

Stand Up For California!
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VIA EMAIL

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Re: DEIS Comments, Tejon Indian Tribe Casino Project

Dear Ms. Dutchke and Mr. Broussard:

Thank you for the opportunity to comment on the Bureau of Indian Affairs' (BIA) Draft Environmental Impact Statement (DEIS) for the Tejon Indian Tribe Trust Acquisition and Casino Project.

The three Proposed Actions involved in this case consist of the transfer of an approximately 306-acre property (Mettler Site) from fee to federal trust status for the benefit of the Tejon Tribe, issuing a Secretarial Determination, also known as a two-part determination, to determine whether the Tribe can conduct gaming on the Mettler Site, and the approval of a management contract by the National Indian Gaming Commission (NIGC). The Tribe proposes to develop approximately 80 acres of the Mettler Site with a casino resort and associated facilities, a fire and sheriff station, water infrastructure, and wastewater treatment and disposal facilities (Proposed Project). The casino would be managed by a professional management company on behalf of the Tribe pursuant to the terms of a management contract to be approved by the NIGC. For the reasons discussed in these comments, the DEIS is deficient in numerous respects, and we accordingly ask that the Bureau of Indian Affairs (BIA) prepare a Supplemental Environmental Impact Statement (SEIS) for this project.

A. Overview of Deficiencies

The National Environmental Policy Act (NEPA) requires the BIA to take a “hard look” at the environmental issues related to the Proposed Project and engage the public during BIA’s decision-making process. The Indian Reorganization Act (IRA) and the BIA’s own implementing regulations require BIA to consider community impacts from fee-to-trust applications and to analyze community impacts through the NEPA process before taking land into trust.

The Indian Gaming Regulatory Act (IGRA) and the implementing regulations require the Secretary, “after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [to make a determination] that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.” 25 U.S.C. 22719(b)(1)(A). Although BIA has not yet sought comments for purposes of the two-part determination, that process is also built on the DEIS.

This DEIS contains many flaws, inaccuracies, and ambiguities regarding the Proposed Project’s environmental and land use impacts, its alternatives, and impacts on the surrounding community. Moreover, the information is presented in a way that is not only atypical for any EIS, it appears designed to make understanding of the Proposed Project’s environmental impacts more difficult and less accessible. As currently drafted, the document is deficient and an SEIS is required.

1. The DEIS ignores the current public health crisis and the associated economic fallout.

This year, there has been a world-wide public health crisis from the ongoing COVID-19 pandemic. Many experts believe that COVID-19 will be endemic for the foreseeable future. Because the DEIS ignores this issue entirely, it is inadequate and must be supplemented.

There are several aspects to this issue that the DEIS must address. First, BIA should have addressed the general public health and safety consequences to the local community and to casino employees and customers posed by concentrating a large number of people in an indoor facility. Indoor entertainment venues are increasingly identified as transmission “hotspots” tied to local outbreaks. The establishment of such a venue poses a clear risk to the surrounding community—a risk that the DEIS entirely fails to evaluate. The public health and safety concerns posed by such a venue raise other issues, as well. For example, social distancing requirements could substantially reduce the functional capacity of the proposed casino, requiring a much larger development to produce the same economic benefit to the Tribe. A larger development would, in turn, entail greater impacts. Alternatively, the economic benefit of the casino may not be realized because ongoing public health concerns are likely to result in reduced attendance. Even if the pandemic were to end in the next six months, the public health issues this pandemic has brought to the fore are not going to go away.¹ BIA’s failure to address COVID-19 or to discuss any potential mitigation for future outbreaks not only fails to satisfy NEPA, it is fundamentally irresponsible.

¹ <https://www.businessinsider.com/epidemiologists-on-chances-of-future-coronavirus-outbreak-2020-3>

Second, COVID-19 has had profound impact on community health. The World Health Organization has found that health services have been partially or completely disrupted in many countries, with more than half surveyed reporting partially or completely disrupted services for hypertension treatment; 49% for treatment for diabetes and diabetes-related complications; 42% for cancer treatment, and 31% for cardiovascular emergencies.² The same is true in California. In mid-March, Governor Newsom announced a state-wide, shelter-in-place order. He also requested that hospitals increase their inpatient bed supply from approximately 80,000 to 130,000. But as COVID-19 containment efforts took hold, patient volume fell precipitously as hospitals discontinued elective and non-urgent care. Outpatient services—which represent about 40% of total California hospital volume—decreased by more than 50% in the 60-day period after the state-wide shelter-in-place order went into effect.³ These developments are expected to have long-term economic impacts on hospitals and public health services, with social services facing substantial reductions. The DEIS remarkably does not address any of these pressing public health issues.

Nor does it address the economic impacts of COVID-19, which have been extensive. In May, California estimated a drop in anticipated revenue of \$41 billion and over \$10 billion in new coronavirus-related costs to the government. Unemployment in the State has grown from 350,000 receiving services in March to 2.9 million in July.⁴ Such extensive unemployment will obviously affect the gaming market. The facility’s primary gaming market is from population centers in Southern and Central California.⁵ But unemployment in Los Angeles County has grown to over 20% and Kern County is now at 18%.⁶

The DEIS says nothing about these issues or the possibility that the gaming market is likely to change in the near term. For example, the massive growth in online gaming is likely to affect the anticipated gaming revenues at brick and mortar facilities. In 2019, the significant increase in overall gaming profits in the United States was driven predominantly by the +13.9% growth in console game revenues.⁷ In 2020, the global online gambling market is expected to grow from \$58.9 billion in to \$66.7 billion at a compound annual growth rate (CAGR) of 13.2%, largely because a significant portion of the population is confined due to COVID.⁸ The market is then expected to reach \$92.9 billion in 2023 at a CAGR of 11.64%—numbers which likely will result in declining revenues at brick and mortar facilities.⁹ Nothing in the EIS addresses the economic consequences of the health crisis, including how long recovery might take or when it will even begin. At a minimum, BIA should have considered this massive public health and economic crisis the country is facing.

Fourth, the pandemic has highlighted another issue that should be addressed in the DEIS—the public risks associated with inconsistent public health policies within the same geographic area.

² <https://www.who.int/news-room/detail/01-06-2020-covid-19-significantly-impacts-health-services-for-noncommunicable-diseases>

³ <https://www.chcf.org/wp-content/uploads/2020/06/FinancialImpactCOVID19CAHospitals.pdf>

⁴ <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/unemployment/>

⁵ DEIS, Appendix I, at 10.

⁶ <https://edd.ca.gov/newsroom/unemployment-june-2020.htm>

⁷ <https://goldencasinonews.com/blog/2019/12/09/top-3-gaming-markets-hit-92-billion-revenue-in-2019/>

⁸ <https://www.prnewswire.com/news-releases/tbrc-report-insights-free-time-due-to-coronavirus-lockdown-is-increasing-the-demand-for-online-gambling-301079346.html>

⁹ <https://linchpinseo.com/trends-in-the-gambling-casino-industry/>

California gaming operators have been very hard hit by COVID-related health policies. All 66 state-regulated card rooms voluntarily closed in mid-March. Many cardrooms briefly reopened in mid-June, only to be ordered by Governor Newsom to cease indoor operations in 19 counties in July. The closures have obviously adversely impacted the card rooms and their employees. And because the card rooms are subject to taxation, the detrimental impact of card room closures has extended beyond the operators and employees to the host communities. Despite these widespread impacts, the closures have been deemed essential to protecting public health.

Tribes have maintained, however, that they are not subject to State public health mandates, and the Governor has agreed.¹⁰ Thus, while tribal casinos closed in mid- to late-March, they reopened over the objections of the Governor and have continued to operate, despite the Governor's efforts to reduce spread by ordering an immediate halt to all indoor activities at restaurants, bars, entertainment venues, zoos, and museums following a 20% spike in new COVID cases. As of July 23, California has 413,576 total cases and 7,870 deaths related to COVID-19. The continued operation of tribal casinos is hampering the State's efforts to protect public health.

The inability of the State to implement public health measures that are consistent state-wide is directly relevant to the Secretary's analysis. The relevant test in this case is whether the Proposed Project "would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community." 25 U.S.C. § 2719 (b)(1)(A). The Governor must also concur in the Secretary's determination. *Id.* There is no way for the Secretary to determine that the Proposed Project is in the best interest of the Tribe or that it would not be detrimental to the surrounding community, in light of COVID-19 and the possibility of future pandemics.

2. BIA's scoping for the Proposed Project was out-dated.

Apart from its failure to address COVID-19, BIA's scoping for the Proposed Project was outdated. On April 4, 2019, Stand Up requested that BIA re-initiate scoping due to the long lapse between the Notice of Intent and the DEIS. BIA published a Notice of Intent to prepare an Environmental Impact Statement (EIS) for the Proposed Project on August 13, 2015. It did not complete a scoping report for the Proposed Project until February 2019—three and a half years later. The original schedule called for a DEIS to be issued within six to eight months of the scoping hearing—more than four years ago.

The information BIA obtained during scoping in 2015 was stale by the time BIA issued its scoping report in 2019. Between 2015 and the date of the DEIS, new residential projects were approved and others formally proposed. Economic development along the I-5 corridor expanded. Groundwater management evolved as implementation deadlines in California's Sustainable Groundwater Management Act passed. BIA should have updated its scoping report to ensure that the public could have raised concerns related to the Proposed Project in light of new developments.

3. BIA's selection of AES and its lack of oversight over the process renders the EIS inadequate.

¹⁰ There is substantial controversy regarding the Governor's authority to close tribal casinos. *See* <https://kmp.com/news/local/businesses-on-tribal-lands-operating-while-other-california-businesses-close>.

