of being met by a wide variety of projects on the tribe's current reservation lands. The fact that the *off-site* alternative to be evaluated here would actually be the *on-reservation* alternative means that the EIS preparers should make a special effort to develop a feasible alternative project at that site.

What sort of alternative on-reservation project might be feasible and also meet the broad project objectives? A starting point might be to examine what other less-costly-to-build development has taken place elsewhere in the rural geographic area near the North Fork Rancheria's reservation. These types of projects might include recreational projects, visitor-serving restaurants and accommodations, small industry and the like. Also the EIS preparers could have examined various types of non-casino projects that other California tribes have successfully developed in rural locations. Instead, the EIS preparers contented themselves with including a doomed-to-fail, financially infeasible off-site/on-reservation alternative. This is certainly not the way a legally adequate EIR alternatives analysis should be prepared. If the Governor's Office were to comply with its mandatory duty under CEQA, section 21082, to promulgate "objectives, criteria and procedures" for implementing CEQA with respect to its concurrence responsibilities for off-reservation Indian gaming proposals, those provisions would provide helpful guidance for the alternatives analysis, particularly with respect to ensuring that a feasible off-site, but on-reservation alternative is included.

B. <u>The EIS Fails to Identify the "Environmentally Superior Alternative."</u>

Under CEQA, one of the important concluding steps of the EIR's alternatives analysis is the identification of the "environmentally superior alternative." CEQA Guidelines, section 15126.6(e)(2) requires that, if (as here) the "no project" alternative (Alternative E) is environmentally superior to all others, the EIR must identify which of the other "build" alternatives causes the "least environmental damage."

The EIS alternatives analysis here contains a short, convoluted discussion, entitled "Preferred Alternative," comparing the various alternatives. EIS, 2-83 to 2-84. Importantly, the EIS does *not* identify the "environmentally superior alternative" that "causes the least environmental damage." Instead, it uses a cost/benefit approach to conclude that, compared to the off-site Alternative D project (small casino), the Madera-sited Alternative A (the proposed large casino/hotel resort project), Alternative B (a reduced size project) and Alternative C (a big box retail center) would all "result in the lowest overall impact on the human environment relative to their economic benefits to the Tribe given that the Madera site is less biologically sensitive that the North fork site and is closer to existing development and infrastructure." *Id.* The EIS goes on to recount that Alternative A would "best meet the purpose and need," although Alternatives B and C "would generally result in slightly lower environmental impacts." EIS, p. 2-84. After application of the proposed mitigation measures, the EIS observes that "most post-mitigation impacts of Alternative A would be similar to post mitigation impacts of Alternatives B and C." The EIS alternatives analysis thereupon concludes that "Alternative A is judged by BIA [the federal lead agency] to best meet the purpose and need while minimizing impacts on the

human environment. Therefore, the BIA has selected the proposed project (Alternative A) as its Preferred Alternative." *Id.*

As can be seen, the federal EIS preparers simply related why they considered Alternative A to be an appropriate "preferred alternative," using the const/benefit analysis they employed. This is a far cry from the CEQA required identification of the "environmentally superior alternative" that causes the "least environmental damage."

C. The EIS Identifies the Proposed Project's "Significant" Environmental Impacts by Using Federally Based "Significance" Definitions, Criteria and Procedures That Are Inappropriate under CEQA

The definition of "significance" with respect to a proposed project's environmental impacts plays a critical role under CEQA, a far more important role than it does under NEPA. The principal reason for the difference is that CEQA imposes *substantive* duties, as well as procedural duties, on government officials, whereas NEPA is simply a *procedural* statute.

- CEQA contains a "substantive mandate" that public agencies must not approve proposed projects that have potentially "significant" environmental impacts if there are "feasible alternatives or mitigation measures" that can substantially lessen or avoid those impacts. *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134. See CEQA, section 21002.1(b) ("each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so"). No public agency may approve or carry out a project where an EIR identifies "one or more [project-related] significant effects on the environment," unless the agency makes a "finding" that, as to "each significant effect," changes or alterations have been required in [the project] or that "specific economic, legal, social, technological or other considerations" "make infeasible the mitigation measures or alternatives identified" in the EIR. CEQA, section 21081(a).

