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UNITED STATES DEPARTMENT OF THE INTERIOR

ASSISTANT SECRETARY - INDIAN APPEALS

BRIAN KRAMER AND SUZANNE KRAMER; COUNTY OF SANTA BARBARA, CALIFORNIA; NO MORE SLOTS; LEWIS P. GEYSER AND ROBERT B. CORLETT; PRESERVATION OF LOS OLIVOS; SANTA YNEZ VALLEY CONCERNED CITIZENS; ANNE (NANCY) CRAWFORD-HALL and SANTA YNEZ VALLEY ALLIANCE,

Appellants,

v.

PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,

Appellee.

SANTA YNEZ BAND OF CHUMASH INDIANS, REAL PARTY IN INTEREST

OPENING BRIEF OF APPELLANT SANTA YNEZ VALLEY CONCERNED CITIZENS

Appeal of December 24, 2014 Decision of the Pacific Regional Director to Take Approximately 1,427.78 Acres of Land in the County of Santa Barbara into Trust for the Santa Ynez Band of Chumash Mission Indians

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Santa Ynez Valley Concerned Citizens ("Appellant") submits this Memorandum of Points and Authorities in support of its Appeal of the December 24, 2014 decision of the Pacific Regional Director of the Bureau of Indian Affairs ("BIA") to take approximately 1,427.78 acres of land in the County of Santa Barbara into trust for the Santa Ynez Band of Chumash Mission Indians (the "Tribe"). Appellant timely filed a Notice of Appeal and Statement of Reasons to the Interior Board of Indian Appeals on January 30, 2015.

I. INTRODUCTION

The Santa Ynez Band of Chumash Mission Indians (the "Tribe") has asked the Pacific Regional Director to take into trust more than 1,400 acres of agricultural land in the heart of the Santa Ynez Valley, an area prized for its world-famous wines and rural tranquility. The Tribe's immediate stated plans for this massive plot of land—an area known as Camp 4 that is nearly the size of the nearby town of Solvang—include construction of 143 single-family homes on one-acre residential lots, tribal facilities, and associated infrastructure. AR0080.00016[1] (Revised fee-to-trust application for the Camp 4 property). The Tribe also states that it means to engage in "economic pursuits" that include, but may not be limited to, the operation of a vineyard and a horse boarding stable. *Id.* at 00011.

The Tribe, however, has not said how it intends to use the remaining 869 acres—fully 62% of the requested trust acquisition. *Id.; see also* AR0194.00013-14 (Final Environmental Assessment). It instead has repeatedly purported to justify its request for all 1,433 acres by suggesting that it must provide housing for its more-than-1,000 tribal members and lineal descendants who do not currently live on tribal lands, and for "anticipated growth." *See, e.g.,* AR0080.00010 and AR0237.00002-03 (Finding of No Significant Impact). The Tribe states that the additional acreage will "help meet the Tribal long range needs to establish a greater reservation land base" and that Camp 4 will "[h]elp meet the need for a land base for future generations, land-banking, etc." AR0080.00009-10.

Were the land to remain in fee status, tribal decisions concerning the use of the land

[1] All citations to documents with the prefix "AR" are to documents in the administrative record.

would be subject to the laws of California and the County of Santa Barbara. *See* AR0080.00011. Once placed into trust, the Tribe will secure near absolute authority over the use of the land, including public roadways (AR0080.00182), and can develop it in any way the Tribe wishes, regardless of the potential environmental impacts. The building and zoning ordinances that protect the character and quality of the valley—for example, by prohibiting the construction of dense housing or tall buildings in the heart of the valley's bucolic farmlands—would no longer apply. *Id*. at 00013; *see also* AR0194.00094-96 (Camp 4 is zoned for minimum-100 acre agricultural plots). Moreover, if the land is placed in trust, over 20 acres of public roads that the Tribe does not own in fee will be accessible, if at all, only at the Tribe's discretion. BIA's approval of the Tribe's trust acquisition application will not only allow the construction of 143 one-acre residential parcels; it would be a blank check for the Tribe to control and build anything it chooses on some of California's most treasured land.

Prior to taking the land into trust for the Tribe, BIA was required to analyze the environmental impacts of doing so under the National Environmental Protection Act ("NEPA"). NEPA's purpose is to "insure that environmental information is made available to public officials and citizens before decisions are made and before actions are taken," and accordingly sets forth a review process to "ensure that federal agencies take a *hard look* at the environmental consequences" of a proposed action. 40 C.F.R. § 1500.1(b); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (emphasis added). The scope of the review must be broad, and should evaluate all direct, indirect, and cumulative impacts that the federal action and any connected or interdependent action may cause.

Here, it was especially important for BIA to take a hard look at the environmental consequences of the proposed action because once Camp 4 is approved for trust status, there will never be another opportunity for the federal government to study the environmental consequences of any development the Tribe may choose to undertake. Yet BIA did not take the required "hard look" at all potential environmental impacts. It instead defined the project as narrowly as possible, analyzing only the Tribe's *immediate* construction plans while ignoring the Tribe's oft-repeated statements concerning probable future development. An expansion of

homes onto the "open space" will stress the environment by, among other things, increasing utility usage, traffic, and noise. By ignoring reasonably foreseeable future development, BIA has painted an unrealistic picture of the trust acquisition's effect on the environment.

BIA also violated NEPA by failing to analyze alternatives that would have taken fewer acres into trust. An agency is required to consider *all* feasible alternatives. If there were truly no reasonable possibility that the Tribe will expand housing out on the 869 acres of open space, then there is no reason BIA could not have considered taking into trust only that portion of land on which development is currently planned. Acquiring a smaller portion of land for the Tribe would fully satisfy the stated purpose and need of providing housing for tribal members, and should have been analyzed as a feasible alternative. *See* AR0194.01707.

BIA's analysis of potential impacts contains a third critical flaw: it failed to consider that, according to the Tribe, the construction would not begin for at least a decade, at which time the environmental impacts may look completely different than they do today. As one example, the analysis fails to account for the current drought by assuming groundwater will remain at 2009 levels. Because it defines the project too narrowly, fails to consider feasible alternatives, and adopts an unreasonable baseline, BIA's analysis falls far short of the "hard look" NEPA requires.

The reviewing agency does not achieve NEPA's purpose when it shuts its eyes to both the scope and the consequences of the activity it approves. Here, BIA ignored pertinent information about future development on the site and failed to provide useful information about the likely consequences of the trust acquisition to the public and the decision-makers. BIA's inadequate NEPA analysis cannot serve as the basis for its approval of the trust acquisition.