Stand Up has significant concerns regarding the impartiality and objectivity of the environmental contractor, and therefore the reliability of the DEIS. The environmental contractor that prepared the EIS in this case is the same contractor that is used for virtually all gaming-related trust acquisitions and many other tribal projects— Analytical Environmental Services (“AES”). AES has been repeatedly accused of bias and producing sub-standard EISs. Other federal agencies do not use the same contractor for every project, as it creates the appearance of impropriety and can ultimately undermine the integrity of the NEPA review process, as the product tends to be very similar from one project to another. In the case of AES’s EISs, there is, in fact, a remarkable similarity between documents. Not only do the documents look startlingly similar, AES has apparently never concluded that a project will have detrimental effects, based on Congressional questioning.¹¹

In fact, AES identifies scores of tribes as clients, creating a conflict of interest, and if AES is listing *projects* that it has worked on, it clearly seems to misperceive who, in fact, is its client. Under federal law, it is the *agency* who is the client, not the tribe. The purpose of NEPA is to ensure informed and *objective* decision-making by federal agencies, which using the same environmental contractor for every project thwarts. Authorship of an EIS by a biased party —can prevent the fair and impartial evaluation required by NEPA. Indeed, AES has been alleged to have a “revolving door” with BIA where employees of BIA and AES have switched jobs and has a history of conflict of interest complaints.¹²

The concern regarding conflicts of interest is heightened because AES is paid directly by the Tribe, or the Tribe’s gaming investors, rather than BIA. BIA must therefore disclose to the public the financial arrangement by which AES’ services have been procured and the process by which AES was selected as the environmental contractor.

Most concerning, however, is the evidence that AES engages in direct back channel communications with tribal clients and their representatives on the substance of EISs—communications which are not included in BIA’s administrative record. These communications include the exchange of drafts of EIS documents, allowing tribes and their representatives to effectively ghost write the EIS for their own projects. BIA does not regularly include these communications in the administrative record, nor produce them in response to FOIA requests, but evidence of this practice can be found in various administrative records for different projects. BIA must ensure that it is properly overseeing AES and must disclose the nature and extent of AES communications with the Tribe or its representatives.

BIA’s failure to properly supervise the DEIS and its virtually exclusive use of AES for all gaming applications renders the document inadequate.

4. Purpose and Need Statement and Range of Alternatives

¹¹ See House Resources Committee, Subcommittee on Indian and Alaska Native Affairs Oversight Hearing on “Executive Branch standards for land-in-trust decisions for gaming purposes” (Sept. 19, 2013) (Congressmen LaMalfa 55:20).

¹² See, e.g., Motion for Summary Judgment, *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Jewell*, No. 12-03021-TLN, Doc. 98 at 13-15 (E.D. Cal., filed June 24, 2014).

BIA must revise the purpose and need statement to include the statutory purpose of avoiding detriment to the surrounding community and federal land acquisition policies—not just the purpose of furthering the Tribe’s economic development and self-determination—and revise the range of alternatives accordingly. The purpose and need statement unlawfully assumes the Tribe’s economic development interests satisfies the BIA’s land acquisition policy without considering the development complies with the IRA, 25 U.S.C. § 5108, and BIA’s regulations at 50 C.F.R. § 151.3. While BIA has discretion when defining the purpose and need of a project, an unreasonably narrow or pre-determined purpose and need statement violates NEPA.

As the Ninth Circuit has explained, “The stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives” *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1995) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 192 (D.C. Cir. 1991)). The analysis of alternatives is at the heart of an EIS. If the purpose and need statement is deficient, the EIS will not address an appropriate range of alternatives.

The statement of purpose and need is supposed to “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. BIA must first reasonably and fairly define the project’s purpose. *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997) (citing *Citizens Against Burlington*, 938 F.2d at 195–96). Importantly, BIA must “tak[e] responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.” *Colo. Env’tl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999).

BIA must also take into account its own statutory mandates. *See New York v. Dept. of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983). There are two statutes in play: 1) the Indian Reorganization Act, which relates to the trust acquisition decision; and 2) the IGRA gaming eligibility determination, which relates to where, when, and how gaming is to occur. The “statutory objectives” relevant here are the dual findings that the Secretary must make before seeking gubernatorial concurrence: that (1) gaming is beneficial to the Tribe and (2) not detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(a). BIA’s EIS purpose and need statement must incorporate both the need to promote the Tribe’s economic development, self-sufficiency, and self-government and the need to avoid detriment to the surrounding community.

BIA’s purpose and need statement is inadequate because, although it cites the relevant statutory and regulatory authority, it does not fully describe BIA’s legal duties and the public interest factors that are required by those authorities to be balanced against the Tribe’s desire for economic development. BIA must fully inform the public that, in addition to a determination that the project would not be detrimental to the surrounding community under 25 U.S.C. § 2719(b)(1)(a), BIA must also consider, among other things, the existence of statutory authority for the acquisition; the tribe’s need for additional land; the impact on the State and local jurisdiction from removal of the land from the tax rolls; and jurisdictional problems and potential land use conflicts which may arise. 25 C.F.R. §§ 151.10(a)-(g).

An inadequate purpose and need statement skews the entire analysis. The bias and predetermination in favor of the Tribe’s economic development, at the expense of impacts to the community, is evident in the “Comparison of Environmental and Economic Consequences,” DEIS 2.6.2,

where the alternatives are described as “those which could accomplish most of the purpose and need for the Proposed Actions, *and* that could avoid or substantially lessen one or more of the significant effects of the Proposed Actions,” as if avoiding or lessening impacts were not just as much a part of the purpose and need as economic development. (emphasis added). This bias is confirmed by the description of the no-action alternative:

Alternative C would avoid all environmental effects associated with the development of Alternatives A and B, and thus would have significantly fewer environmental effects. However, this alternative would be the least effective in meeting the purpose and need for the Proposed Actions.

Again, the relevant statutory mandates include avoiding and minimizing impacts, and in particular, preventing detriment to the surrounding community. These are not merely aspirational policy goals that take second place to the Tribe’s economic development, and they are not optional. Nor are they separate from the purpose and need of the project. The failure to start with an accurate purpose and need statement skews BIA’s entire analysis in favor of maximizing the economic benefits to the Tribe and minimizes the statutory mandate to avoid detriment to the surrounding community.

Given the statutory and regulatory requirements to consider impacts to the local community, a range of alternatives that only considers casino sites in a single community is not reasonable. Properly understood, the Purpose and Need for BIA’s proposed action makes clear that alternative locations outside of the surrounding Kern County community must be evaluated.

The EIS must examine a reasonable range of alternatives to the proposed federal action (trust acquisition of the proposed site in Kern County). At a minimum, a reasonable range of alternatives must examine several locations outside of the surrounding Kern County community. Each location must be evaluated for both gaming and commercial non-gaming economic development. Different development scenarios for the same location, however, must not be treated as separate alternatives if the federal actions involved are the same (e.g., different development scenarios for large and small gaming operations on the same site do not require different federal actions). Further, alternative sites must not be chosen in locations that allow them to be rejected out of hand as unsuited for economic development. The surrounding Kern County community is not the only possible location for the Tribe’s economic development.

Applying these principles, it is clear that the DEIS does not evaluate a reasonable range of alternatives. First and foremost, the DEIS does not consider any action alternative outside of the surrounding Kern County community. The Maricopa Highway Site is within the surrounding Kern County community (indeed, only 15 miles away). Given the statutory and regulatory requirements to consider impacts to the local community, a range of gaming alternatives that only considers sites in a single community is not reasonable. And given that the only non-gaming alternative considered would have only negligible economic benefits to the Tribe, and therefore does not meet the purpose and need of the project, it is clear that BIA has chosen a range of alternatives with only one possible outcome: development of a casino in the surrounding Kern County community.

In addition, the Maricopa site gaming alternative has impacts almost identical to the Mettler site gaming alternatives. BIA eliminated from consideration a non-gaming alternative at the Maricopa site because it would have similar impacts to the gaming alternatives at the Mettler site, and therefore wouldn't meaningfully add to the range of alternatives. DEIS App. B at 1. By the same logic, the Maricopa site gaming alternative does not meaningfully add the range of alternatives. The same logic also applies to the reduced gaming Mettler alternative, which also has impacts almost identical to the proposed alternative, and therefore doesn't meaningfully add to the range of alternatives.

Further, the non-gaming alternative at the Mettler Site provides negligible economic benefits to the Tribe, and therefore does not meet the purpose and need of the project. BIA eliminated a non-gaming alternative at the Maricopa site on this basis. Thus, it also does not add meaningfully to the range of alternatives.

Finally, the gaming and reduced gaming alternatives at the Mettler site are simply different development scenarios of the same alternative. The federal actions for each are identical, and there is no legal mechanism by which BIA can restrict the size of a casino once the land is in trust. No two-part determination has ever been qualified by specific project design parameters, and BIA's long-standing position is that its statutory authority to take land into trust does not include the ability to restrict the allowable uses of land once it has been placed into trust.

The DEIS therefore only considers one meaningful action alternative—gaming development in the surrounding Kern County community. This is not a reasonable range of alternatives, and it raises the concern that BIA has predetermined the decision and chosen a range of alternatives that leaves only one real possible outcome.

BIA must therefore produce an SEIS that considers sites outside of the surrounding Kern County community. As Stand Up previously commented, this requires reinitiation of scoping to allow the public to comment on possible alternatives. In particular, BIA must explain how BIA screened and selected the range of alternatives. Neither the scoping report nor the DEIS adequately explain the alternatives screening process, including screening criteria and a specific assessment of each alternative regarding whether it met the criteria.

BIA must therefore identify *all* of the screening criteria used to identify alternatives. The scoping report and DEIS indicate that, apart from the criteria BIA identified, the "Historic 1851 Tejon Treaty Area" was used as a screening criterion to identify or reject alternative locations that meet the purpose and need of the proposed action. *See, e.g.*, Scoping Report at 2-11 ("[H]owever, as the Taft Highway Site is not located within the Tribe's Historic 1851 Tejon Treaty Area, this site was eliminated from further consideration."). This is inappropriate for several reasons, and by itself requires that BIA reinitiate the scoping process.

First, this criterion was not identified as part of the purpose and need of the proposed action at any point in the scoping process—indeed, it is not even included in the stated purpose and need in the DEIS. Furthermore, what area constitutes the "Historic 1851 Tejon Treaty Area" has not been previously disclosed to the public. The public cannot be expected to comment meaningfully on alternative locations if it is not informed of the geographic constraints being placed on alter-

native locations. Alternatives are, of course, the heart of the EIS process, and the failure to disclose this criterion irremediably taints the process unless scoping is reinitiated.