- In contrast, NEPA is "essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (1978) 435 U.S. 519, 558. NEPA requires merely that federal agencies "consider" the potential significant adverse environmental impacts of their "major" federal actions 42 US.C. section 4332(B) and (C). The federal agency has no mandatory duty to act on mitigation measures and alternatives suggested in the EIS analysis, even if they are feasible. 40 C.F.R. section 1502.14; *Robertson v. Methow Valley Citizens Council* (1989) 490 U.S. 332, 350.

Because of the substantial difference between CEQA and NEPA, California's courts have ruled that California agencies cannot merely accept federal thresholds of significance without expressly reviewing them to determine whether they provide appropriate standards for determining the significance of a project's environmental impacts under CEQA. In *Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners* (2001) 91 Cal.App.4th 1344, a local agency used a federal noise standard called the Community Noise Equivalent Level (CNEL) to determine that cumulative noise impacts were "less-than-significant." The Court ruled that the fact that the federal CNEL standard might be proper under NEPA was not a sufficient justification for its use in an EIR prepared under CEQA. "[W]hile federal authorities interpreting the environmental requirement under NEPA...may be helpful..., it is important to stress that...CEQA imposes its own requirements for assessing the environmental impacts." *Id.* at 1379. Accordingly, the Court held that the lead agency must develop its own "significance" criteria based on CEQA standards, expert opinion and public input. *Id.* at 1382.

In consequence of the critically important role played by the lead agency's determination of the "significance" of a project's potential environmental impacts, CEQA contains many provisions prescribing how an agency should go about analyzing these impacts and making that "significance" determination. California's courts have also established rules about the criteria and process for making the "significance" determination. For example, in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83, fn. 16., the California Supreme Court stated that the term "significant" "covers a spectrum ranging from 'not trivial' through appreciable' to 'important' and even 'momentous.'" In *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, the Court held that, when a general plan's land use policy has the purpose of avoiding or mitigating environmental effects, a proposed project's conflict with that policy may itself indicate a potentially "significant" impact on the environment. See also *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207 (inconsistency between proposed project and applicable local general plan is a "factor to be considered" in determining the significance of changes in the physical environment caused by the project).

Many California public agencies currently use their authority under CEQA Guidelines, section 15064.7 to develop "thresholds of significance" to assist in making the "significance" determination." Under section 15064.7, these thresholds provide "an identifiable quantitative, qualitative or performance level of a particular environmental effect, noncompliance with which will normally be determined to be significant." They must be adopted by ordinance, resolution, rule or regulation after a public review process.

Thus, a lead agency may use a threshold of significance, an ad hoc significance criteria that it has specifically determined is appropriate for the pending decision, or some other criteria that it has established pursuant to its obligation under CEQA, section 21082, to adopt

"objectives, criteria and procedures" for implementing CEQA as to its decision-making authority. Whatever significance criteria the lead agency uses, it must "explain the reasons why [it] found [a particular impact] would not be significant." Simply stating that a project's particular impact "will not result in a significant impact," without more, would not constitute the needed statement of reasons, "but a bare conclusion." *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112.

Here, the EIS falls far short of utilizing the needed CEQA definitions, criteria and process for making the key "significance" determination. The EIS commonly adopts a federal "significance" standard without any explanation of why that standard is appropriate or why it might also be suitable for CEQA purposes. It dismisses obvious and substantial conflicts with applicable local general plan policies that are designed to avoid or mitigate environmental effects without explaining why those conflicts do not represent "significant" environmental impacts. It repeatedly fails to employ specific CEQA-dictated procedures for analyzing particular environmental impacts and determining their significance.