Where an approval of a trust acquisition rests on an inadequate NEPA analysis, that acquisition should be set aside. This acquisition should be set aside for other reasons, too. First, BIA failed to consider the "anticipated economic benefits" of the commercial activity that the Tribe intends to conduct on Camp 4, as BIA's own regulations require it to do. Second, BIA did not clear title to public roadways within the trust boundary, and it provided incorrect information about these roads to the public. Neither of these actions is within the permissible bounds of BIA's discretion to approve trust acquisitions.

II. STATEMENT OF FACTS

In 2010, the Tribe purchased 1,411.1 acres of land on five contiguous parcels in the Santa Ynez Valley known collectively as Camp 4. AR0080.00005. The vast majority of Camp 4 is undeveloped: it is characterized by rolling green pastureland, with viewsheds disrupted only by the Tribe's sprawling casino resort on the existing reservation just up the road. The environmental integrity of Camp 4 is currently protected by zoning regulations that limit development to large-lot agriculture. Residences and other structures are allowed only by special permit from the County of Santa Barbara. AR0194.00094-96; *see also* Santa Barbara County Code §§ 35.21.20 and 35.21.30. The land is also protected by Williamson Act Contracts—10-year, self-renewing agreements between a local government and a private landowner pursuant to which specific parcels of land are restricted to agricultural use or open space, in exchange for greatly reduced property taxes. AR0194.00143. The contracts were originally entered into by Camp 4's prior owner and they have been in place for nearly half a century. AR0195.00312 (July 11, 2014 letter from County of Santa Barbara). Consistent with these restrictions, the only development on Camp 4 is a 256-acre vineyard, a horse stable and a single ranch house. AR0194.00013.

In 2013, the Tribe began a series of actions to strip these protections away from the land.

First, the Tribe applied to BIA to take Camp 4 into trust, which would remove the land from the jurisdiction of the County of Santa Barbara and eliminate all existing County zoning restrictions. AR0194.00165. The Tribe's application did not request that BIA include the 21.9 acres of public roadways that cross Camp 4 in the trust acquisition, but instead ignored those roadways' existence. *See generally* AR0080.

Second, the Tribe filed a notice of nonrenewal for all Williamson Act Contracts encumbering Camp 4. AR0080.00199*; see also* AR0194.00143.

The Tribe's fee-to-trust application included various conceptual ideas for how it would develop Camp 4 if the land were no longer protected by the County's zoning laws or the Williamson Act Contracts. Ultimately, the Tribe narrowed its consideration to Alternatives A and B, which differed primarily in the size of the 143 new residential lots—either five acres

(Alternative A) or one acre (Alternative B) (5% and 1% of the minimum allowed lot size under the County's zoning laws, respectively).[2] *See* AR0080.00016. Both plans include development of the infrastructure needed to support those new homes, including new water, sewer and power lines; a wastewater treatment facility; and new roads. Alternative B, which the Tribe ultimately selected (*see* AR0237.00535-37 (Tribal Resolution 930B)), also includes the construction of a more-than-12,000 square foot "tribal facility"—complete with a 250-car parking lot—capable of accommodating "up to 100 events per year." AR0194.00029. Because the residential lot sizes under Alternative B are so much smaller than those under Alternative A, the amount of "open space" under that proposal is significantly greater, at 869 acres. *Id.* The stated purpose for taking Camp 4 into trust "is to provide housing to accommodate the Tribe's current members and anticipated growth." *Id*. at 00013.

By Tribal Resolution, the Tribe agreed "to comply with the terms of [the] Williamson Act Contracts during the nine (9) year non-renewal period until the expiration of the Contracts." AR0080.00199 (Tribal Resolution No. 931)*; see also* AR0194.00143. Accordingly, the Tribe resolved not to commence any construction on Camp 4 contemplated under either Alternative A or Alternative B until 2023. *Id.*

Upon receiving the Tribe's fee-to-trust application, NEPA obligated BIA to conduct a comprehensive environmental analysis. NEPA requires agencies considering "major Federal actions significantly affecting the quality of the human environment" to prepare an Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C). To determine whether an EIS is required, an agency may first prepare a less extensive Environmental Assessment ("EA"). 40 C.F.R. § 1508.9. If the EA finds the proposed action will significantly affect the environment, the agency must prepare an EIS. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013). However, if the EA finds no significant environment impact, the agency may issue a Finding of No Significant Impact ("FONSI"), "accompanied by a convincing

[2] All prior concept plans for developing Camp 4 were designed to meet the same level of need, and differed primarily in where the proposed housing development would be located. *See* AR0194.01708.

statement of reasons to explain why a project's impacts are insignificant," and then proceed with the acquisition without further study. *Sierra Club*, 510 F.3d at 1018.

Here, BIA concluded that the Tribe's plans to convert over 1,400 acres of nearly untouched pastureland in the heart of the lush Santa Ynez Valley into a suburb—complete with a new wastewater treatment plant; new roads; new utilities; and a large tribal facility that will hold "events" of unknown description (but which can accommodate at least 250 carloads of people) an average of twice per week—would not have a "significant effect" on the environment. *See generally* AR0237. BIA did not analyze any future development on Camp 4 beyond the immediate proposal and therefore must have concluded that future development was not "reasonably foreseeable," as NEPA requires the environmental impacts analysis to include all reasonably foreseeable impacts. *See infra*, Section IV.A.1.

BIA's decision was based on a Final Environmental Assessment ("Final EA") that is problematic in several respects.

First, while the Tribe has repeatedly referenced *both* an immediate need to provide housing for more individuals than 143 homes could conceivably accommodate *and* an amorphous need to establish "a land base for future generations" (AR0080.00009-10), the Final EA analyzed only the environmental impacts of the Tribe's explicit short-term development plans, without addressing any future development on Camp 4. AR0194.00153-72.

Second, though the Tribe supposedly has no plans to develop the 869 acres of open space and has not explicitly articulated a need for them beyond the vague term "land-banking," the Final EA did not contemplate any alternatives to the project that would have taken fewer than 1,433 acres of Camp 4 into trust (other than the "no action" alternative). *See* AR0194.00018-19.

Third, though the Tribe has resolved not to begin construction of the proposed project until 2023, BIA did not consider how the project would affect the environmental setting at that time—instead, the Final EA assumed a 2014 construction date.[3] AR0194.00025.