Second, this criterion is unnecessary. The purpose and need in the Notice of Initiation is identified to be the improvement of the economic status of the Tribal government. A casino project need not be located in the “Historic 1851 Treaty Area” to meet this purpose and need. To the contrary, the use of this criterion effectively restricts alternatives to the Kern County community, which fails to meet the purpose and need to consider alternatives that do not impact the surrounding community.

Third, this criterion lacks any legal basis or rationale. The “Historic 1851 Tejon Treaty Area” refers to the area that would have been set aside as a reservation for multiple tribes under an unratified 1851 treaty known as “Treaty D.” As the Department is aware, the Tribe previously attempted to bypass the two-part determination process by requesting a determination that the Mettler Parcels were within the Tribe’s “last recognized reservation” based on this unratified treaty.

As the Department is aware, this is incorrect for multiple reasons, including the fact that the existing Tule River Reservation was ultimately set aside for the Tribe (among others).¹³ In 1864, Congress enacted a statute known as “the Four Reservations Act” authorizing the President to consolidate all the tribes of California into no more than four reservations in the State. Act of April 8, 1864, 13 Stat. 39. All other reservations were abandoned, as a matter of law. One of the four reservations the United States formally established pursuant to the 1864 Act was the Tule River Reservation, which President Grant established by Executive Order in 1873. The Department stated in its decision to reaffirm the Tejon that, “[i]n 1873, the Tule River Reservation was established by executive order *for the Tejon (Manche Cajon) and other bands of Indians.*” 2012 Reaffirmation Memorandum at 4 (emphasis added); *see* Executive Order of January 9, 1873; 1 Kapp. 831.¹⁴ As confirmed by the Supreme Court’s recent decision in *McGirt v. Oklahoma*, a tribe’s right to a reservation established for it cannot be terminated except by an unambiguous act of Congress. No such act exists, and therefore the Tribe continues to have the right to occupy the Tule River Reservation, and to conduct gaming there.

The Tribe is therefore not “landless,” and this fact must accordingly be incorporated into the purpose and need of the project and disclosed to the public to allow a meaningful scoping process to be completed. A reasonable range of alternatives must necessarily include development on or near the Tule River Reservation.

In addition, there is reason to believe that the Tribe’s aboriginal territory was outside of and to the southeast of the “Historic 1851 Tejon Treaty Area” which again, was intended to be set aside for multiple tribes, rather than to preserve some portion of any single tribe’s aboriginal territory. *See* Scoping Report, Comment Letter P-22. A renewed scoping process should therefore also consider possible sites within the Tribe’s aboriginal territory.

¹³ We incorporate by reference into the administrative record the following: Letter from Perkins Coie to Assistant Secretary for Indian Affairs Kevin Washburn (April 7, 2015) (regarding the Tejon Tribe’s request for an Indian Lands Opinion that the Mettler Site is within the Tribe’s “last recognized reservation”); Letter from the Tejon Tribe to Assistant Secretary for Indian Affairs Kevin Washburn (June 1, 2015) (response); Letter from Perkins Coie to Assistant Secretary for Indian Affairs Kevin Washburn (July 22, 2015) (reply).

¹⁴ *See also* Executive Orders of October 3, 1873 and August 3, 1878 (modifying boundaries).

Finally, the proposed action is to take the Mettler site into trust. It is imperative that the public be fully informed of the actual likelihood and feasibility of the proposed action being changed to taking the Maricopa site into trust instead. In particular, BIA must disclose the nature of any legal interest the Tribe may have in each site. The trust acquisition regulations require that the tribe “already own[] an interest in the land” to be acquired in trust. 25 CFR § 151.3(a)(2). The public was very misled by the last-minute change in proposed action from Galt to Elk Grove in the recent Wilton Rancheria gaming trust acquisition. Reinitiating the scoping process after identifying a reasonable range of alternative locations and disclosing the Tribe’s legal interest in those sites will ensure that the public is able fully to comment on the scope of the project.

5. The mitigation measures and enforcement methods are inadequate.

The DEIS’ conclusions regarding the significance of numerous impacts is inextricably bound to the assumption that various mitigation measures will be implemented. These conclusions are unsupported if those mitigation measures are not enforceable, because there is otherwise no reason to believe that they will in fact be implemented. Without some reasonable assurance of enforceability, the actual impact of the proposed action cannot be accurately predicted, analyzed, or commented on. In addition, the public has had no opportunity to comment on the adequacy and effectiveness of specific proposed methods of enforcement for each mitigation measure. The DEIS addresses enforceability in a single blanket statement that all mitigation is enforceable because it is either required under federal or state law, covered under terms of the Intergovernmental Agreement (IGA) with Kern County, or inherent in the project design. DEIS 4-1. The DEIS also states that Best Management Practices (BMPs) would be incorporated into project design to minimize potentially adverse environmental effects. DEIS 2-1. These conclusory statements, however, are insufficient.

While mitigation measures that might be required under federal law would indeed be enforceable, no federal approvals have yet been issued. The exact nature of the mitigation required in such federal approvals or permits is therefore uncertain. Nor would such federal permits or approvals include all of the mitigation measures relied upon by the DEIS. And again, the Department has long maintained that the use of trust lands cannot be restricted or conditioned through the trust acquisition process.

State law, of course, would generally not apply once the proposed site is taken into trust. To the extent Tribal law is relied upon, it is subject to unilateral change by the Tribe itself, and therefore cannot be considered an independent source of authority to enforce mitigation requirements against the Tribe. Some mitigation measures have no plausible means of enforcement. For example, mitigation measures intended to reduce greenhouse gas emissions are intended to ensure compliance with State law (indeed, Table 3.4-6 is titled “Compliance with State emission reduction strategies”), but of course, those measures will not be enforceable under State law once the proposed site has been taken into trust. Conclusory statements and blanket assurances that all mitigation measures are enforceable are insufficient to determine whether specific measures are enforceable, and therefore whether the proposed enforcement mechanisms, if any, are adequate and effective. Conclusions regarding the significance of impacts that rely on these mitigation measures are therefore unsupported by the record.

The IGA, to the extent it is enforceable, would include some, but by no means all, of the mitigation measures assumed by the DEIS. The IGA provides primarily for financial payments to compensate the County for public services provided to the Tribe and to mitigate other unspecified impacts. The IGA does not require that the mitigation measures identified in the EIS actually be implemented. The IGA asserts that the financial payments serve to mitigate all project impacts to the surrounding community, but the IGA does not require the County to use those funds to mitigate the specific impacts that will result if specific mitigation measures are not implemented. There are, moreover, significant questions regarding the effectiveness of the IGA. As an initial matter, the IGA is only enforceable by Kern County. The County, of course, has a direct financial interest under the IGA in the Tribe's gaming operations, and therefore would have a conflict of interest with respect to enforcing mitigation requirements.

Furthermore, many of the provisions in the proposed IGA are in reference to the "Gaming Facility", which is defined only as "any building on the Property in which class III gaming authorized under the Tribal-State Compact occurs." Thus, for example, the General Fund and Capital Maintenance Fund Payments would not be based on the value of separate commercial buildings, including potentially the hotel and event center, if such facilities are in separate buildings. The examples in the IGA and the estimated payments in the County staff report are based on the announced \$600M value of the project as a whole, and may therefore be inaccurate. The IGA also provides that the County is not entitled to retain any payments in the event that the Tribal-State Compact terminates for any reason. Such compacts are often terminated for fairly routine reasons, including renegotiation by the State and tribe.

More significantly, the DEIS entirely fails to consider the possibility that the Tribe could open a Class II casino, which is almost entirely outside the scope of the IGA (only the hotel room fee and problem gaming payment would apply if a Class III gaming facility is not implemented). BIA cannot predetermine the outcome of the two-part determination, nor can BIA assume that the the State and Tribe will enter into a gaming compact. Class II gaming, however, can occur on trust land without a tribal-state compact. The DEIS must therefore evaluate the reasonably foreseeable development of a Class II facility, almost all of whose impacts would not be mitigated by the IGA.

More fundamentally, the entire DEIS is premised on the enforceability of the different alternatives considered, yet there is no explanation of how that is true. It is irrelevant that certain mitigation measures are "inherent in the project design" if the project design is itself unenforceable, i.e., if there is no mechanism to force the Tribe to adhere to the project design for the alternative chosen. The DEIS portrays Alternatives A1 and A2 as distinct actions, yet the federal actions involved for each are the same: a two-part determination that tribal gaming on the proposed site would be in the best interests of the Tribe and not detrimental to the surrounding community; acquisition of the proposed site in trust for the benefit of the Tribe; and approval of a gaming management contract. The only difference in the alternatives is what the Tribe does afterwards -- build a large casino or a smaller one -- which is not a federal action at all. The DEIS does not explain how the Tribe would, or even could, be required by BIA to build the alternative chosen in the ROD. In other words, the DEIS does not explain how if Alternative A2, the reduced gaming alternative, is chosen, the Tribe would be precluded from actually building Alternative A1 or an even larger casino. Without such an explanation, it is entirely uncertain what the actual effects

of the proposed federal actions will be, and there is no way to comment on the adequacy or effectiveness of any proposed enforcement mechanism.

Moreover, it is far from clear that such an enforcement mechanism even exists. No two-part determination has ever been qualified by specific project design parameters, nor is it apparent from the statutory language that the legal authority exists to so qualify a two-part determination, much less to bring an enforcement action for any violation of such a qualification. Similarly, it is not clear that trust acquisitions can impose title restrictions regarding the size of gaming facilities or otherwise limit gaming development on the land acquired to a specific project design. Indeed, any attempt to do so by BIA would raise significant concerns under the Federal trust responsibility to Indian tribes. Finally, approvals of gaming management contracts by the NIGC are governed by specific statutory standards, none of which include the imposition of mitigation measures or otherwise make a particular project design alternative enforceable. In fact, NIGC has disclaimed having any role in ensuring that mitigation measures are enforced.