1. Improper CEQA Analysis of the Significance of the Proposed Project's Impacts on Agricultural Resources.

As one obvious example, with respect to the proposed project's land use impacts, the EIS contains a 13-page description of the Madera County general plan, and it identifies the particular general plan and zoning categories and restrictions applicable to the Madera site. EIS, at pp. 3.8-25 to 3.8-36. In this regard, the general plan designates the site as "Agriculture (A)" providing for agricultural uses, with some very low density residential development allowed, while the site is zoned "ARE-40" permitting agricultural and some residential uses. EIS, at pp. 3.8-35 to 3.8-36. The site is presently being farmed for feed grain crops, and the site contains prime farmland, unique farmland and farmland of statewide and local importance. EIS, pp. 3.8-35, 3.8-46. The majority of the site is made up of farmland of local importance, meaning that it has been identified by a local agency as "important farmlands." EIS, p. 3.8-47. The proposed casino/hotel/spa resort would nonetheless entail development of 85 acres, which are classified as farmland of local importance, located roughly in the middle of the 305-acre site. EIS, p. 4.8-41.

The EIS repeatedly acknowledges that approval of the proposed project at the Madera site would be flatly inconsistent with numerous key policies of the Madera County general plan that are designed to protect agricultural uses and to guide urban development (such as the sizable proposed casino/hotel/spa complex) to the existing urbanized area. Thus, the proposed project is inconsistent, inter alia, with:

- Policy 5.A-1 to "maintain agriculturally designated areas for agricultural uses and direct urban uses to designated new growth areas, existing communities and/or cities;

- Policy 5.A-2 to "discourage the conversion of prime agricultural land to urban uses unless an immediate and clear need can be demonstrated that indicates a lack of land for non-agricultural use;

- Policy 5.A-3 to "ensure that new development [does] not encourage further expansion of urban uses into designated agricultural areas; and

- Policy 5.A-4 to "allow the conversion of existing agricultural land to urban uses only within designated urban and rural residential areas new growth areas, and city spheres of influence where designated for urban development on the General Land Use Plan Diagram.

EIS, pp. 4.8-32 to 4.8-33. The EIS notes in passing that, as a mitigation measure, the EIS "recommends" that somewhere in another part of Madera County, the developer should purchase an "agricultural conservation easement" to simply maintain that area in agricultural uses. EIS, p. 4.7-32.

The EIS goes on to determine that the conversion of the proposed site from agricultural farmland to urban casino/hotel/spa uses would constitute a *"less-than-significant"* impact on agriculture. In making this "significance" determination, the EIS points to the fact that the 85 acres slated for development is relatively lesser quality soil, and that much of the site is proposed to be retained as open space, which theoretically could still be farmed. The EIS also heavily relies upon a federal site evaluation methodology that uses criteria established by the federal Natural Resource Conservation Service for rating conversions of farmland to non-farm uses on a scale of 260 points. The federal methodology uses a U.S. Department of Agriculture (USDA) "threshold" in which a farm's rating of less than 160 points is not considered an appropriate for protection under the Farmland Protection Policy Act (the "FPPA"). The EIS reports that the "relative value" of the farmland proposed to be converted at the Madera site reached a point total of only 143, "which is lower than the USDA [160 point] threshold."[2] EIS, pp. 4.8-41 to 4.8-43.

[2] The EIS's heavy reliance on the federal agency ratings exercise (documented in Appendix Q) appears altogether wrong from a CEQA standpoint. Thus, with respect to site assessment criteria number 4 -- whether state and local government provide protection against conversion for the particular agricultural site -- the federal agency ratings exercise awarded *zero* points out of a maximum of 20 points Given the local general plan's strong policies here aimed at protecting the site's agricultural resources from urban development uses (which the EIS concedes would be flatly violated by the proposed casino/hotel project), the ratings should certainly have awarded the full 20

More broadly, the EIS proclaims that the local general plan's land use policies will essentially become irrelevant once the land is taken into the trust. EIS, Summary of Potential Environmental Impacts, p. lxvi.

