



SWEETWATER AUTHORITY

505 GARRETT AVENUE
 POST OFFICE BOX 2328
 CHULA VISTA, CALIFORNIA 91912-2328
 (619) 420-1413
 FAX (619) 425-7469
<http://www.sweetwater.org>

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September 13, 2011

Amy Dutschke
 Regional Director
 Pacific Regional Office
 Bureau of Indian Affairs
 2800 Cottage Way, Room W-2820
 Sacramento, CA 95825

Comments from: James L. Smyth, General Manager, Sweetwater Authority
 P.O. Box 2328, Chula Vista, CA 91912-2328

Subject: Final Environmental Assessment, Proposed Sycuan Fee-to-Trust
 Project

Dear Ms. Dutschke:

Sweetwater Authority (Authority) has reviewed the Final Environmental Assessment (EA) for the Sycuan Band of the Kumeyaay Nation Proposed Fee-to-Trust Acquisition. The Authority understands that the Regional Director of the Bureau of Indian Affairs (BIA) will determine whether the environmental review process has been consistent with National Environmental Policy Act (NEPA) requirements; if a Finding of No Significant Impact (FONSI) can be issued; if additional studies should be requested; or if an Environmental Impact Statement (EIS) should be prepared. The Authority also understands that the Trust Application is currently under review by the Department's Bureau of Indian Affairs and has not been circulated for comments. The Authority's comments on the Trust Application, as well as compliance with 25 C.F.R. Part 151 and other legal requirements, will be submitted in a follow-up letter. (See, e.g., 25 C.F.R. § 151.12.)

I. **NEPA Requirements in the Fee-to-Trust Process**

NEPA compels federal agencies to consider the consequences of their proposed activities on the human environment. (42 U.S.C. § 4331.) The statute requires a federal agency to produce an environmental impact statement when proposing to engage in any "major federal action" that will "significantly affect the human environment." (42 U.S.C. § 4332(2)(C) (1994).) BIA regulations provide that fee-to-trust applications trigger NEPA. (See 25 C.F.R. § 151.12(h); see also *Santana v. Sacramento Area Director, Bureau of Indian Affairs*, IBIA No. 97-127-A (Dep't of the Interior, Jan. 28, 1999).)

NEPA also requires that, "to the fullest extent possible . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies" set forth in the Act. (42 U.S.C. § 4332.) As the Ninth Circuit Court of Appeals

A Public Water Agency

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has recognized, "[T]hese are strong words directing our statutory interpretation." (Jones v. Gordon, 792 F.2d 821, 826 (9th Cir. 1986).) This language serves as the foundational statement of the "greatest importance to NEPA" which is "to require . . . agencies to consider environmental issues just as they consider other matters within their mandates." (Calvert Cliffs' Coor. Com. v. United States A E Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis in original).) The Ninth Circuit has held that NEPA should be given "the broadest possible interpretation." (Westlands Water Dist. v. Nat. Res. Def. Council, 43 F.3d 457, 460 (9th Cir. 1994), citing Jones, 792 F.2d at 826.)

In assessing the EA, the BIA is also governed by the United States Department of the Interior (DOI) NEPA implementing procedures. (Bureau of Indian Affairs NEPA Handbook (59 IAM 3).) Those procedures require that the underlying environmental analyses "factually, objectively, and comprehensively analyze the environmental effects of proposed actions and their reasonable alternatives. [DOI management should] systematically analyze the environmental impacts of alternatives, and particularly those alternatives and measures which would reduce, mitigate or prevent adverse environmental impacts or which would enhance environmental quality." (Bureau of Indian Affairs NEPA Handbook § 1.4.A.)

It is therefore of paramount importance that the public, local agencies, and federal decision makers be provided with sufficient information on all of the potential environmental and other effects of the action at issue. As detailed below, to date, that has not occurred.

II. *Impacts and Limitations Associated with the 1993 Settlement Agreement*

As described in previous comments on the Draft EA, in 1993, the Authority entered into a settlement agreement with the Tribe's predecessors in interest to the project area, Sloan Canyon Sand Company, CalMat Company, and H.G. Fenton Material Company ("1993 Settlement Agreement"). A copy of the 1993 Settlement Agreement is enclosed. The 1993 Settlement Agreement granted the Authority an easement to access and operate slide gates at Lake Emma, limited the potential uses of Lake Emma, and settled certain water rights claims between the parties. The 1993 Settlement Agreement is binding on successors in interest to the property. This includes Sycuan and the United States Government if it takes the property in trust for the Tribe.