Fourth, the Final EA does not specify the "anticipated economic benefits" of the

[3] Moreover, once construction begins in 2023, the Tribe plans to phase construction over approximately 4 to 9 years as new tribal homes are needed. AR0194.00025.

commercial activity that the Tribe has said it will conduct on Camp 4, nor has the Tribe submitted any other document containing that information.

Fifth, though the Tribe's fee-to-trust application only requested that BIA consider taking the 1,411.1 acres of land that the Tribe owns in fee into trust (AR0080.00005), the Final EA contemplates, for the first time, including 21.9 acres of public roads in the trust acquisition—without discussing any environmental impacts associated with converting public roads to private, or providing any support for the assertion that these roads are already owned by the Tribe.[4] *See* AR0194.00008.

Members of the public, including Petitioners, submitted hundreds of letters to BIA objecting to these flaws and identifying many other issues with BIA's NEPA analysis.[5] *See generally* AR0128 (comment letters to 2013 EA) and AR0195 (Comment letters to Final EA). Shortly after finding that the trust acquisition would not significantly affect the environment, BIA issued a Notice of Decision approving the Tribe's application.

III. STANDARD OF REVIEW

BIA has no authority to take land into trust without giving due consideration to the factors listed in 25 C.F.R. Parts 151.10 and 151.11. While "there is no requirement that BIA reach a particular conclusion with respect to each factor," BIA's decision must, at a minimum, "reflect that the Regional Director considered the appropriate factors set forth in 25 C.F.R. Part 151 . . . ." *Jefferson Cnty, Oregon, Bd. of Comm'rs v. Northwest Regional Director, Bureau of Indian Affairs*, 47 IBIA 187, 199-200 (2008).

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[4] The only discussion regarding this issue is a brief response to public comments in the Final EA which states that "[t]he Tribe conducted a review of the title and concluded the above-listed [rights of way] are easements not dedications; therefore, the Tribe is the owner in fee of the [rights of way]" which can be accessed by the public after the trust acquisition on a "case by case basis" in the Tribe's discretion. AR0194.01704. Documentation supporting the Tribe's ownership of these roads is not present in the Administrative Record.

[5] While Appellant does not discuss in depth here all of the inadequacies of BIA's evaluation of the environmental impacts of the proposed project (*e.g.*, the impacts of additional traffic, water use, etc.), Appellant hereby incorporates by reference the arguments laid out in the comment letters on the Final EA (AR0195) and the comment letters on the FONSI. *See* AR0244 (County of Santa Barbara's Comments on FONSI); AR0248 (Department of Transportation's Comments on FONSI); and AR0251 (Fire Department's Comments on FONSI).

For the acquisition of land for tribes, BIA must consider, among other things: (1) the need of the tribe for additional land (25 C.F.R. § 151.10(b)); (2) the purposes for which the land will be used (*id.* at § 151.10(c)); and (3) the extent to which the applicant has provided information that allows the Secretary to comply with NEPA (*id.* at § 151.10(h)). BIA must also "acquire, or require the applicant to furnish, title evidence meeting the *Standards for the Preparation of Title Evidence in Land Acquisitions by the United States*, issued by the U.S. Department of Justice" for the property to be taken into trust. 25 C.F.R. § 151.13. Where, as here, the land to be acquired is "off-reservation" and is to be acquired for business purposes, the Tribe must also submit, and BIA must consider, "a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R. § 151.11(c)).

The Interior Board of Indian Appeals reviews BIA's consideration of these factors for abuse of discretion, and must "determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations." *Cnty of San Diego, California v. Pacific Regional Director, Bureau of Indian Affairs*, 58 IBIA 11, 23 (2013). In reviewing BIA's compliance with NEPA, this Board must ensure that BIA gave a "hard look" to "the environmental consequences of its proposed action." *Neighbors for Rational Development, Inc. v. Albuquerque Area Director, Bureau of Indian Affairs*, 33 IBIA 36 (1998). Where, as here, BIA found that the trust acquisition would have no significant impact on the environment, the Board "review[s] BIA's FONSI to determine whether it is supported by the record and whether it articulate[s] a rational connection between the facts found and the choice made." *Voices for Rural Living v. Acting Pacific Regional Director, BIA*, 49 IBIA 222, 240 (2009) (internal citations omitted). The Board must overturn a FONSI that does not "contain[] a reasonably thorough discussion of the significant aspects of the probable environmental consequences [of the project]." *Id.* The Board must also overturn a FONSI that fails to consider alternatives "reasonably in light of the goals, needs, and purposes [BIA] has set for the project." *Gary and Sharron Johnson v. Acting Minneapolis Area Director, BIA*, 32 IBIA 147, 153 (1998) (internal citations omitted).

IV. ARGUMENT

A. BIA Failed to Take the Requisite Hard Look at the Potential Environmental Impacts of the Camp 4 Trust Acquisition

1. BIA Violated NEPA by Failing to Consider Probable Future Development on Camp 4

An environmental assessment that defines a project too narrowly can mask the true extent of the project's environmental impacts. 40 C.F.R. § 1508.27(b)(7) ("significance cannot be avoided by terming an action temporary or breaking it down into small component parts"); *see also Sylvester v. U.S. Army Corps of Engineers,* 884 F.2d 394, 400 (9th Cir. 1989). To ensure the agency considers the scope of the project realistically, NEPA requires agencies to consider both the direct *and* indirect environmental effects of a project to assess whether the project's environmental impact, as a whole, is "significant." 42 U.S.C. § 4332 (an environmental impact statement is required for all "major federal actions"); 40 C.F.R. § 1508.18 (defining "major federal action" as an action with major "effects"); 40 C.F.R. § 1508.8 ("effects" can be either direct or indirect). Indirect effects are those "caused by the action and are later in time or farther removed in distance, ***but are still reasonably foreseeable***." 40 C.F.R. § 1508.8(b) (emphasis added).

The agency action at issue here is the taking of 1,433 acres of land into trust for the Tribe, for the stated purpose of providing housing for current and future Tribal members. The Tribe has a short-term plan for the construction of 143 residential lots and related infrastructure, which leaves the majority of the land as "open space" reserved for the undefined purpose of "land-banking." AR0080.00009. The Final EA, however, fails to account for probable future development on this open space.