Whatever its propriety under NEPA, the EIS's "significance" determination is completely improper under CEQA:

- It fails to explain why the blatant inconsistencies with key provisions of the applicable general plan that are designed to protect the County's important agricultural resources by directing new urbanization to the existing urbanized area do not themselves constitute "significant" adverse impacts through the inappropriate conversion of agricultural resources;

- It utilizes a federal "significance" criteria that was created in connection with a particular federal law to promote certain federal policies without explaining why those criteria should have any application to the instant proposed action from a CEQA decision-making standpoint, let alone why the federal criteria should trump consideration of the applicable local general plan policies;

- It erroneously dismisses the legal significance of the local general plan's policies as they should appropriately be taken into account with respect to this proposed governmental action simply because, once the action is taken, they would no longer be operative.

2. Improper CEQA Analysis of the Significance of the Proposed Project's Impacts on Airport Land Use Compatibility Impacts.

With respect to certain potential project impacts, CEQA requires that a particular process be followed in making the analysis of the "significance" of those impacts. One of these particular impact analysis areas involves airport land use compatibility impacts. Thus, in preparing an EIR for a project within two nautical miles of a public airport or a public use airport, the public agency preparing the EIR must use Caltrans' "Airport Land Use Planning

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points under that criteria. These additional 20 points in turn, would have boosted the overall ratings point total from 143 to 163, which actually exceeds the stated federal threshold of 160 points. More importantly, under a CEQA analysis, the relevant criteria for this type of analysis should have focused principally on criteria number 4, the local government's applicable policies to protect the Madera site from urban development uses. In contrast, the FPPA and the implementing USDA criteria both seem aimed more at protecting the nation's food supply than they do with assessing environmental impacts arising from the conversion of agricultural land to urban uses despite strong local general plan policies to the contrary.

Handbook" (the "Airport Handbook") as a technical resource for assessing "airport-related safety hazards and noise problems." CEQA, section 21096(a); CEQA Guidelines, section 15154(a).

Here, the Madera site is located only half a mile from the Madera Municipal Airport (EIS, p. 3.8-36), so the CEQA requirement that the airport land use compatibility impacts analysis be undertaken pursuant to the Airport Handbook" clearly applies. Although there is no indication that the EIS preparers undertook the impacts analysis for airport land use compatibility pursuant to the Airport Handbook procedures and standards, the EIS does provide some pertinent information. Thus, the proposed Madera development site is so close to the Madera Municipal Airport that a portion of the site is within the Zone A "runway protection zone" which is a "high risk" area with no buildings allowed, while much of the site is within Zone B1 the approach/departure zone, where aircraft commonly travel below 400 feet above ground level with substantial noise and where the maximum allowable density is 60 people per acre. EIS, pp. 3.8-36 to 3.8-40.

Again, the significance determination flowing from the EIS's impacts analysis is largely dependent upon federal significance criteria and participation of a federal agency, here the Federal Aviation Administration (FAA), rather than those of the applicable state and local agencies, such as Caltrans and the Madera County Airport Land Use Commission. In fact, the EIS repeatedly determines that various airport compatibility impacts are "less-than-significant" simply because the FAA has advised the EIS preparers that a particular compatibility issue is not a problem. Thus, for example, when the EIS preparers submitted the 72-foot height of the proposed casino/hotel structure to FAA to determine whether that high a structure would constitute a significant safety hazard impact, the FAA determined that it would not. EIS, p. 4.8-40. EIS then concludes that the 30- to 50-foot height of the construction crane above the project structure (i.e., above the structure's 72-foot level as it reaches full height) would represent a "significant" environmental impact "*if* the FAA [later] found it to be a hazard to air navigation during construction." *Id.* The EIS does not explain why the construction crane height issue was not concurrently sent to the FAA so that its recommendations would become part of the EIS's "significance" determination for construction-related impacts, just as they are for the post-construction building height. Rather, the EIS simply provides (as a temporary working mitigation measure) that, until it consults with the FAA, the construction crane "shall not operate unless the FAA determines that [its] operation will not cause a hazard to air navigation." EIS, Summary of Potential Environmental Impacts, Mitigation Measures and Significance, p. lxvii. If the FAA later determines that the proposed crane construction would be unacceptably hazardous, how would the proposed project be built? Clearly, under CEQA, this important safety hazard construction impact, its significance and its mitigation measures should have been fully analyzed as part of the environmental review process, including use of the Airport Handbook, and should

not have been improperly deferred to some indefinite point in the future *after* the Governor's concurrence decision is made.

