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October 8, 2009

Dale Morris, Regional Director
Pacific Region, Bureau of Indian Affairs
2800 Cottage Way, Room W-2820
Sacramento, CA 92825.

RE: Draft EA comments, Sycuan Reservation Proposed Fee-to-Trust Project

Dear Director Morris:

Endangered Habitats League (EHL) appreciates the opportunity to comment on the National Environmental Policy Act (NEPA) Environmental Assessment (EA) of the Sycuan Band of Kumayaay Indians fee-to-trust transfer project. For your reference, EHL is Southern California's only regional conservation group, and participates on behalf of its members in Southern California in regional land use, transportation, and habitat planning efforts. EHL has participated as a major stakeholder in planning for the unincorporated areas of San Diego County, and in the creation and implementation of the Multiple Species Conservation Plan (MSCP) upon which the transfer would encroach.

Sycuan has applied for a transfer of lands out of state and local jurisdiction, partially to enable the construction of housing and other Tribal facilities on those transferred lands. Potentially significant impacts on biological resources will result from the transfer, both as a result of the immediately planned Tribal development, and from *future* development of lands that have been permanently removed from the protections afforded them by state and local law—including the County's MSCP.

The EA correctly recognizes that anticipated development and acquisition of Trust lands will occur in lands designated by the MSCP as Biological Resource Core Areas under multiple criteria and therefore as Pre-Approved Mitigation Areas (PAMA). The EA also acknowledges that manifold impacts to federally and state-protected species could occur, either from planned or future development on trust lands.¹

¹ The EA states: "Based upon the review of regionally occurring federally listed species and the results of the field assessments, the Sycuan Property provides potential habitat for three federally listed plant species and five federally listed animal species (**Table 3.5-11**). Three of the federally listed animal species: Arroyo Toad, southwestern willow flycatcher, and least Bell's vireo, have potential habitat on the Sycuan Property but not in the proposed development envelopes. The remaining two animal species: Quino checkerspot butterfly and coastal California gnatcatcher, and all three plant species: San Diego thornmint, San Diego ambrosia, and Otay tarplant, have potential habitat both in the proposed development envelopes and in portions of the Sycuan Property outside of the development envelopes." (EA, at p. 3.5-4.)

The EA proposes to find that these potentially significant impacts have been mitigated to a level of insignificance, largely based on a purported commitment to adopt the MSCP and implementing Biological Mitigation Ordinance (BMO) to guide future Tribal development. The EA notes that “although neither the MSCP nor the BMO apply to federal trust lands, they were consulted to guide the evaluation of how the Proposed Action could impact biological resources and the development of mitigation measures.” (EA at p. 3.5-3.) The EA further states that “[u]ntil the Resources Management Plan is adopted, Tribal Trust lands would be managed *in a manner consistent with the MSCP and BMO.*” (Id, emphasis added.) Finally, “[t]he proposed Resources Management Plan provides a clear statement of the Tribe’s intent to manage a significant portion of the Sycuan Property and existing trust lands *in a manner that is consistent with the goals and standards of the MSCP.*” (Id, emphasis added.) Indeed, the resource Management Plan “*would serve the same function* for the Tribal Trust lands as the sub-area plan of the MSCP serves for local non-tribal lands.” (Id.)

It follows that the validity of the EA's proposed determination of an insignificant impact on biological resources must turn on the correctness of its assertion that future activities will in fact be consistent with the MSCP and BMO. Regrettably, even a cursory application of MSCP conservation standards to the project and to commitments made regarding future development activities shows that this is not the case.

To understand why, it is essential to review just what the MSCP and BMO require. First, the primary engine of protection under the BMO is *avoidance* of impacts. The BMO requires that impacts to land determined to be a Biological Resource Core Area “shall be avoided to the maximum extent practicable.” (§ 86.505(a).) Accordingly, development “shall be sited in areas which minimize impact to habitat.” (§ 86.505(a)(1).) “Clustering” shall be used “as a means of achieving avoidance.” (Id § 86.505(a)(2).) Despite these MSCP requirements, there is no evidence that any effort was made to site development in areas where impacts to high quality Diegan Coastal Sage Scrub would be avoided. To the contrary, a portion of the proposed Dehesa Road housing complex would be located in *high* quality habitat. Similarly, Sloan Canyon Olive Grove housing is proposed for an area between designated arroyo toad mitigation sites, as shown on Figure 9 of the RMP. To comply with the MSCP, the EA must either relocate this housing or articulate why relocation is not feasible.

Second, the BMO requires that “projects shall be required to comply with applicable design criteria in the County MSCP Subarea Plan.” (§ 86.505(a)(5).) These design criteria, in turn, stress the maintenance of large blocks of habitat in Preserve Design (Attachment G) and the preservation of habitat linkages and corridors (Attachment H). For the reasons given by the Conservation Biology Institute in its letter dated August 11, 2009, the proposed project and draft Resource Management Plan ignore these requirements.

Third, as demonstrated above, while mitigation of unavoidable impacts is a *component* of MSCP and BMO compliance, implementation of required ratios alone does not satisfy MSCP

standards. Yet the EA commits the Tribe *only* to adherence to mitigation ratios in considering future development on Trust lands. The EA states that “[i]f impacts occur prior to the Tribal adoption of the Resources Management Plan (Appendix A) as the guiding document for habitat management, *mitigation would be according to the ratios specified in Table 4.5-1.*” (EA at p. 4.5-1, emphasis added.) Similarly, “[i]f the impact occurs after the Tribe has adopted the Resources Management Plan, *mitigation will occur according to the relative value of the impacted and preserved habitat areas, as described in the Plan.* (Id., emphasis added.) Finally, “[a]s proposed developments occur on the project site, *mitigation for impacts would be calculated using formulas based on the MSCP*, and the corresponding amount of land on the Sycuan Property would be preserved in designated Conservation Areas. (EA at p. 3.5-3, emphasis added.)

These statements reflect a fundamental misunderstanding of the function and purpose of the MSCP. The MSCP does not exist simply to mitigate project impacts, but to affirmatively create a viable, robust multi-species habitat reserve. That is why avoidance, reserve design criteria, and preservation of habitat linkages and corridors are critical components of MSCP. Therefore, to be considered “consistent with the goals and standards of the MSCP,” the Tribe must commit not only to observe the mitigation ratios, but also the MSCP’s avoidance, reserve design and corridor preservation requirements.

The EA relies on purported MSCP compliance for its proposed finding of no significant impact. Because it has failed to properly apply the MSCP’s conservation standards, NEPA precludes approval of the project on the records developed to date. To avoid having to prepare an EIS, the project must be redesigned to MSCP standards and a revised EA re-circulated for public comment. EHL believes that such a redesign is possible, and would be happy to work with the BIA and the Tribe to this end.

Thank you for your consideration of EHL’s views.

Respectfully submitted,

Michael D. Fitts
Staff Attorney

cc: Dept of the Interior
US Fish and Wildlife Service
California Dept of Fish and Game
County of San Diego
Interested parties