Throughout the application process, the Tribe has continually referred to its need to provide housing for 136 tribal members, 1,300 lineal descendants, and "anticipated growth" as justification for the trust acquisition. *See, e.g., id.* at 00010; AR0237.00002-03 ("The Tribe's purpose for taking the 1,411 acres plus rights of way of land into trust is to provide housing to accommodate the Tribe's current members and anticipated growth . . . . The Tribe has a population of 136 tribal members and approximately 1,300 lineal descendants which it must

provide for."). As 17% of these individuals have housing on tribal lands already (*see* AR0080.00010) and the existing reservation is purportedly developed to capacity (*id*.), the proposed trust acquisition ostensibly calls for the development of housing for 1,192 individuals, plus "anticipated growth." Alternative B, the Tribe's selected alternative, contemplates construction of 143 one-acre residential lots, each with a single-family home.

Unless an average of 8.3 people (plus "anticipated growth") will live in each house, this number of new residential lots is patently inadequate to meet the stated need for additional tribal housing. At the same time, the Tribe fails to state how it will use more than 60% of the proposed trust acquisition. Development of additional housing beyond the first 143 homes on Camp 4 is not just a remote, speculative future action; it is a near certainty if the Tribe's stated need is taken at face value.

In approving the Tribe's application, however, BIA did not scrutinize the clear disconnect between the Tribe's plans and its stated need. Instead, BIA analyzed only the potential environmental impacts of constructing 143 homes, and did not consider the likelihood, or indeed even the possibility, that additional homes may be built on Camp 4. AR0194.00153-72 (environmental impacts of Alternative B assume construction of only 143 new homes on Camp 4); *id*. at 00176-77 (consideration of "cumulative effects" contemplates no additional homes on Camp 4); *id.* at 00192 ("Indirect and growth-inducing effects" does not discuss development of additional homes on Camp 4).

This inquiry is impermissibly narrow and falls far short of the "hard look" BIA was required to give to the potential environmental impacts of the trust acquisition. Agencies may not limit their NEPA inquiry only to the information presented to them in a project application; to the contrary, "[r]easonable forecasting and speculation is . . . implicit in NEPA, and [courts] must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry' . . . ." *Methow Valley Citizens Council v. Reg'l Forester*, 833 F.2d 810, 817 (9th Cir. 1987) *rev'd on other grounds sub nom. Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), *citing City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975); *see also Border Power Plant Working Group v.*

Dept. of Energy, 260 F.Supp.2d 997, 1014 (S.D. Cal. 2003) ("NEPA does not recognize any distinction between primary and secondary effects when requiring environmental review of the effects."); *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) ("an environmental effect is reasonably foreseeable if it is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision" (internal citations omitted).).

Courts routinely reject NEPA analyses that improperly narrow their scope to exclude reasonably foreseeable actions that could have environmental impacts.

In *Mid States Coalition*, for example, petitioners challenged a decision by the federal Surface Transportation Board to approve the addition or upgrading of nearly 1,000 miles of rail line to facilitate the transport of coal from mines in the Powder River Basin. Petitioners argued, in part, that the agency's EIS failed to consider a reasonably foreseeable indirect effect: the environmental impacts that would result from the increased supply of coal in the marketplace. 345 F.3d at 548.

The project applicant responded that it was appropriate for the agency to omit these environmental effects from the EIS because they were "too speculative," but the Court was not persuaded, finding that

> the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price, which is the stated goal of the project, is illogical at best . . . . [I]t is reasonably foreseeable—indeed, it is almost certainly true—that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.

Id. at 549.

The *Mid States Coalition* court was also not persuaded that NEPA allows an agency to disregard indirect effects when the *extent* of the impact is speculative, finding "when the *nature* of the effect [i.e., the increased availability of coal] is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect." *Id.* (emphasis in original).

Similarly, here, the development of additional homes on the 869 acres of "land-banked" "open space" is an entirely foreseeable (and, indeed, perhaps the intended) consequence of BIA's

approval of the trust acquisition, even if those homes are not part of the Tribe's immediate plans. These homes would not and could not be built without the trust acquisition because Camp 4 is currently zoned for large-lot (100-acre minimum) agriculture. AR0194.00094; *see also* 40 C.F.R. § 1508.25(a)(1) (agency's NEPA review of a project must include actions that cannot or will not proceed unless other actions are taken previously). While the *extent* of the environmental impacts of these additional homes may not now be entirely foreseeable, they will require additional infrastructure, they will create more traffic, they will generate additional waste, and they will potentially have myriad other environmental impacts that BIA failed to consider because it ignored the Tribe's explicit intentions and defined the scope of this action too narrowly.

At a minimum, BIA should have addressed the environmental consequences of these foreseeable additional homes as cumulative impacts. 40 C.F.R. § 1508.25(c) (agency must consider not only direct and indirect impacts, but cumulative impacts as well). A "[c]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and ***reasonably foreseeable*** future actions . . . ." 40 C.F.R. § 1508.7 (emphasis added). Agencies examining a proposed project are required to consider cumulative impacts for the same reason that they must define the project scope broadly: to "prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 1002-03 (9th Cir. 2004), *citing Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9th Cir. 2003).

That certain actions with potential cumulative impacts will occur in the future does not relieve agencies of the duty to examine them. "Indeed, to require agency actions to be simultaneous in order for them to fall within the definition of 'cumulative actions,' would undermine the purpose of § 1508.25(a)(2)." *Id.* at 1004. A full and comprehensive evaluation of cumulative impacts is especially critical where, as here, the agency has prepared an EA in lieu of an EIS. *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1076 (9th Cir. 2002), *citing* Council on Environmental Quality, *Considering Cumulative Effects under the National*

Environmental Policy Act at 4 (January 1997).

When evaluating whether a future action is "reasonably foreseeable" such that it warrants inclusion in a cumulative impacts analysis, an agency "must make a good faith effort to consider likely cumulative effects" and cannot exclude future actions simply because they are not fully formed. *Surfrider Found. v. Dalton*, 989 F.Supp. 1309, 1324 (S.D. Cal. 1998). Nor can reasonably foreseeable projects be excluded from a cumulative impacts analysis on the grounds that they have not been "proposed." *Oregon Natural Res. Council v. Marsh*, 832 F.2d 1489, 1497–98 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 360 (1989).