3. Improper CEQA Analysis of the Significance of the Proposed Project's Impacts on Water Supply and Water Resource Impacts.

As with the airport land use compatibility impacts analysis, CEQA requires that certain specific, technical procedures must be followed with respect to an EIR's analysis of the "significance" of water supply and water resource issues. Thus, for certain large proposed projects, CEQA demands that a "water supply assessment" (WSA) be prepared in accord with special procedures and criteria set out in the Water Code, and the work product of this effort must then used in the EIR's "significance" determination regarding these environmental impacts. All projects meeting the size criteria of Water Code, section 10912, must have a water supply assessment prepared as part of their environmental impact analysis under CEQA. CEQA, section 21151.9. The pertinent size criteria for mandated WSA analysis include any "business establishment" employing more than 1,000 persons. Water Code, section 10912(a)(2). Here, the proposed project (Alternative A) is projected to employ 1,291 full time employees (EIS, p. 2-2), more than enough to qualify for mandatory preparation of a WSA as part of the CEQA process.

WSAs must contain detailed information, inter alia, regarding the sufficiency of the local water supply based on the historical record of at least 20 years, including normal and dry years; Gov. Code, section 66473.4. It must also contain an analysis of whether the total projected water supplies over the next 20 years, during both normal and dry years, will meet the projected future water demands associated with the proposed project. The analysis must assess existing water supplies, projected normal and dry year water supply and demand, and it must assess both existing water supplies and the supplier's ability to rely on any particular projected future supply. Gov. Code, section 66473.7(a)(2) and (d). The projected water supply must be compared to the projected demand in all year types. The WSA must also include a water shortage contingency analysis. Water Code, section 10910(c)(2) and (c)(3); Gov. Code, section 66473.7(a)(2). The pertinent water provider agency must prepare the WSA, or, if no supplier exists, the city or county in which the project is to be approved must prepare it. Water Code, section 10912(c), (g). The WSA becomes part of the CEQA EIR analysis, and its detailed comparison of projected supply to demand enables the lead agency, in a fully informed way, to appropriately evaluate the "significance" of the impact.. Water Code, section 10911(b).

The EIS here indicates that the proposed project's projected water demand is approximately 400,000 gpd, which could be reduced to approximately 273,000 gpd if an on-site wastewater treatment plant is built and recycled water is used for indoor non-potable uses and for landscaping. EIS, p. 2-17. The proposed project will obtain its water from an on-site water well.

Because the groundwater level has been dropping in the area, the well would have to be at least 600 feet deep. EIS, p. 2-19. Using an existing City-owned water well, the City of Madera would be a backup supplier of water to the project. This would be done only as a redundancy measure and the project's on-site well would be the primary water supply source. *Id.*

The EIS recounts that "[g]roundwater levels in the vicinity of the Madera site have been declining over time consistent with an overdraft situation, with accelerated declines occurring in the past few years, possibly due to a local increase in pumping and statewide drought." EIS, p. 3.3-8. Specifically, during the last 50 years, the groundwater surface level has declined approximately 115 feet. *Id.* The City of Madera uses groundwater as its municipal supply, with one well about a mile from the site approximately 600 feet deep and a capacity of 1,300 gpm and another site 1.5 miles away that is approximately 500 feet deep with a capacity of approximately 2,200 gpm. The groundwater within the basin has been in an "overdraft condition" of approximately 100,000 AF per year, and the overdraft will soon reach fully 155,000 AF per year. EIS, pp. 3.3-8 to 3.3-9; EIS Responses, p. 17.