The DEIS must therefore evaluate the impacts that would result if the mitigation measures are not implemented. Without enforceable mechanisms to ensure compliance, this possibility is reasonably foreseeable. Recent examples of trust land decisions confirm that BIA should not rely on the presumption that mitigation measures that are not incorporated into an enforceable agreement will be implemented or that mitigation agreements with local governments will be reached after the fact and will fully mitigate all associated impacts. For example, the Cowlitz Indian Tribe is currently disposing of wastewater from its casino project by underground injection well above a sole source aquifer that is the water supply for over 300,000 local residents in violation of its agreement to comply with state and county standards. In 2008, BIA prepared an EIS for that Tribe's proposed trust acquisition and reservation proclamation. The basis of BIA's determination in the EIS that impacts to water resources from the Tribe's casino would be mitigated was the Tribe's agreement in its Environmental, Public Health, and Safety Ordinance to comply with the state and county standards. That agreement, however, was unenforceable, and the Tribe continues to dispose of its wastewater in violation of its agreement.

In another case, the Department issued a two-part determination in 2015 to allow gaming on the Spokane Tribe of Indians' trust land in Airway Heights, Washington. The record of decision in that case provided that impacts on Spokane County would be mitigated because an intergovernmental agreement would be reached after the decision. No such agreement has materialized. Spokane County does not have a mitigation agreement with the Tribe that addresses the impacts of that development, nor is there any realistic prospect of such an agreement.

There are other examples of where BIA has relied on the prospect of mitigation for purposes of concluding in an EIS that significant adverse impacts would be mitigated to insignificant levels where no such mitigation has occurred, including the Enterprise Rancheria. It is therefore unreasonable for BIA to assume that impacts will be mitigated to insignificant levels in the absence of a legally enforceable mechanisms. Unenforceable assurances do not provide a reasonable basis to conclude that significant impacts will be mitigated. A determination that a proposed project is will not be detrimental to the surrounding community should be limited to only those cases in which there is an enforceable mitigation agreement in place.

While BIA may ultimately determine that unenforceable mitigation is nonetheless likely to be voluntarily implemented by the Tribe, that determination must be fully informed and must consider all important aspects of the enforceability issue. For each mitigation measure or project design parameter (and for each alternative), BIA must therefore disclose whether the mitigation measure or design parameter is enforceable, identify the enforcement mechanism (federal or state law; IGA; etc.), and evaluate the likely effectiveness of that enforcement mechanism. For each mitigation measure or project parameter that is not enforceable, BIA must evaluate the likelihood that it will be voluntarily implemented, in whole or in part, and why. Does BIA have a record of the tribe complying with voluntary mitigation measures? There are many past instances in which tribes have failed to implement such measures and commitments, including the current, wide-spread refusal of tribal casinos in California to comply with public health orders issued in response to the COVID-19 pandemic. It is reasonably foreseeable that this Tribe, like many others, could potentially fail to fully implement all or some unenforceable mitigation commitments. Thus, BIA should address other questions, such as whether the mitigation measures are burdensome or expensive, thus making voluntary compliance less likely? Do the mitigation measures require additional permits or approvals such that there is no guarantee that the mitigation will occur? It is not enough for BIA to assume that mitigation will be implemented when its assumptions have proved wrong in so many cases. Thus, in the absence of enforceable mitigation measures, BIA must therefore evaluate the impacts to the surrounding community if such measures were not to be implemented.

B. Specific Defects in the DEIS

1. Formatting/Accessibility

The presentation of all EIS figures in Appendix E of the EIS is counter to the fundamental policies of the CEQ Regulations for Implementing NEPA, including that an EIS be “concise, clear, and to the point” (40 CFR §1500.2(b)) and that agencies “encourage and facilitate public involvement” (40 CFR §1500.2(d)). This format substantially increases the amount of time needed to review the document. It also makes comparisons of the text and figures difficult in both paper and electronic formats. The EIS should be revised to place figures immediately following the associated references in the main body of the document, which is the traditional method the BIA has used for EISs.

The PDFs provided by the BIA at <https://www.tejoneis.com/> do not meet the standards of Section 508 of the Rehabilitation Act of 1973, which mandates that web content maintained by the federal government be made accessible to people with disabilities. An Accessibility Checker was used to review the PDFs and found numerous errors; the error reports are attached. These errors inhibit screen readers from transmitting meaningful information for blind or visually impaired persons. For example, figures in the appendices have no associated description of their content for screen readers or have only incorrect descriptions such as page numbers or file links.

In addition, the project website was frequently unavailable during the public comment period, instead displaying an error message of: “Bandwidth Limit Exceeded. The server is temporarily unable to service your request due to the site owner reaching his/her bandwidth limit. Please try again later.” The public cannot be expected to comment on the DEIS when one of the primary methods of availability is unavailable, especially when in-person access is infeasible because of

the COVID pandemic. The comment period should therefore be re-opened and extended to allow the public a full opportunity to comment.

2. Executive Summary

The Executive Summary refers to Alternative A3 (pg. ES-2) as a “mixed-use development.” As this alternative includes only organic farming, the reference to mixed-use should be corrected.

3. Project Description

Section 2.2.2.1 describes the height of the proposed hotel under Alternative A1. The height of the other proposed components is missing from the discussion. No height information is given for the hotel or other project components under Alternative A2 in Section 2.2.3.1. No height information is given in Section 2.3.2 for Alternative B, although it is assumed that heights would be the same as Alternative A1. The project description needs to be revised to discuss the heights of the project components.

The description of the alternatives in Section 2.0 lacks a discussion of the type of foundation that would be utilized in construction. As discussed under the *Geology and Soils* heading below, the Mettler and Maricopa Highway Sites are located within several hundred feet of a fault system responsible for a major historic earthquake. A preliminary geotechnical report should be included within the EIS substantiating that the selected foundation type is feasible to ensure the safety of persons at the proposed facilities.

Section 2.2.2.2 discusses four site access improvements proposed for Alternatives A1 and A2. The discussion references Figure 18-1 in Appendix F as a figure showing the access layout. The referenced figure fails to show all of the proposed site access improvements. For example, Figure 18-1 does not show the extension of S. Sabodan Street to Valpredo Avenue. Additionally, the figure does not provide the reader with a clear picture of what the improvements would look like or where the improvements would be located with respect to the project site boundary. There may be potential off-site impacts associated with the site access improvements, which have not been evaluated within the EIS. A new figure should be added to the EIS that addresses these deficiencies. The full extent of any traffic improvements should be shown on an aerial photograph. The project site boundary should be clearly shown on this figure so that any potential off-site impacts can be evaluated.

The Water Supply discussions for Alternatives A1 (Section 2.2.2.4) and A2 (Section 2.2.3.2) and Alternative B (2.3.2.2) include average daily water demands which do not match the referenced Water and Sewer System Planning report in Appendix G. For example, the EIS states that “The estimated average daily water demand for Alternative A1 is approximately 178,000 gallons per day (gpd) (Appendix G)” while Table 2-1 of Appendix G provides an average demand of 154,872 gpd. Similar inconsistencies occur for Alternative A2 and Alternative B. The EIS should explain the differences or correct the reports for consistency.

The Grading and Drainage discussions for Alternative A1 and A2 (Sections 2.2.2.6 and 2.2.3.3) do not disclose where large amounts of needed fill would be obtained. The discussions state that a portion of this fill “could” be obtained from the site. If this is uncertain, the EIS should assume

all fill would be coming from off-site for the purposes of calculating construction impacts related to traffic, air quality and noise. If the proposed detention basins provide for fill, an additional 405,000 cubic yards of fill for Alternative A1 and 283,000 cubic yards of fill for A2 would still be needed and should be accounted for in the construction impacts related to traffic, air quality and noise.

3. Geology and Soils

The Mettler area has a very high probability for seismic hazards, yet the EIS does not address this basic safety issue.¹⁵ Figure 3.2.2 shows two unnamed fault lines just south of the Mettler and Maricopa Highway Sites as well as unnamed faults north of the two alternatives. These are part of the White Wolf Fault and should be labeled as such. The White Wolf Fault was the cause of the 7.7 magnitude 1952 Bakersfield Earthquake, which caused major structural damage throughout the area. The Bakersfield Earthquake resulted in elevation change of up to 4 feet and caused severe damage as far away as Las Vegas. Twelve lives were lost, and there was at least \$50 million in property damage. In addition, there were at least 20 aftershocks 5th magnitude or greater associated with the initial 7.5 magnitude shock, including a 5.8 magnitude quake that hit nearly a month later the first earthquake.

The Mettler area is a geologically complex area where multiple major fault systems intersect and present significant risks. In fact, the strongest earthquake on record in California is a 7.9 near Fort Tejon in 1857, according to the State's Department of Conservation. That earthquake occurred on the San Andreas fault only 15 miles south from Mettler. In addition, the Garlock fault intersects with the San Andreas just south of Mettler. In 2019, there was a 7.1 earthquake in Ridgecrest, which scientists believe has strained the Garlock fault. In fact, in July 2020, geophysicists from the California Institute of Technology and NASA's Jet Propulsion Laboratory issued a study suggesting that the 2019 Ridgecrest earthquake increased the probability of a major earthquake on the San Andreas.¹⁶

Despite the proximity to multiple active fault systems and the potential for very powerful earthquakes in that region, the EIS does not provide adequate analysis of the risks these systems pose, the potential associated structural damage caused by such earthquakes and aftershocks. The EIS does not include a preliminary geotechnical feasibility report or explain how California Building Codes would ensure the safety of individuals within an 11-story hotel. A preliminary geotechnical report should be included in the EIS to demonstrate that construction of a multi-story hotel is feasible at the Metter and Maricopa Highway Sites.

The geotechnical report should include up to date information regarding recent seismicity in the Bakersfield area and review current research regarding seismic risk in southern California.