In *Texas Comm. on Natural Res. v. Van Winkle*, 197 F.Supp.2d 586 (N.D. Tex. 2002), plaintiffs challenged the cumulative impacts analysis in an EIS prepared by the Army Corps of Engineers ("ACE") for the construction of a flood control project on the grounds that it did not address a series of related future projects. ACE argued that the projects were properly excluded "because they were not actually 'proposals' and because [ACE] 'had insufficient detail to provide [a] detailed discussion of cumulative impacts." *Id*. at 614. The Court was not persuaded by ACE's arguments, finding that "[r]egardless of whether any of the other projects constitute actual proposals, ***there is a reasonable basis to believe that some or all of them will be implemented*** . . . . Even if the exact future of these other projects is uncertain, uncertainty alone does not excuse [ACE]'s failure to address the cumulative impacts of these projects in connection with the [flood control] project." *Id.* at 619 (emphasis added).

Here, the Tribe has been very clear that it has a need for housing beyond just those development plans described in Alternative B. *See supra*. There is at least a "reasonable basis to believe" that additional housing will be built on Camp 4, and nothing further is required to trigger BIA's consideration of this "reasonably foreseeable" activity in the EA's analysis of cumulative impacts. *Texas Comm.*, 197 F.Supp.2d at 619.

2. <u>BIA Violated NEPA by Failing to Adequately Consider a Reasonable Range of Alternatives</u>

NEPA directs federal agencies to "study, develop, and describe appropriate alternatives" prior to approving an action that may significantly affect the environment. 42 U.S.C.

§ 4332(2)(E). This requirement "applies whether an agency is preparing an [EIS] or an [EA].'" *Abbey*, 719 F.3d at 1050 (citations omitted). While an EA is generally not required to be as thorough as an EIS, "an agency must still 'give full and meaningful consideration to ***all reasonable alternatives***' in an environmental assessment." *Id.* (emphasis added).

Analysis of feasible project alternatives is "critical to the goals of NEPA." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988). Agencies must demonstrate "informed and meaningful consideration of alternatives . . . even where a proposed action does not trigger the EIS process," because

> the goal of the statute is to ensure 'that federal agencies infuse in project planning a thorough consideration of environmental values.' The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers '[have] before [them] and take[] into proper account ***all possible approaches*** to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.'

Id. at 1228-29 (citations omitted) (emphasis added); *see also Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 976 (D. Haw. 2008) ("Informed and meaningful consideration of ***all alternatives*** . . . is an integral part of the NEPA statutory scheme."), *citing Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (emphasis added).

The articulated purpose and need of the proposed action defines the scope of reasonable alternatives that an agency must consider. *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 2006). An agency "must consider all reasonable alternatives within the purpose and need it has defined." *Id.* "The existence of a viable but unexamined alternative renders an [EA] inadequate." *Abbey*, 719 F.3d at 1050 (citations omitted) (brackets in original).

Even though the Tribe has not said what it intends to do with 62% of the property, BIA never considered taking fewer acres into trust, even though doing so would satisfy the Tribe's stated plans for the land. Instead, BIA considered only two alternatives, both of which contemplated an acquisition of all 1,433 acres of Camp 4 (plus a token "no action" alternative). BIA's failure to consider viable alternatives renders its NEPA analysis deficient.

In *Abbey*, the Plaintiff challenged an EA prepared by the Bureau of Land Management

(the "Bureau") which addressed renewal of grazing permits at a specific site within the Breaks National Monument—an area consisting of 375,000 acres of pristine land in north-central Montana.[6] *Id.* at 1050-51. The stated purpose and need of the permit renewal was "to evaluate rangeland health standards and modify current grazing practices on the allotment so that progress can be made toward meeting [certain federal] standards." *Id.* at 1052.

The Bureau's EA in *Abbey* considered three action alternatives and one no-action alternative. The three action alternatives each considered issuing new grazing permits at the same grazing level as the previous permit, but with changes to the terms and conditions of the permit, and the no-action alternative was identical to the expiring permit. *Id.* at 1050. The Bureau also considered, but declined to analyze in detail, alternatives that would provide for no grazing, reduced grazing, and alternative management strategies, asserting that these proposed alternatives did not meet the purpose and need of the proposed action, or were unnecessary because they had been considered and rejected in a prior environmental assessment. *Id.*

The Ninth Circuit held that the range of alternatives considered by the Bureau was unreasonable because, among other reasons, the "no grazing" and "reduced grazing" alternatives "could feasibly meet the project's goal. Feasible alternatives should be considered in detail." *Id.* at 1052.[7] Accordingly, the Ninth Circuit reversed and remanded with instructions that the Bureau be directed to either "remedy the deficiencies in the EA . . . or to prepare a more detailed EIS" that would "consider[] a reasonable range of alternatives that included a no- or reduce-grazing option." *Id.* at 1054.

Oregon Wild v. BLM, 2015 U.S. Dist. LEXIS 32584 (D. Or. Mar. 14, 2015) clarifies that *Abbey* requires agencies to consider "*all* viable and reasonable alternatives," rather than a limited number with varying potential impacts. *Id.* at *14 (emphasis in original). In *Oregon Wild,* Plaintiffs argued that the Bureau's EA for a timber harvest project was inadequate because it

[6] Generally, the Bureau issues ten-year grazing permits for allotments within the Breaks Monument, and each permit renewal must comply with NEPA.

[7] The Court also held that a prior assessment of similar alternatives cannot substitute for an analysis of the same alternatives in a current EA—"an agency errs when it relies on old data without showing that the data remain accurate." *Id.*

failed to analyze viable alternatives to the proposed project: specifically, the alternative of limiting the project's variable retention harvest to younger trees. *Id.* at *12. The Bureau argued that, by providing a detailed analysis of a no-action alternative and the project as proposed, as well as briefly discussing and rejecting two different alternative harvest methods, it fulfilled its NEPA obligation by "developing and analyzing several alternatives that encompassed varying levels of environmental impact." *Id.* at *13.

The district court held that the Bureau misconstrued the holding in *Abbey* and, consequently, its obligations under NEPA. *Id.* at *12-14. The court rejected the argument that *Abbey* "established only 'the limited proposition' that an EA's analysis of alternatives is adequate unless the agency has 'failed to analyze any alternatives that would result in varying levels of environmental impact.'" *Id.* at *13-14. An EA does not satisfy NEPA by merely considering some alternative with less environmental impact than the proposed project—as *Abbey* demonstrates, NEPA "hold[s] agencies to the stricter standard of examining ***all*** viable and reasonable alternatives." *Id.* at *14 (emphasis in original). Because "BLM failed to take a 'hard look,'" the district court found that BLM violated NEPA and therefore granted the plaintiffs' motion for summary judgment. *Id.* at *16 and *41.