The EIS projects that the proposed project's drawdown of the water table, in combination with the ongoing basin decline, "could shorten the lifespan of neighboring wells," especially during dry years when basin water table declines are more rapid. Approximately 259 wells are located within a two-mile radius of the Madera site, and all of these would experience drawdown effects from the proposed casino/hotel pumping. These local drawdown effects would range from 1.5 feet to 72 feet without recycling and 10 feet to 4.9 feet with recycling. Reduction in the lives of these wells would be "a reduction of several years in the usable lifetime" among the shallower wells within two miles of the Madera site. EIS, p. 4.3-3; EIS Responses, p. 16. The EIS dismisses these impacts as "less-than-significant," largely because the Tribe has an agreement with the local irrigation district to recharge at least as much water that would be pumped into nearby recharge areas. EIS, pp. 4.3-3 to 4.3-4.

The EIS proposes mitigation measures that would involve the Tribe purchasing water to recharge the basin in the amount of its use, and to monetarily compensate the nearby well owners for the water-related cost increases they will experience, as if these measures will fully mitigate the project's groundwater impacts. EIS, pp. 5-5 to 5-8.

As seen from the above, despite the obvious short-term and long-term groundwater problems and impacts, the EIS was prepared *without* following the CEQA-required WSA procedures and criteria. As a result, it is totally lacking in much of the required water supply impacts information and analysis.

D. The EIS's Analysis of Biological Resources Improperly Rejected the Pertinent State Agency's Effort to Participate in the Environmental Impact Analysis and in Formulating Mitigation Measures on the Erroneous Premise That, Because the Madera Site May Ultimately Become Federal Trust Lands If the Governor Concurs, the State Agency Would Thereupon Lose Jurisdiction.

After the Draft EIS was prepared and circulated for public comment, the State of California's Department of Fish and Game ("State DFG") transmitted extensive comments to the BIA describing its concerns about the EIS's biological resources impacts analysis. State DFG proposed numerous data collection activities and mitigation measures that it asserted would be needed to protect certain state species of special concern and other biological resources at the Madera site. EIS Appendix Y, Draft EIS Comments and Responses, Comments L-12.1 to L-12.32.

State DFG reported that the State-listed San Joaquin Kit Fox, which has special protection under the California Endangered Species Act ("CESA"), is "known" to be present within the Madera site area. L-12.13, L-12.21, L-12.23. State DFG contended that project-related impacts to such State-listed species "may not be adequately addressed by avoidance minimization and mitigation measures included in a [NEPA] document." L-12.12. Accordingly, State DFG "has a regulatory process *which must be followed* for addressing impacts" to those State-listed species. *Id.* State DFG also strongly urged that a "no-construction buffer zone" of at least 250 feet be imposed to protect the burrowing owl (which has state law protection) and that a minimum of 6.4 acres of foraging habitat per pair of burrowing owls identified during the needed studies should be set aside. L-12.24, L-12.25.

State DFG also asserted that it has jurisdiction to enforce state laws making it unlawful to deposit or allow to be paced into the "waters of the state" any substance or material that could be deleterious to fish, plant life or bird life. Its comment letter warned that, without suitable mitigation measures, development of the casino/hotel project at the Madera site could "result in pollution of a 'waters of the state' from increased road, parking, storm water runoff or construction-related erosion." This could "impact the site's fish and wildlife resources by increasing sediment input, toxic runoff and impairment of wildlife movement along riparian corridors." L-12.15.

Further, State DFG identified the state Fish and Game Code provisions that protect birdlife and observed that "since mature oaks, other mature trees and riparian vegetation are present" at the Madera site and may be removed during construction, "appropriate avoidance and minimization measures for raptors and other nesting birds" should be implemented. L-12.17.