The Authority is concerned that the EA does not adequately address (or accurately describe) the limitations imposed on use of the project area by the 1993 Settlement Agreement. The Authority's concerns on this issue are as follows:

- Slide Gate Operation and Maintenance: Appendix A, Section 3.9.3, *Existing Agreements for Lake Emma*, states that "nothing in the NRMP [Sycuan Natural and Cultural Resources Management Plan of 2011] is intended to impede the SWA [Sweetwater Authority] in its operations of the slide gate..." This statement, which is

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repeated elsewhere in the document, does not sufficiently ensure the Authority's access to the slide gate or project compliance with the 1993 Settlement Agreement. The Authority suggests the following replacement language: "nothing in the NRMP shall impede the SWA in its ingress/egress and operations of the slide gate."

Moreover, the Authority is concerned that the EA does not specifically acknowledge the Authority's continued operation and maintenance of the slide gate. The 1993 Settlement Agreement is binding on the Tribe, and will be binding on the United States Government if the Tribe's fee-to-trust application is approved. The EA needs to state that pursuant to the 1993 Settlement Agreement, the Authority will continue to operate and maintain the Lake Emma slide gate. NEPA, applicable case law, and the BIA's own NEPA regulations require the EA to be factually accurate. (See e.g. Bureau of Indian Affairs NEPA Handbook § 1.4.A.) Failure to acknowledge and analyze the Authority's right to operate and maintain the slide gate renders the EA defective.

- **Easement Preservation:** The 1993 Settlement Agreement granted the Authority an express easement over portions of the project area. This includes the slide gate discussed above. While the easement is not exclusive, it is nonetheless a real property interest that will not be extinguished by the proposed project. The permanent nature of the Authority's easement is not adequately discussed in the EA. The EA therefore needs to be revised to describe the easement and the Authority's ongoing use of the property. The revisions should include a detailed map and a description of the easement in the mitigation measures for the project. Any other Authority easements on the effected property must also be acknowledged and analyzed.
- **Lake Emma Recreation:** Overall goals for management of Lake Emma are listed in Appendix A, Section 7.7, *Lake Emma Management Strategies*. The Tribe proposes non-motorized, non-contact recreation (e.g., canoeing, kayaking, and shoreline fishing) on Lake Emma. These proposed uses conflict with the permitted uses of Lake Emma described in Exhibit D, Paragraph D of the 1993 Settlement Agreement. The 1993 Settlement Agreement does not allow recreational uses of Lake Emma. It is the Authority's position that the terms and conditions of the 1993 Settlement Agreement are binding, regardless of the proposed development plans and fee-to-trust transfer. Perhaps more importantly, the proposed recreational use could have significant effects on the environment that are not adequately analyzed in the EA.

Within the last four years, the spread of invasive Quagga and Zebra Mussels has threatened water delivery systems, natural resources, agriculture, recreational boating, and fishing in the western United States. The Bureau of Reclamation and

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multiple federal, state, and local agencies are actively encouraging vigilance in preventing the transport and spread of harmful aquatic invasive species to uninfested water bodies by following standard precautionary procedures. To significantly reduce the likelihood of unintentional spreading of mussels within the Sweetwater River System, the proposed project should be revised so that only watercraft dedicated to Lake Emma for water quality sampling purposes are allowed, and shoreline fishing at Lake Emma is limited to the same extent as at the Loveland and Sweetwater Reservoirs. The Authority's shoreline fishing rules and regulations for each reservoir are enclosed.

Appendix A, Section 7.7.2 states that "Sycuan intends to meet water quality objectives as part of the limited and monitored use of Lake Emma." Water quality monitoring through annual sampling for constituents listed in Section 7.7.2 is inadequate for maintenance of water quality for its later use as municipal drinking water. The Authority suggests the following replacement language: "Sycuan shall meet water quality objectives as part of the limited and monitored use of Lake Emma." The Authority requests that the Tribe implement the enclosed *Recommended Water Quality Sampling Program for Lake Emma*, which is based on the California Regional Water Quality Control Board's *Water Quality Control Plan for the San Diego Basin (9)* (Basin Plan).