As in *Abbey* and *Oregon Wild*, BIA's Final EA here was inadequate because it failed to consider alternatives capable of meeting the purpose and need articulated by the Tribe and the BIA for taking Camp 4 into trust. BIA should also have considered the environmental consequences of taking less than the full acreage of Camp 4 into trust. As the FONSI demonstrates, the Tribe has no present intent to use more than 194 acres of land for residential development,[8] 206 acres for agriculture operations, 134 acres for other uses dedicated to resource management, or 30 acres for "tribal facilities." AR0237.00005, 00535-37. This leaves 869 acres of Camp 4 unaccounted for. *Id.* Because the Tribe has not articulated a need for these additional lands—and the BIA apparently did not deem development beyond this phase as reasonably foreseeable (*see* Section IV.A.1, *supra*), and did not analyze the potential impacts

[8] Under the approved trust acquisition alternative, the Tribe asserts that it plans to use only 194 acres of Camp 4 for housing development. AR0237.00535-37.

associated with development beyond the proposed activities—taking less land into trust could clearly meet the identified purpose and need. BIA was obligated to consider *all* feasible alternatives consistent with that articulated purpose and need, including taking only the amount of land into trust that is needed to accomplish the articulated purpose of the trust acquisition. *See Abbey*, 719 F.3d at 1052.

The Final EA concludes, with no discussion, that a smaller trust acquisition would not meet the purpose and need of the proposed project, because it would not "provide acreage for housing assignments; circulation; multiple access and egress points for residential safety; agriculture operations to diversify tribally-governed commercial enterprises; open space, recreation, and conservation in accordance with tribal environmental ordinances; and associated utility infrastructure to support each of the designated land uses." AR0194.00017; *see also* AR0194.01707 (BIA's response to comment letters reiterating the same); AR0237.00453 (same). However, the Tribe *itself* never articulated this purpose or need in its applications for the trust acquisition. *See generally* AR0032, AR0080; *see also Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Dir., BIA*, 58 IBIA 278, 314, 2014 WL 2595152, at *28 (BIA is required to consider "the need articulated ***by the Tribe***" (emphasis added)). And, though BIA contends that a smaller trust acquisition is inconsistent with the purpose and need of the project, the actual record shows that this alternative could feasibly meet the Tribe's articulated goal of constructing 143 residences on 194 acres of Camp 4 to accommodate the Tribe's current and future members, as well as allowing tribal governance over the Tribe's existing agricultural operations on the property. *See* AR0194.00013.

"Feasible alternatives should be considered in detail." *Abbey*, 719 F.3d at 1052. Here, they were not. For this reason, alone, the Final EA failed to satisfy NEPA, and thus the BIA's decision should be overturned.[9] *Id.* at 1053.

3. BIA Used an Inappropriate Baseline to Assess Environmental Impacts

To comply with NEPA, it is imperative that a federal agency evaluate a project's

[9] Because BIA's FONSI was based on the Final EA, it is also inadequate.

environmental impacts against the baseline of environmental conditions as they would exist without the project. Without establishing accurate baseline conditions, "there is simply no way to determine what effect [an action] will have on the environment and, consequently, no way to comply with NEPA." *Am. Rivers v. Ferc*, 201 F.3d 1186, 1195, n.15 (9th Cir. 1999), *citing Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); *see also Gifford Pinchot Task Force v. Perez*, 2014 U.S. Dist. LEXIS 90631, at *81-82 (D. Or. July 3, 2014) ("Without the baseline data, the agency cannot carefully consider information about significant environmental impacts and thus, the agency fails to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.").

Here, although no development will occur on the property until 2023, BIA used present-day environmental conditions as its baseline to assess the project impacts, and did not even attempt to forecast conditions as they might exist in 2023.

Where a project will not occur until well into the future, the proper baseline should factor in those future conditions. In *Cal. ex rel. Imperial County Air Pollution Control Dist. v. United States DOI*, 2012 U.S. Dist. LEXIS 49020, at *39-40 (S.D. Cal. Apr. 6, 2012) ("*Imperial County*"), Plaintiffs challenged the Secretary of the Interior's approval of an agreement governing the use and distribution of Colorado River water. Specifically, Plaintiffs challenged the Secretary's use of a "hypothetical future" baseline in the Environmental Impact Statement[10] to evaluate the potential impacts of reduced flows to the Salton Sea. *Id.* Plaintiffs argued that it was error not to consider the Salton Sea's current elevation and salinity levels, and that the hypothetical baseline was contrived to avoid revealing the project's substantial effects on the Salton Sea's elevation and salinity. *Id.*

The court, however, found that comparing

> future conditions with the project versus future conditions without the project . . . is consistent with the CEQ regulations (40 C.F.R. § 1502.14(d)), and *especially appropriate* here, given the established ongoing trend of increased salinity and declining water surface

[10] In assessing the sufficiency of an EA's baseline information under NEPA, courts may rely on EIS cases. *See Gifford Pinchot Task Force v. Perez*, 2014 U.S. Dist. LEXIS 90631, at *86 (D. Or. July 3, 2014).

> elevation. Because the Salton Sea's salinity and elevation will change without the project, the Court agrees ***that the most accurate way to assess the project's impacts is to compare it to a future baseline***.

Id. (emphasis added). As the court explained, "comparing [the project's environmental impacts] to a current conditions baseline would not factor in changes that will occur regardless of the project," which would lead to an improper analysis of the project's impacts. *Id.*

Here, while BIA acknowledges that "the baseline of the existing resources [should] consist[] of the existing conditions anticipated ***at the time the project would be developed***," BIA here does not even attempt to forecast the conditions that will exist just before the development begins. AR0194.01689, *citing* BIA NEPA Guidebook (emphasis added). As discussed above, the Tribe does not plan to begin construction on Camp 4 until at least the year 2023, and anticipates construction will last through roughly 2032. AR0080.00199; AR0194.00025, 00143. However, BIA did not evaluate the effect of constructing 143 residences, a 12,000 square foot tribal facility, related infrastructure, and new roads on the environmental landscape as it will exist in 2023. Instead, BIA used a present-day baseline to assess the impacts of the Tribe's proposed development. *See, e.g.*, AR0194.00025 ("for the purpose of evaluating impacts to other resources (e.g. land use), the construction date was assumed to be 2014"); AR0194.00036 ("the existing conditions described herein provide the baseline for determining the environmental effects"); AR0237.00428-429 ("The Proposed Action and project alternatives were then analyzed within the context of the existing setting to determine potential environmental impacts.").