4. Water Resources

The EIS does not analyze the 500-year flood and associated floodplain in the flood impact analysis and this omission may be unresponsive to requirements in Executive Order (EO) 11988. The

¹⁵ <https://www.conservation.ca.gov/cgs/Pages/PSHA/PSHA-map-index/Bakersfield.aspx>

¹⁶ <https://sanfrancisco.cbslocal.com/2019/10/17/ridgecrest-earthquakes-strained-garlock-fault/>

Mettler Site is described as “being in a floodplain as defined by EO 11988” (pg. 3-11) and all references to the floodplain in the EIS refer to the 100-year floodplain. However, EO 11988 states that “the minimum floodplain of concern for critical actions is the 500-year floodplain, with a “Critical Action” defined as an action for which even a slight chance of flooding is too great. A critical action includes “structures or facilities which produce, use or store highly volatile, flammable, explosive, toxic or water-reactive materials” and facilities “which are likely to contain occupants who may not be sufficiently mobile to avoid the loss of life or injury during flood and storm events.”¹⁷

The EIS states that “Diesel fuel storage tanks would be needed for emergency generators at the casino resort” (pg. 3-97) and “...all aboveground fuel storage tanks would be built to National Fire Protection Association standards and be above the floodplain in order to prevent accident release” (pg. 3-15). No details are provided in the EIS for how the tanks would be protected from flooding and the quantity of diesel fuel is not mentioned in the EIS, but if “even a slight chance of flooding” could create a hazard to life and property, then the 500-year flood should be analyzed. Furthermore, the Mettler Site Alternatives A1 and A2 would include a hotel with 400 or 300 rooms, respectively (Table 2-2, pg. 2-2). While the exact demographic of hotel guests is unknown, it can reasonably be assumed that some portion of the guests at any given time may be elderly and may not be sufficiently mobile during a flood event, further supporting the analysis of the 500-year floodplain as the minimum floodplain of concern. The proposed future development of 92 residences may also include elderly Tribal members, which should be considered for the floodplain analysis.

EO 11988 requires the identification and evaluation of “practicable alternatives to locating [a] proposed action in a floodplain or wetland” and “if a practicable alternative exists outside the floodplain or wetland FEMA must locate the action at the alternative site.”¹⁸ It is not clear why the Mettler Site should remain a practicable alternative when the Maricopa Highway Site is located outside of the FEMA floodplain.

The EIS fails to analyze additional flooding characteristics that are appropriate for the floodplain setting per EO 11988,¹⁹ including:

1. Velocity of floodwater – The EIS fails to address flood flow velocities. The EIS describes the flood analysis modeling that “allows for a more realistic prediction of velocities over the project site” (Appendix H, pgs. 20-21/110) and provides model output showing the depths of flooding (Appendix H, pgs. 22-23/110), but does not address the velocity of floodwaters. The Mettler Site would be located on land with an “average natural slope of

¹⁷ Federal Register, 2019. Code of Federal Regulations, 44 - Emergency Management and Assistance, PART 9— FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS, § 9.4 Definitions. October 1. <https://www.govinfo.gov/content/pkg/CFR-2019-title44-voll/xml/CFR-2019-title44-voll-part9.xml>.

¹⁸ Federal Register, 2019. Code of Federal Regulations, 44 - Emergency Management and Assistance, PART 9— FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS, § 9.6 Decision-making process. October 1. <https://www.govinfo.gov/content/pkg/CFR-2019-title44-voll/xml/CFR-2019-title44-voll-part9.xml>.

¹⁹ Federal Register, 2019. Code of Federal Regulations, 44 - Emergency Management and Assistance, PART 9— FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS, § 9.7 (b) Determination of proposed action's location. October 1. <https://www.govinfo.gov/content/pkg/CFR-2019-title44-voll/xml/CFR-2019-title44-voll-part9.xml>.

1.4%” (Appendix H, pg. 4/110). Average velocities for shallow concentrated flow on unpaved and paved surfaces at this slope may be 1.9 and 2.4 feet per second, respectively.²⁰ For the greater depths of flow shown in the EIS (Appendix H, pgs. 22-23/110) floodwater velocities may be much greater.

2. Rate of rise of floodwater and available warning and evacuation time and routes – The EIS describes the peak flow of the 100-year flood event, but does not discuss how quickly the peak flow may be reached and, correspondingly, how much time residents, hotel and casino guests may have to evacuate beyond the flood hazard. Given the location of this site approximately 4 miles from “the foothills below the Los Padres National Forest” (Appendix H, pg. 4/110), there may be the potential for flash flooding. Construction on the Mettler Site would result in a 102-acre residential area, health center and a casino development within a floodplain, where large gatherings of people may occur including casino and hotel guests and employees. The EIS should include an assessment of the potential for flash flooding and the associated risk to life and property, with an emphasis on the rate of rise of floodwaters and any implications on the ability to evacuate elderly guests.
3. Erosion – The EIS fails to address erosion associated with flooding. Flood flow velocities are not presented, but may be significant, and the associated impacts of erosion, and associated sediment transport should be addressed.
4. Subsidence – The EIS fails to address the rate or extent of subsidence at the proposed sites since 1970 and the effect of ongoing or future subsidence on flooding. The EIS states that “where the Mettler and Maricopa Highway Sites are located, overdraft [extraction of petroleum], led to subsidence of up to 8 feet between 1926 and 1970” (pg. 3-13). Subsidence may increase the depth and/or spatial extent of flooding and invalidate assumptions and findings made in the EIS flood analysis.

Furthermore, the Kern County Floodplain Management Code calls for “restricting or prohibiting uses which...result in damaging increases in erosion or in flood heights or velocities”²¹ and the floodplain administrator shall consider the “velocity, duration, rate of rise, and sediment transport of the flood waters expected at the site”.²² Therefore, the above flood characteristics need to be adequately disclosed and analyzed to allow Kern County to assess the potential impacts of the project.

The Mettler Site is located in an area designated as approximate Zone A, where Base Flood Elevations (BFEs) have not been provided by FEMA. Property owners are required to develop BFE data to demonstrate that new construction meets the standards described in the NFIP regulations.²³ The EIS appears to have followed FEMA guidance for using a Detailed Method (FLO-

²⁰ NRCS, 1986. Technical Release 55, Urban Hydrology for Small Watersheds, 210-VI-TR-55, Second Ed., June. Figure 3-1 Average velocities for estimating travel time for shallow concentrated flow
<https://www.hydrocad.net/pdf/TR-55%20Chapter%203.pdf>

²¹ Kern County Floodplain Management Code, 17.48.050.A Methods of reducing flood losses.
<https://kernpublicworks.com/building-and-development/floodplain-management/>

²² Kern County Floodplain Management Code, 17.48.390.A.9 Grounds for granting variance.
<https://kernpublicworks.com/building-and-development/floodplain-management/>

²³ 44 CFR § 60.3 (b)(4) Flood plain management criteria for flood-prone areas.

2D hydraulic model) to estimate BFEs²⁴; however, no data on BFEs are presented in the EIS. The EIS states the Maricopa Highway Site is not within a floodplain” (pg. 3-11); however, the Existing Site Maximum Flood Depths mapping (Appendix H, pg. 21/110) shows the eastern portion of the Maricopa Highway Site is within the floodplain as delineated by the modeling used for the flood impact analysis. As discussed previously, the EIS does not evaluate the 500-year floodplain for either site.

The EIS fails to consider the contribution to flooding from direct rainfall; i.e., pluvial flooding. The EIS uses the numerical model FLO-2D in the flood impact analysis. FLO-2D is a combined hydrologic and hydraulic model and can perform combined rainfall/runoff and flood routing.²⁵ The FLO-2D modeling should be expanded to analyze pluvial flooding because the true risks from flooding may not currently be shown. For example, the First Street Foundation Flood Model, a new public data source, considers a location’s risk of flooding from overflowing rivers and streams, and high intensity rainfall.²⁶ The 100-year floodplain shown by the First Street Foundation Flood Model is different than the effective FEMA floodplain. This can be expected when using different methods and models, but it is significant to note that while the First Street Foundation 100-year floodplain extends across the Mettler Site, similar to the FEMA approximate Zone A floodplain, it also extends onto the Maricopa Highway Site.²⁷

The Water Resources section of the EIS should include a regional watershed map showing the drainage areas contributing drainage directly to the Mettler and Maricopa Highway Sites so that the associated flood potential at each site can be better understood. The EIS identifies and uses watersheds associated with the Easterly Watershed Discharge point (Tecuya Creek) and a West-erly Watershed as input to the hydraulic model; however, both of these watersheds terminate at the bottom of the foothills, approximately 4 miles southeast of the Mettler and Maricopa Highway sites. The USGS StreamStats map-based web application was used in the EIS to estimate 100-year peak flows at the above-mentioned discharge points as input to the hydraulic model; however, the stream networks passing across the Mettler and Maricopa Highway Sites, as shown in StreamStats, appear different than those assumed in the EIS. For example, the stream network passing across the northeast corner of the Mettler site drains from an area east of Highway 99; it is not mentioned in the EIS if there are, or are not, culvert crossings under Highway 99 that may contribute drainage to the Mettler Site.

The accuracy of the elevation data used for the preliminary grading and drainage plans is not described in the EIS and the validity of the pre-construction and post-construction contours cannot be confirmed. The Preliminary Grading and Drainage Plans rely on USGS Quad Map contours supplemented with Google LIDAR contours were used for the existing elevations” (Appendix H, pg. 5/110). The most recent USGS Quad Map show 10-foot contours across both sites²⁸; on a map with a contour interval of 10 feet, the map is accurate to within 5 feet (1.5 meters) of the

²⁴ FEMA, 1995. Managing Floodplain Development in Approximate Zone A Areas, A Guide for Obtaining and Developing Base (100-Year) Flood Elevations, FEMA 265, July. <https://www.fema.gov/media-library/assets/documents/7273>

²⁵ FLO-2D, 2020. <https://www.flo-2d.com/flo-2d-basic/>

²⁶ First Street Foundation, 2020. Flood Model 2020 Methodology Overview, June 29. https://firststreet.org/flood-lab/research/flood-model-methodology_overview/

²⁷ FloodFactor, 2020. Flood Risk Explorer, Mettler CA. https://floodfactor.com/city/mettler-california/647164_fsid

²⁸ USGS, 1992. Mettler CA, 7.5-minute quadrangle topographic map quadrangle map, 24:000.

actual elevation.²⁹ The Google LIDAR contours may be more accurate, but that information is not provided for comparison.