In response, the EIS took the strong position that the state law protections and the state law based impact analysis procedures discussed by State DFG do not apply to the Secretary's Determination and the Governor's concurrence with respect to whether the Madera site should become the location of a off-reservation casino/hotel complex. As the Responses to Comments explained, the EIS preparers would *not* use State DFG's "formal analysis" process for state law protected species at the Madera site, because, once the Secretary makes a favorable decision, the development of the casino/hotel project there would take place "on trust lands." L-12.3. Putting it a different way, the EIS reasoned that, because the ensuing proposed casino/hotel at the Madera site would occur "on federal trust land, the standards of CESA and Fish and Game Code...do not hold jurisdictional authority." L-12.8. Nonetheless, the EIS preparers assured State DFG, "all *federal* standards shall apply, including consultation with ...appropriate *federal* agencies to determine correct mitigation, if determined necessary." L-12.8

Further, based on the *federal* studies undertaken for the EIS, the EIS concluded that development of the casino project at the Madera site "would create a less than significant impact" to the site's biological resources. L-12.14. More specifically, because the casino/hotel complex would cover "only a small portion" (actually 85 acres) of the total 305-acre Madera site, the EIS preparers baldly asserted that DFG's recommended minimum 6.4 acres of foraging habitat per burrowing owl pair "need not apply." L-12.25.

The EIS's legal reasoning rejecting application of state law and state law based environmental impact analysis procedures to the governmental decision to approve the casino/hotel project at the off-reservation Madera site is fundamentally wrong. The Governor must concur in the Secretary's decision, and he cannot make that concurrence decision without first complying with CEQA and without considering the impacts of that decision on state law protected resources. The mere fact that, *after* the Secretary and the Governor make their initial key decisions, the Madera site may become part of the federal trust and at that point would be largely exempted from state environmental protection laws cannot logically justify a conclusion that the initial key decision itself should somehow be exempt from those laws.

E. The EIS's Analysis of Cumulative Impacts from the Proposed Project and Other Related Projects Does Not Comply With CEQA.

An EIR must include a cumulative impacts analysis that evaluates the proposed project's impacts together with the impacts of other "closely related past, present and reasonably foreseeable probable future projects." CEQA Guidelines, sections 15130, 15355. Here the EIS appears to take an approach to its cumulative impacts analysis that is markedly different. In the various categories of cumulative environmental impact analysis, the EIS does not appear to have consistently taken into account the specific "related projects" that are anticipated to be developed

over time. Instead, it appears that sometimes, in its 2010 horizon year operational impacts analysis and in its 2010 construction impacts analysis, the EIS has used only a generalized background population growth increase of 3 percent. Further, in some instances, the EIS does not appear to have undertaken a cumulative impacts analysis for construction impacts at all.

F. <u>If the Governor Were to Decide to Concur in the Secretary's Decision, His Office Must Prepare Written CEQA Findings, Including a Statement of Overriding Considerations, With Respect to That Decision.</u>

As described above, because CEQA has a substantive content, CEQA demands that the decision-making officials prepare written findings explaining how their decisions have appropriately taken environmental protection into account, and how they have avoided or mitigated all "significant" environmental impacts to less-than-significant levels unless it was infeasible to do so. When appropriate, the CEQA findings may include a statement of overriding considerations explaining why a proposed project has been approved despite its still-remaining significant environmental impacts. In other words, the CEQA findings must explain how CEQA's policies and procedures, as well as other state environmental laws, have been properly applied and upheld by the decision makers in connection with their approval of the proposed project. These CEQA findings and any statement of overriding considerations must be based on substantial evidence in the record.

The Secretary's determination was clearly based on *federal* laws relating to analyzing environmental impacts and protecting environmental resources, not CEQA and the applicable state laws. Consequently, it would be very difficult, if not impossible, to find substantial evidence in the existing record with respect to CEQA and the applicable state law environmental protection laws and policies. That, of course, is the very purpose of the CEQA findings requirement -- to serve as a final procedural hurdle ensuring proper application of our state's important environmental protection laws.

Very truly yours,

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Chukchansi Indians