BIA's use of a 2014 baseline assumes that the environment will not change over the next decade. This is not a reasonable or supported conclusion. *See Abbey*, 719 F.3d at 1053 ("[w]here changed circumstances affect the factors relevant to the development and evaluation of alternatives, the [agency] must account for such change in the alternatives it considers").

For instance, BIA's conclusion that the project would not have a significant impact on water resources is based in large part on a 2009 Santa Ynez Valley Community Plan that identifies a surplus of approximately 513 acre-feet of water per year in the Uplands Basin, which

it concludes could serve the potable water supply demands of incoming residents. AR0237.00006. However, 2009 preceded the current California drought, and as the City of Santa Barbara pointed out in comments to the Final EA, "[r]ecent data on water supply . . . does not support the alleged surplus . . . [and the] standing water levels in the wells in the project area have fallen considerably from 2009 to 2013."[11] AR0237.00075 (County of Santa Barbara's Comments on the Final EA). Given the current drought, it is entirely foreseeable that the water supply for the Santa Ynez Valley could be substantially lower in 2023 than it is now. *See, e.g., Gov. Jerry Brown signs historic groundwater management legislation*, LA TIMES (September 16, 2014), *http://www.latimes.com/local/political/la-me-pc-groundwater-regulation-bills-20140916-story.html* (in 2014, the California legislature approved its first-ever restrictions on groundwater pumping, which will not go into full effect until 2025). Not only would the supply of groundwater likely decrease from the 2009 baseline; demand would also likely increase as supplies from the State Water Project become less reliable. *See, e.g., DWR Drops State Water Project Allocation to Zero, Seeks to Preserve Remaining Supplies*, CA.GOV (January 31, 2014), *http://ca.gov/drought/news/story-22.html*. Water is just one resource that may diminish before construction begins; other local resources, such as solid waste disposal; fire, police and other emergency services; schools; and parks and recreation, may also become scarcer by 2023.

BIA did not even attempt to forecast the conditions as they would exist when the construction will begin. Instead, BIA concluded that it had to use a current-day baseline because "there is inadequate information available to accurately determine the environmental setting in 2022, and use of an inaccurate existing setting would result in an inaccurate or, at best, a limited assessment of impacts to resources." AR0237.00429. That may be, but it does not excuse BIA from considering what the environment may look like when development commences. As BIA admits, "information and models are available that may speculate on future [conditions such as] groundwater conditions." *Id.* Without explanation, however, BIA simply states that the current-

[11] BIA responded to this comment by stating that it did not recognize the references provided by the County of Santa Barbara and would continue to rely on cited data from 2009. AR0237.00442.

day data presents a more analytically sound baseline than one that attempts to forecast conditions as they might exist in the future, when construction is actually scheduled to begin. *Id.* Because key environmental conditions like groundwater supply are so likely to change by 2023, BIA's decision to use outdated data is not reasonable and does not satisfy NEPA's requirement to take a hard look at potential environmental impacts.[12]

B. Although Camp 4 is Being Acquired in Part for Business Purposes, BIA Failed to Consider a Plan Specifying the Anticipated Economic Benefits Associated with the Proposed Use

The Tribe intends to use Camp 4, at least in part, for business purposes. *See* Notice of Decision, p. 22 ("The remainder [of the Camp 4 property] will continue to be used for economic pursuits (vineyards and a horse boarding stable) . . ."); AR0080.00011 (same). Pursuant to 25 C.F.R. § 151.11(c), "[w]here land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." BIA "shall" consider that plan as part of a tribe's request for the acquisition of off-reservation property. 25 C.F.R. § 151.11; *cf. Christine A. May v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 33 IBIA 125, 133 (1999) (where a tribe submitted a "plan [that] addresse[d] . . . the anticipated economic benefits associated with the proposed use," BIA satisfied 25 C.F.R. § 151.11(c) by discussing that plan in connection with its analysis of the purposes for which the land would be used).

Here, as the Tribe has supplied no such plan, BIA did not and could not have considered

[12] Appellants also adopt and incorporate County of Santa Barbara's additional and related argument that NEPA requires the agency to consider significant new circumstances relevant to environmental concerns that bear on the proposed action and its impacts. 40 C.F.R. § 1502.9; *Greater Gila Biodiversity v. US Forest Service*, 926 F. Supp. 914, 916-17 (D. Ariz. 1994) (applying requirement to EA's). Here, the BIA must consider the significant new circumstances associated with the state-wide drought, as noted above, and the restrictions imposed by the Governor and the local water authority. *See Governor Brown Declares Drought State of Emergency*, CA.GOV (January 17, 2014) http://www.water.ca.gov/waterconditions/declaration.cfm; *Drought Information*, Water Wise Santa Barbara, http://waterwisesb.org/education.aspx?id=1342 (Stage II Critical Water Restrictions imposed on Sept. 22, 2015)). Additionally, the newly-acquired 350-acre parcel requires a re-evaluation of the alternatives to be considered by the BIA.

this mandatory factor. BIA and the Tribe[13] do not deny that the land is being acquired for business purposes, nor do they argue that § 151.11(c) is inapplicable. Instead, they argue that because the regulations do not specify the form in which the plan must be submitted, a PowerPoint presentation the Tribe delivered in January 2013 that "provides substantial information on the Tribe's plans" satisfies § 151.11(c). Notice of Decision, p. 18. The PowerPoint presentation, however, is simply a series of conceptual maps showing various options for how the land may be used. *See* AR0118.00009-18. It is utterly silent on "the anticipated economic benefits associated with the proposed use" —the sole piece of information that a § 151.11(c) plan must contain.

BIA and the Tribe also argue that this requirement is satisfied because "the discussion of the on-going business operations . . . on the property and any potential future development of the vineyards have been thoroughly discussed in both the EA and the Final EA. For instance, the Final EA (Section 2.1.1) notes that . . . the size of the vineyard would be reduced by fifty acres." Notice of Decision, p. 18. However, like the PowerPoint presentation, this information does not specify, or even describe in a general sense, "the anticipated economic benefits associated with the proposed use" of Camp 4. No other information in either the EA or the Final EA addresses the anticipated economic benefits of the business activities that the Tribe intends to undertake on Camp 4. *See generally* AR0127 (EA) and AR0194 (Final EA).