The Mettler Site is located in a FEMA Zone A Special Flood Hazard Area subject to the 100-year flood. FEMA and Kern County require that “proposed building sites will be reasonably safe from flooding”.^{30,31} The EIS fails to address how the proposed development will be reasonably safe from flooding for the following reasons:

1. The EIS does not describe how utilities and facilities, such as sewer, electrical, and water systems will be located and constructed to minimize or eliminate flood damage. The water treatment/storage and sewer treatment/disposal locations and groundwater well sites 1 and 2 for the Mettler Site Alternatives A1 and A2 are shown west where no earthwork (cut/fill) is proposed (Appendix H, pgs. 91 and 96/110); therefore, these utilities and facilities would be exposed to flooding. The EIS does state “All treatment plant components and processes will be protected from the floodplain by means of a flood control levee. Initial findings on potential flood threats in the project vicinity would merit a levee between 2 to 4 feet high to protect from the anticipated 100-year flood water levels (Appendix G, pg. 43/45); however, no information is provided in the EIS to adequately assess the potential impacts of flooding on this facility. A higher levee may be required to account for a 500-year flood. A description of the needed levee should be added to the project description discussion in Section 2.0.
2. The EIS does not indicate if adequate drainage is provided to reduce exposure to flood hazards.
3. The EIS does not describe how the water supply systems would be designed to minimize or eliminate infiltration of flood waters into the systems.
4. The EIS does not describe how the sanitary sewage systems would be designed to minimize or eliminate infiltration of flood waters into the systems and discharges from the systems into flood waters.
5. The EIS does not discuss how onsite waste disposal systems would be located to avoid impairment to them or contamination from them during flooding.

The EIS states that “Potential flooding impacts associated with Alternatives A1 and A2 would be less than significant (pg. 3-15). However, the EIS also states, “Alternatives A1 and A2 would be raised approximately 2.5 feet above the existing ground level (1 foot above the base flood elevation)” (pg. 3-15). The EIS does not adequately describe the impact of importing up to 404,235 cubic yards of fill material (for Alternative A1) into the floodplain (Appendix H, pg. 5/110) to

²⁹ USGS, 1999. Map Accuracy Standards, Fact Sheet 171-99, November.

<https://pubs.usgs.gov/fs/1999/0171/report.pdf>

³⁰ FEMA, 2001. Ensuring That Structures Built on Fill In or Near Special Flood Hazard Areas Are Reasonably Safe From Flooding, FIA-TB-10, May. <https://www.fema.gov/media-library-data/20130726-1511-20490-3169/tb1001.pdf>

³¹ Kern County Floodplain Management Code, 17.48.180.C Permit review. <https://kernpublicworks.com/building-and-development/floodplain-management/>

demonstrate flooding impacts would be less than significant. This volume of fill material would be a significant obstruction to flood flow and due to the inadequate modeling output provided it is not possible to assess changes in flood patterns or velocities; such as whether flooding would be increased across Highway 99 to the east or Valpredo Avenue to the north and west. The Preliminary Grading section of Appendix H states, “retaining walls around the Casino would also help to isolate the building, keeping it above the base flood elevations...” (Appendix H, pg. 5/110). However, the EIS fails to provide plan and elevation views showing the relationship of the proposed building and retaining walls to maximum flood elevations.

The EIS (pg. 3-15) states, “To avoid potential flood impacts, Alternatives A1 and A2 would feature a stormwater drainage basin that is sized to retain potential flood waters displaced by the proposed development.” However, since the basin would be located in the floodplain, just northwest of the casino (Appendix H, pg. 4/110), it would remain an obstruction to flood flows impacting the carrying capacity of the floodplain and, consequently would be a flood impact. FEMA and Kern County require within A zones designated on FIRM, that the “flood carrying capacity within the altered or relocated portion of any watercourse is maintained”.^{32,33} The EIS does not provide any analysis to demonstrate that the basin would not have an impact on the carrying capacity of the floodplain.

The EIS flood analysis states that “The model reflects that access routes from the fire & sheriff’s station to the resort remain above the base flood elevation for safety purposes during emergency situation” (Appendix H, pg. 20/110); however emergency ingress and egress beyond the flood hazard area is not addressed.

The hydraulic modeling information presented in the EIS is not adequate to assess impacts for the following reasons:

1. Grid cell size - The methods and assumptions used to establish the grid cell size in the FLO-2D model are not explained in the EIS. The EIS states that “implementation of either alternative would not cause a substantial increase in flood elevations in the surrounding environment. Onsite, the highest elevation increase was 2.6 feet, which occurred on the south side of the casino building and resulted in a flood water depth of 3.3 feet in total” (pg. 3-15 and Appendix H, pg. 7/110). The hydraulic modeling output of post-project maximum flow depths (Appendix H, pgs. 22-23/110) shows one grid cell at a 3.3-foot depth. This implies the casino may be represented by one grid cell in the model. By comparing grid cells discernable along the floodplain boundary of the FLO-2D flood depth mapping to the underlying agricultural field dimensions measured from Google Earth, it appears the grid cells are approximately 200-meters (656-feet) on a side, which is approximately the length of the south side of the casino building. Within special flood hazard areas, the Kern County Floodplain Management Code requires adequate drainage paths around structures on slopes to guide flood waters around and away from proposed struc-

³² 44CFR § 60.3 (b)(7) Flood plain management criteria for flood-prone areas.

³³ Kern County Floodplain Management Code, 2020. 17.48.200.A.2 Notification of Other Agencies. <https://kernpublicworks.com/building-and-development/floodplain-management/>

tures.³⁴ It is not possible to determine if drainage paths are adequate at the extremely coarse scale of the model grid.

2. Hydraulic roughness - The EIS does not describe the methods and assumptions used to incorporate hydraulic roughness in the FLO-2D model.
3. Floodplain width changes - The EIS states “the FLO-2D model outputs mimicked the FEMA Flood Zone” (Appendix, pg. 20/110); however, no information is provided showing the FLO-2D floodplain compared to the effective FEMA floodplain to verify this statement. The pre- and post-project floodplains shown in Appendix H (pgs. 21-23) vary in width. For example, at the I-5 and Highway 166 interchange, the existing conditions floodplain covers the eastern half of the interchange, the Alternative A1 floodplain completely covers the interchange, and the Alternative A2 floodplain covers less of the interchange than the existing conditions floodplain. These floodplain width changes should be explained.
4. Floodplain depth changes – The pre- and post-project floodplain depth changes shown in Appendix H (pgs. 21-23) are not explained in the EIS. For example, all three maps show a linear feature having an approximate depth of 1.8-feet (the green shading) that appears to parallel Highway 99; however, it is not clear why this is showing if the terrain is essentially flat. Also, the Alternative A1 and A2 maximum flood depth maps show a new linear feature having an approximate depth of 1.8-feet (the green shading) extending from the casino in a northwesterly direction; again, there is no explanation in the EIS regarding the cause of these increased flood depths. The EIS states “During final design it is recommended that the increased flows between the road and the casino be routed back into Tecuya Creek or towards the freeway to lower the flood depths and additional floodplain storage.” (Appendix H, pg. 20/110). The EIS does not present enough information to assess impacts from this proposed design change.
5. Tie-ins to effective FEMA mapping - The EIS states “The greatest increase in [Base Flood] elevation was seen approximately 3,000 feet north (downstream) of the Mettler Site with a rise in flood water depth of 0.41 feet for the Site Alternative A1 and 0.36 feet for the Site Alternative A2” (Appendix H, pg. 20/110). These flood elevation increases occur beyond the Mettler Site boundaries and the justification for increasing flood elevations on other properties is not explained in the EIS. FEMA guidance states “When performing new analyses and developing revised flooding information, appellants must tie the new BFEs, base flood depths, Special Flood Hazard Area (SFHA) boundaries, SFHA zone designations, and/or regulatory floodway boundaries into those shown on the FIRM.”³⁵ This requirement should be addressed in the EIS.

³⁴ Kern County Floodplain Management Code, 2020. 17.48.260.A Construction materials and methods. <https://kernpublicworks.com/building-and-development/floodplain-management/>

³⁵ FEMA, 2016. Guidance for Flood Risk Analysis and Mapping: Contiguous Community Matching, May. https://www.fema.gov/media-library-data/1469794100970-b275b6c85f29ab5e6e81e04f2a470d18/Contiguous_Community_Matching_Guidance_May_2016.pdf

6. Maximum flow depth mapping – The maximum flow depth maps of the model output (Appendix H, pgs. 19-21) do not adequately show a zero flow depth condition; it is difficult to discern elevations above the BFE because, according to the legend, even depths “<=0.0” are colored blue, similar to depths of up to 0.4-foot. The mapping should be redone to exclude map colors at the zero flood depth condition such that the underlying orthoimagery is visible and would indicate the floodplain boundary.
7. Base Flood Elevations – The EIS does not provide any data on BFEs. The objective of the flood modeling was to estimate BFEs because the effective FEMA Zone A mapping does not include BFEs (Appendix H, pg. 7/110); it is not clear why BFEs are not provided in the EIS for pre-and post-project conditions and the lack of these data inhibits the ability to assess flooding impacts.
8. Flood flow velocities – The EIS states that the “[modeling] methodology allows for a more realistic prediction of flood water depths and velocities over the project site” (Appendix H, pg. 17); however, the EIS does not present any information on pre- or post-project flood flow velocities. The EIS states “Changes in flood water depths were observed directly on the south side of the casino building, which was modeled as an obstruction to calculate an approximation flood water elevation needed to determine the finished floor elevation. Flood water depths increased 2.6 feet for the Site Alternative A1 and 2.6 feet for Site Alternative A2, resulting in a flood water depth of 3.3 feet for Site Alternative A1 and for Site Alternative A2.” (Appendix, pg. 18). If the building is assumed to be a complete obstruction to flow, the 2.6-foot rise in the water level may be caused by flood flows having a significant velocity. The EIS should address flood flow velocities with regard to erosion and damage potential and impacts to the ability to evacuate people and vehicles in flowing water.
9. Pre-and post-construction hydraulic model results – Pre-and post-construction hydraulic model results are presented as maximum flow depths (Appendix H, pgs. 21-23). It is difficult to discern the flood depths and changes on the Mettler Site; the Mettler Site boundary should be delineated on all mapping. Since the focus is on the change in flood depths from pre-to post-project conditions, it would be helpful if the difference in flood depths between the pre-project condition and the two post-project conditions was also mapped; i.e., a similar color ramp would indicate the magnitude of flood depth changes, but areas with no change in flood depth would not be colored and the extent of these areas would be more evident.