The EA also does not sufficiently ensure that the Tribe will provide all water quality monitoring results to the Authority. We suggest the following replacement language for the final paragraph of Appendix A, Section 7.7.2: "The maintenance of water quality for its later use as municipal drinking water by the SWA is an ongoing issue concerning Lake Emma's water, and nothing authorized by this NRMP shall impede the ability of the SWA to convey water between the reservoirs on the Sweetwater River. All water quality monitoring reports shall be provided to the USEPA and SWA, and these reports will be made available to other appropriate agencies at the discretion of the Band. If concentrations of constituents or indicator levels are found to exceed those acceptable for safe drinking water levels under the Safe Drinking Water Act or CWA, Sycuan shall cease all potentially contributing activities until the subsequent monitoring tests conducted under the proper authority of the CWA (USEPA) show that water quality has returned to acceptable levels, or the Tribal activities are determined not to be the cause of the exceedences.

Lastly, the EA's Response to Comments section downplays the 1993 Settlement Agreement's restrictions on the project area. Response 26-8 seems to state that because the 1993 Settlement Agreement conflicts with prior County approvals and the 1997 Biological Opinion, it is somehow not binding on the property owner.

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This is not the case. As is evident from the text of the agreement, the property owners agreed to bind themselves in excess of the limitations imposed by the County and USFWS in settlement of claims brought by the Authority. The 1993 Settlement Agreement therefore supersedes the MUP and BO to the extent that it imposes additional restrictions on the property. Since the agreement runs with the land, it is binding on the Tribe.

III. *Other Concerns*

In addition to the above, the following issues have not been adequately addressed:

- Mitigation Measures: EA Section 5.0, *Mitigation Measures*, states that "all mitigation necessary to reduce significant impacts to less than significant level will be binding on the Tribe because the mitigation is intrinsic to the project or required by federal law." Consequently, compliance with the 1993 Settlement Agreement, including slide gate operation and maintenance by the Authority, preservation of the subject easement, and permitted uses of Lake Emma, should be included in the mitigation measures.
- Failure to Draft an EIS: It is the Authority's position that the EA is inadequate as a stand-alone document, that the proposed project will have a significant effect on the environment, and that the BIA is required to develop an Environmental Impact Statement.
- Resolution 84-8 As Amended: Authority Resolution 84-8 As Amended establishes an impact fee to pay for water quality control infrastructure associated with development upstream of the Sweetwater Reservoir. Sweetwater estimates that the proposed project will result in approximately \$40,000 in fees under Resolution 84-8. These fees have a direct benefit for the environment and serve to mitigate the impact of development on water quality in the Sweetwater Reservoir. The beneficial impacts of Resolution 84-8 As Amended and the proposed project's compliance with the resolution need to be discussed in the EA and required as mitigation for the proposed project.

EA Table ES-1 and Section 5.2.2, *Water Supply and Groundwater*, reference Sweetwater Authority Resolution 84-8 As Amended and state that, "If it is found that the Mitigated Proposed Action is subject to this resolution, fees will be paid as appropriate." It is the Authority's position that the terms and conditions of Resolution 84-8 As Amended are binding regardless of the fee-to-trust transfer. The Authority suggests the following replacement language: "The Mitigated Proposed Action is subject to this resolution, and fees will be paid as appropriate."

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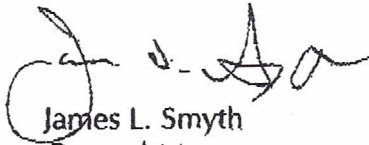
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The Authority appreciates the BIA's efforts to keep it apprised of the status of the proposed Sycuan Fee-to-Trust Application. Please provide the Authority with a copy of your decision on the project. If the Authority's concerns above are not incorporated in project approvals, or if you have any questions, please contact me at (619) 409-6701, or [jsmyth@sweetwater.org](mailto:j Smyth@sweetwater.org).

Sincerely,



James L. Smyth
General Manager

JLS:jd

enclosures: 1993 Settlement Agreement
Loveland Reservoir Shoreline Fishing Rules and Regulations
Sweetwater Reservoir Shoreline Fishing Rules and Regulations
Recommended Water Quality Sampling Program for Lake Emma

cc: Sean Sterchi
California Department of Public Health
Drinking Water Field Operations Branch
1350 Front Street, Room 2050
San Diego, CA 92101

W. G. Riggs
Crest-Dehesa-Granite Hills-Harbison Canyon
Subregional Planning Group
P.O. Box 21489
El Cajon, CA 92021-1489

Scott McClelland, Sweetwater Authority
Ron Mosher, Sweetwater Authority
Michael Garrod, Sweetwater Authority