BIA and the Tribe make two final points on this issue: first, that "there are no new economic benefits associated with the acquisition" because the commercial activities that will take place on Camp 4 are already taking place; and second, that the "primary purpose" of the acquisition is for tribal housing, not economic pursuits. Notice of Decision, p. 18. These points, however, are irrelevant. 25 C.F.R. § 151.11(c) does not require BIA to consider a business plan only when the Tribe intends to conduct "new" business activities, nor does it require BIA to review a business plan only when the land is being acquired "primarily" for business purposes.

[13] In its Notice of Decision, BIA adopted *verbatim* the Tribe's response to comments received on this issue. *Compare* Notice of Decision, p. 18 *with* AR0118.00006-07 (Tribe's response to public comments received in connection with the 9/17/2013 and 11/19/2013 notice of application letters).

The language of 25 C.F.R. § 151.11(c) is clear: "Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use."

BIA may not approve a trust acquisition where, as here, it has failed to consider a legal prerequisite to such acquisition. *See Cnty of San Diego,* 58 IBIA at 23. Thus, its approval must be overturned.

C. BIA and the Tribe Failed to Clear Title to the Public Roadways Within the Project Boundary

BIA's decision to take Camp 4 into trust for the Tribe violates BIA's own regulations and standard procedures requiring appropriate title examination prior to approving a request for the acquisition of land from unrestricted fee status to trust status. *See* 25 C.F.R. § 151.13; Acquisition of Title to Land Held in Fee or Restricted Fee Status ("Fee-to-Trust Handbook") Release #13-90, Version III (rev 4), Issued: 06/16/14. Pursuant to these regulations, BIA must "acquire, or require the applicant to furnish, title evidence meeting the *Standards for the Preparation of Title Evidence in Land Acquisitions by the United States,* issued by the U.S. Department of Justice" for the property to be taken into trust. 25 C.F.R. § 151.13. They require BIA to evaluate title evidence and make a clear determination regarding any liens, encumbrances, or infirmities on the land at issue. *Id.* Inconsistencies regarding title of the land should be resolved prior to BIA approving a fee-to-trust application. *Id.*; *see also* Fee-to-Trust Handbook p. 13.

Here, BIA failed to resolve an inconsistency regarding title over 21.9 acres of land in the proposed trust area. The Tribe's fee-to-trust application formally requested the transfer of land "owned by the Tribe" to trust status. AR0080.0005. The Tribe describes the land as five parcels totaling 1411.1 acres, and provides detailed maps and narratives describing the five parcels in its application at Exhibit N. *See* AR0080.00181-197. The roads known as Baseline Ave., Torrance Ave., Mora Ave., San Marcos Ave., Armour Ranch Rd., Riordan Ave. and State Hwy. 154, which together comprise 21.9 acres of land, all clearly lie outside the boundaries of the five parcels described in the application. *Id.* These are public roadways. *See* AR0080.00182.

Although not actually requested in the Tribe's fee-to-trust application, this additional 21.9 acres of land appears in the Final EA's description of the property to be taken into trust described as "right of ways". AR0194.00008. Various maps appearing throughout the Final EA include some or all of Baseline Ave., Torrance Ave., Mora Ave., San Marcos Ave., Armour Ranch Rd., Riordan Ave. and State Hwy. 154, as well as smaller roads that cut through the five parcels, within the "project boundary." *See, e.g., id.* at 00010, 11, 41, 45, 67, 73, 95, 97, 113, 142, 167, 336, 337, 343, 345, 349, and 383.

Public comments brought this issue to BIA's attention before BIA issued the Final EA. AR0194.01702. In response, BIA stated that "the Tribe conducted a review of the title and concluded the above-listed ROWs [*i.e.*, the roads] are easements not dedications; therefore, the Tribe is the owner in fee of the ROWs and the areas can be taken into trust." AR0194.01704. To support this statement, BIA refers to a letter from L&P Consultants dated April 30, 2014—the day before BIA issued the Final EA. *Id.* This letter is not attached to the Final EA, and it is not in the Administrative Record. If it exists at all, it is contradicted by the documents describing the property to be taken into trust in the Tribe's own fee-to-trust application, which were also prepared by L&P Consultants. *See* AR0080.00181-197. Further, the Title Commitment dated June 3, 2013 and the Amended Title Commitment dated November 4, 2014 refer to the Surveyor's Notes indicating that these roads "may be owned in fee by the County, maybe not." *See* AR0080.000094, AR0122.00010.) Additionally, the Application has an inconsistent description of the northerly boundary of Parcel 1, with maps showing title going to both the northerly and southerly line of Baseline Avenue. *See* AR 0194.00011, AR0194.01703, AR032.00210, AR0080.00188.)

Here, it is especially critical that title to the property taken into trust be clear and unambiguous prior to the trust acquisition because once the land is converted to trust status, the Tribe will have full control over these alleged "right of ways." Indeed, the Tribe has indicated that access to the former public roads will be "assessed on a case by case basis" subject to the Tribe's discretion. AR0194.01704. After the trust acquisition is complete, the public will have ***no legal recourse*** to resolve title disputes or contest rights to the roads. 28 U.S.C. § 2409a;

Block v. North Dakota, 461 U.S. 273, 283 (1983).

BIA's failure to clarify the title to these roads also violates NEPA. *See* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality."); 40 C.F.R. § 1502.14(b) ("agencies shall . . . [d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."). The contradictory, incorrect, and unsupported title information in the Final EA deprived the public of a meaningful opportunity to participate in the environmental review.

In sum, BIA made the decision to take land into trust that the Tribe did not ask for and does not own. The only alleged evidence that the Tribe *does* own the roads at issue is in a document that was apparently drafted the day before the Final EA was released, and is nowhere to be found in the Administrative Record. BIA's decision to take all 1,433 acres of land into trust for the Tribe without resolving these title disputes is a clear abuse of discretion under both BIA regulations and NEPA. The Board (or in this case, the Assistant Secretary) must overturn BIA's decision to take land into trust when that decision reflects an abuse of discretion. *See Cnty of San Diego*, 58 IBIA at 23.

V. CONCLUSION

For the foregoing reasons, Appellant Santa Ynez Valley Concerned Citizens respectfully requests the Interior Board of Indian Appeals reverse the December 24, 2014 decision by BIA to take Camp 4 into trust for the Tribe.

DATED: December 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 31st day of December 2015, I delivered a true copy of the foregoing *Opening Brief of Appellant Santa Ynez Valley Concerned Citizens* to each of the persons named below, either by depositing an appropriately-addressed copy in the United States mail, by email, or both.

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