The EIS is focused on construction impacts from storm events on local runoff (pg. 3-16), but does not address the potential impact of flooding on construction activities. The proposed timing of construction activities should be described with respect to the seasonal potential for regional flooding.

The EIS states that the implementation of the Mettler Site Alternatives A1 or A2 “would not result in significant cumulative effects to surface water and flooding” (pg. 3-19). We interpret “surface water” to mean stormwater runoff from the development that is proposed to be retained on-site. The EIS does not provide enough information to support the statement that the alternatives

would not result in significant cumulative effects to flooding; i.e., the EIS provides inadequate information on the data, methods, and results in the flood impact analysis.

The EIS states that the implementation of the Maricopa Highway Site under Alternative B “would not result in significant cumulative effects to flooding...” (pg. 3-22). While the effective FEMA floodplain mapping does not show a 100-year floodplain on this site, the First Street Foundation Flood Model shows the 100-year floodplain, and 500-year floodplain, extending onto the Maricopa Highway Site. This may be due to the incorporation of pluvial flooding in the First Street Foundation Flood Model. The EIS should address these findings for the Maricopa Highway Site.

The average daily water demand numbers provided in Section 3.3 for Alternatives A1, A2 and B (pgs. 3-16, 3-17 and 3-21), do not match the average daily water demand numbers in the referenced Appendix G. The EIS should be revised to make water demand numbers consistent between Section 3.3 and Appendix G.

Both sites currently have surface water contracts for their agricultural water needs. Once the non-agricultural project is developed, the project would have to procure all water via groundwater. The nearest municipal groundwater production wells are at least 3,000 feet away and more than 700 feet deep. The water consultant anticipates that the impact would be insignificant; however, aquifer testing was not conducted to support this conclusion. The EIS should provide further substantiation that the alternatives under consideration would not affect off-site groundwater wells (either private or municipal).

For Alternatives A1, A2 and B, the EIS relies on the use of mitigation to offset groundwater extraction in a critically overdrafted groundwater basin. The EIS concludes that mitigation would reduce impacts to a less-than-significant level. This is problematic as the EIS does not substantiate that implementation of one or more of the measures would address the impacts of increased groundwater use. Mitigation measures H1 and H3 rely on agreements with water districts and/or municipalities, which have not been executed. The feasibility of implementing these agreements is unknown. Additionally, pumping groundwater without an agreement may conflict with the objectives of the Sustainable Groundwater Management Act, the purpose of which is to prevent adverse effects to groundwater supplies and sustainably manage groundwater supplies within the basin. Mitigation measure H2 involves implementation of a groundwater recharge project, such as constructing a basin to recharge water; however, the recharge project is not fully described or evaluated within the EIS.

5. Biological Resources

The Biological Resources Section fails to provide adequate analysis of potential impacts to support conclusions, and in some cases fails to identify known resources that may be impacted. Unsubstantiated and erroneous information includes:

- **Unsupported Conclusions for Impacts to Waters of the U.S.:** The EIS asserts that no impacts to jurisdictional waters of the U.S. would occur, yet fails to provide evidence as to

why. No formal or informal delineation data is provided, and conclusions are made without any evidence to support them. Therefore, the conclusions made for impacts to waters of the U.S. is unsubstantiated and is arbitrary.

- **Unsupported Conclusions for Impacts to San Joaquin Kit Fox and Wildlife Movement:** The EIS and Biological Assessment assert that the sites do not have value for wildlife movement. However, San Joaquin kit fox are known to occur in the area and are a wide-ranging species that require large swaths of lands for foraging and dispersal. Therefore, the conclusions made for impacts to San Joaquin kit fox and wildlife movement appear to be erroneous.
- **Conflicting Conclusions on impacts to Special Status Species:** The EIS indicates (pg. 3-36) that site development could result in the incidental take of three federally-listed species: San Joaquin kit fox, blunt-nosed leopard lizard, and Tipton kangaroo rat. The BA also states (pg. 22, Conclusions and Determinations) that “These species are likely to occur within the project...” However, the BA goes on to conclude that the proposed project “may effect, but is not likely to adversely affect these potentially occurring federally listed animal species”, a determination which does not support the incidental take for these species under the Endangered Species Act. Furthermore, the blunt-nosed leopard lizard is a fully protected species under State Fish and Game Code (meaning take cannot be authorized for it), a protection which would be lost if the land were placed into federal trust. Nowhere is this acknowledged. Therefore, the conclusions made for impacts to special-status species appear to be erroneous.

In Section 3.5.2.1, “Mettler Site,” under “Terrestrial Habitats,” and in Section 3.5.2.1, “Maricopa Highway Site,” under “Terrestrial Habitats,” identical language is used to describe the habitat value of each site: “highly disturbed and offer low-quality habitat to native plants or wildlife.” This identical characterization is inaccurate. The Mettler Site provides higher value habitat to a wider variety of wildlife, including all of the federally listed species discussed in the EIS, and several of the State-listed and other special-status species identified in the Biological Assessment (Appendix L). Row and field crops have been cultivated at the Mettler Site, and at the time of the site assessment for the EIS, it was fallow or idle, which provides higher habitat value than the vineyard at the Maricopa Highway site. The California Department of Fish and Wildlife’s Wildlife Habitat Relationships System recognizes these differences in habitat quality. The text should be revised to acknowledge this difference in habitat quality between the sites and the corresponding difference in level of impact, particularly for the federally listed species and burrowing owl.

In Section 3.5.2.1, “Mettler Site,” under “Potential Waters of the U.S.,” the text states that the site was “informally assessed” for wetlands and waterways, and that the identified aquatic habitats were three agricultural ponds and drainage ditch. It also states that the drainage ditch “did not meet waters of the U.S. jurisdictional criteria.” However, the text did not state which criteria was not met, or if the U.S. Army Corps of Engineers (USACE) has concurred with this conclusion. No statement regarding jurisdiction is made for the agricultural ponds, and a delineation report is not provided. Therefore, insufficient supporting information has been provided for conclusions regarding the jurisdictional status of these aquatic features. The following information is needed to support these statements:

- A description of the “informal” assessment method. What specifically was done to identify aquatic features? Were they visually inspected onsite? Were the three parameters of the USACE Wetland Delineation Manual and its regional supplement evaluated? Were field data sheets completed?
- An explanation as to why the agricultural ditch did not meet waters of the U.S. jurisdictional criteria (i.e., which criteria were not met and why).
- A statement regarding if the USACE agrees with this conclusion with citation and reference for the communication with USACE.
- A conclusion regarding the jurisdictional status of the agricultural ponds, the basis for that conclusion, and evidence of USACE concurrence.

In Section 3.5.2.2, “Maricopa Highway Site,” under “Potential Waters of the U.S.,” the text states that the site was “informally assessed” for wetlands and waterways, and that one aquatic habitat was identified: “a man-made agricultural roadside drainage ditch” along the sites, west, north, and east perimeter. It also states that this drainage ditch “lacks features required to be subject to USACE jurisdiction under CWA Section 404”. Similar statements are made in Section 3.5.3, “Impacts.” However, the text did not state what required features were lacking, or if the USACE has concurred with this conclusion. Therefore, insufficient supporting information has been provided for conclusions regarding the jurisdictional status of this aquatic feature.

The following information is needed to support the conclusion regarding jurisdictional status:

- A description of the “informal” assessment method. What specifically was done to identify aquatic features? Were they visually inspected onsite? Were the three parameters of the USACE Wetland Delineation Manual and its regional supplement evaluated? Were field data sheets completed?
- A description of what is meant by a “required feature” and an explanation as to why the agricultural ditch did not meet the jurisdictional criteria for a water of the U.S. (i.e., which criteria were not met and why).
- A statement regarding if the USACE agrees with this conclusion with citation and reference for the communication with USACE.

Section 3.5.3 states “Consideration is also given to wildlife corridors, nursery sites, and conservation plans.” However, Section 3.5.3, includes no other mention of wildlife corridors or wildlife movement in general. This is inconsistent with the conclusion that the site has the potential to be occupied by San Joaquin kit fox. San Joaquin kit fox is a wide-ranging, mobile species that has been severely impacted from cumulative effects on movement. An evaluation of potential effects on wildlife movement/wildlife movement corridors should be added to Section 3.5.3.

Section 3.5.3 states “A project would have a significant adverse impact if the development or operation would result in the loss of sensitive or critical habitat or in the take of sensitive plant or wildlife species.” The section includes no discussion of take resulting from habitat loss resulting

from the action. This is inconsistent with the conclusion that the site has the potential to be occupied by blunt-nosed leopard lizard or Tipton kangaroo rat, and with statements in the Biological Assessment. Habitat loss can cause “harm” to a federally listed species, which is a form of take. This is described in the Biological Assessment. On June 29, 1995, the U.S. Supreme Court ruled that harm may include habitat modification “where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering” (U.S. No. 94-859; [1995]).” If blunt-nosed leopard lizards or Tipton kangaroo rats are using the site, because of the small home ranges of these species, the loss of habitat caused by constructing the project would “significantly impair” breeding, feeding, and sheltering (“essential behavioral patterns”) and thus take would occur through harm. Therefore, because these species may be present, and may be encountered during the surveys included as mitigation measures, Section 3.5.3 should be revised to include discussion of the effects of habitat loss on federally listed species, and mitigation for this potential effect should be considered.

The analysis of cumulative effects on biological resources reaches a “less than significant” conclusion for each impact. “Less than significant” is not an appropriate conclusion for a cumulative impact. Any impact, no matter how small can, in combination with other past, present, and reasonably foreseeable impacts, be part of a cumulative impact. Furthermore, with regard to federally listed species, the cumulative impacts discussion states that:

“Federally listed wildlife species have minimal potential to occur on the Mettler Site. Mitigation Measures 4-A through 4-N in Section 4.0 would avoid or minimize impacts to federally listed species. Similarly, all other projects in the region are required to comply with the ESA by avoiding or minimizing effects to protected species. Therefore, adverse cumulative effects to federally listed species would be less than significant with mitigation.”

Besides the use of the term “less than significant,” this text contains two incorrect statements. First, compliance with the Endangered Species Act requires minimization of impacts, not elimination of impacts to listed species. Therefore, the residual impact after mitigation is potentially a cumulative impact. Second, not all impacts contributing to a cumulative impact are the result of projects requiring compliance with the Endangered Species Act. Changes in agricultural practices and other technological changes, and changes in human populations and levels of human activities that cause human-wildlife conflicts are examples of impacts that can have a cumulative effect and that are not directly regulated by the Endangered Species Act. This text, which describes why cumulative effects would not occur, should be replaced with a discussion of the cumulative effects that have, are, and will likely occur.

The Biological Assessment in Appendix L contains no assessment of potential effects on the movement of federally listed animals, in particular San Joaquin kit fox. This is inconsistent with the conclusion that the site has the potential to be occupied by San Joaquin kit fox. San Joaquin kit fox is a wide-ranging, mobile species that has been severely impacted from cumulative effects on movement. An evaluation of potential effects on wildlife movement/wildlife movement corridors should be added to the Biological Assessment.

The Biological Assessment acknowledges the potential for blunt-nosed leopard lizard, Tipton kangaroo rat, and San Joaquin kit fox. It also contains mitigation measures that would minimize

the potential for take resulting from injury or mortality. However, no mitigation is proposed for the harm resulting from loss of habitat. If the blunt-nosed leopard lizard or Tipton kangaroo rat are encountered on site during the surveys proposed as mitigation, then the loss of occupied habitat caused by the construction project would “significantly impair” breeding, feeding, and sheltering (“essential behavioral patterns”) and thus take would occur through harm. This also conflicts with the finding under cumulative effects, where there would be a cumulative loss of occupied habitat.

In Section 5.0 of the Biological Assessment, California Natural Diversity Data Base (CNDDDB) records of “occurrences” (documented observations) are presented as evidence of the potential for species to be present in the action area. In the evaluations of effects on blunt-nosed leopard lizard and Tipton kangaroo rat, occurrences within 5 miles of the project site are considered, but the evaluation of effects on San Joaquin kit fox does not mention CNDDDB occurrences.

The lack of recent occurrences of a species in the vicinity of the project site is used as evidence that the blunt-nosed leopard lizard and Tipton kangaroo rat are unlikely to be present. This is a misapplication of the CNDDDB occurrence data. The CNDDDB contains only submitted observations; not all observations are submitted, and it does not contain negative survey results. In landscapes that are primarily in private ownership, such as the landscapes surrounding the Mettler and Maricopa Highway Sites, most land has not been surveyed for most species. Therefore, while CNDDDB occurrence records in the vicinity of a site is a strong indication that the species may be present; the lack of records in the CNDDDB generally does not indicate the absence of the species. The text of the Biological Assessment should be revised to not use the lack of recent CNDDDB records nearby to indicate that a species is not present, particularly given that for the blunt-nosed leopard lizard and Tipton kangaroo rat, the site is within the species’ range and some of its land cover is potentially suitable as habitat.

Biological Assessment Attachment L, “Preliminary Research Data” includes a RareFind search of CNDDDB records for the U.S. Geological Survey Mettler and Coal Oil Canyon 7.5 Minute Quadrangles. Appendix O, “Biological Technical Memorandum,” does not provide or describe additional use of RareFind for the Maricopa Highway Site. Therefore, the RareFind search results attached to the Biological Assessment appear to be the basis for statements in the EIS Biological Resources section, the Biological Assessment, and the Biological Technical Memorandum regarding records of special-status species in the vicinity of the project site. This narrow search area, which did not include all eight quadrangles surrounding the site, limited the species considered potentially present, and excluded at least one special-status species (Swainson’s hawk) for which the habitat value of the two sites differs and for which the proposed mitigation measures may not minimize effects. This State-listed, migratory raptor has been recently documented within 10 miles of the site and is known to travel ten miles or more when foraging. For example the 1994 Staff Report for Mitigation for Impacts to Swainson’s Hawks [*Buteo swainsonii*] in the Central Valley of California, which is still used by the California Department of Fish and Wildlife, recommends mitigation for foraging habitat up to ten miles from nests. Furthermore, the Mettler Site provides moderate to high value foraging habitat for this species. Therefore, the RareFind and CNDDDB records searches should be expanded to include all eight quadrangles surrounding these sites, and potential impacts to Swainson’s hawks should be considered. Also, Mitigation Measure 4-O should have the survey distance extended to 0.25 miles,

or more, to identify and address potential effects to any nesting Swainson's hawks or other nesting raptors.

Except for the entries in the "Regionally Occurring Special-Status Species" table in Attachment A, a paragraph in Section 4.5, Federally-Listed Species," contains the only analysis of federally listed plant species in the Biological Assessment, or Biological Resources section of the EIS:

"Lists of federally-listed special-status plants known to occur in Kern County or with known occurrences in the Mettler and Coal Oil Canyon USGS quads are included in Attachment A. Further analysis for the federally listed plant species included in the database queries are further analyzed in Attachment B. Regionally-occurring special-status plant species that were determined to have no potential to occur within the project site are not further discussed within this document."

For all special-status plant species, this table contains the conclusion that there was no potential to occur on site. However, for three species the basis of this conclusion is not apparent: Bakersfield smallscale, heartscale, and Kern mallow (which is federally listed). The project site is in the elevation range for each of these species, each has been documented growing nearby, and these three species are associated with alkaline soils, which are present on site (in particular, Excelsior soils seem characteristic of habitat for these species). Although the source of the habitat descriptions in Table 2 is not identified, it seems to be the CNDDDB. The generalized descriptions provided in the CNDDDB are not inclusive of all habitats a plant species grows in, and generally include highly disturbed vegetation. These descriptions do not clearly exclude the vegetation at this site. Furthermore, one of the two native species observed on site, allscale saltbrush, is associated with habitats similar to those occupied by Bakersfield smallscale, heartscale, and Kern mallow. Therefore, the text of the Biological Assessment and of the Biological Technical Memorandum should be revised to provide the rationale for concluding that these three plants species have no potential to be present on the Mettler and Maricopa Highway Sites.

In Attachment B to the Biological Assessment, the table entry for Tipton kangaroo rat's "Potential to Occur" is: "No, Suitable habitat for this species is not present on site." This conclusion is inconsistent with the rest of the Biological Assessment, which identifies a potential to affect Tipton kangaroo rat and proposes mitigation to minimize that effect.

The Biological Technical Memorandum (Appendix O, pg. 21) describes the classification of habitats as:

"Terrestrial habitat types were classified using the A Manual of California Vegetation (MCV) (Sawyer et al., 2009), Preliminary Descriptions of the Terrestrial Communities of California (Holland, 1986), and A Guide to Wildlife Habitats of California (Mayer and Laudenslayer, Jr., 1988). Aquatic habitat types were classified using the Classification of Wetlands and Deepwater Habitats of the United States (Cowardin et al., 1979). Habitat types were further modified based on survey results."

However, the classification of the terrestrial and aquatic habitats on site is not consistent with any of these classifications; rather they represent combinations or portions of categories in these systems.

6. Cultural and Paleontological Resources

Section 3.6 of the EIS, *Cultural and Paleontological Resources*, lacks supporting detail for both the environmental setting and impact discussion. Appendix Q of the EIS contains the cultural resources technical report prepared in support of the project; however, this report is not accessible to the public due to confidentiality issues. The cultural resources technical report is not available from the Southern San Joaquin Valley Information Center (SSJVIC) of the California Historical Resources Information System (CHRIS), which houses cultural reports for Kern County. Because the cultural resources technical report utilized the SSJVIC, the report must be submitted to the CHRIS pursuant to the CHRIS Information Access and Use Agreement.³⁶ Additionally, the EIS should be revised to include additional non-confidential detail and/or a redacted version of Appendix Q to address the issues discussed in the following paragraphs.

Section 3.6.2 lacks a discussion of the geologic context (for paleontological resources), and pre-historic, historic, and ethnographic contexts (for cultural resources) of the project site and alternative site. These background contexts are standard in an EIS, since they provide a framework within which to assess potential impacts to known resources and to assess the sensitivity for unknown (e.g., buried) resources.

The *Native American Program Contact* subsection of Section 3.6.2.1, outlines Native American outreach steps that were taken by the consultant, which included contacting the California Native American Heritage Commission (NAHC, a state agency) and sending outreach letters to Native American individuals identified by the NAHC, but it does not discuss formal consultation between the lead federal agency and tribes. This consultation is required by Section 106 of the National Historic Preservation Act. Additionally, the reference to Appendix I should be corrected to Appendix P in this subsection.

The *Paleontological Resources* subsection of Section 3.6.2.1, indicates a review was conducted of the University of California Museum of Paleontology (UCMP) database for the County. This database does not provide specific location information for fossil localities. It is unknown whether there are known fossil localities within or adjacent to the project site, which would be confirmed by a record search with the San Bernardino Natural History museum, which holds all of the fossil locality records for the County. A record search with the San Bernardino Natural History museum should be conducted for the Mettler and Maricopa Highway Sites and the results should be summarized within the EIS.

In regards to the built resources on the project site, the discussion states that “none of the structures appears to contain values that would make them eligible for listing on the [National Register of Historic Places (NRHP)]. Neither of the structures are old enough to be associated with patent holders Elizabeth Harmon or Elmer Nickell.” (pg. 3-41). Minimal information is provided to assess whether these resources are indeed ineligible for listing in the NRHP. The EIS should include a discussion of specific NRHP eligibility criteria and a statement as to why the resources do not meet them, as well as a statement of resource integrity.

The EIS lacks detail on the potential for buried resources and simply states:

³⁶ http://ohp.parks.ca.gov/pages/1068/files/CHRIS_Access_and_Use_Agreement_7-29-2016.pdf

“There is low potential for previously unknown archaeological resources that could be encountered during ground-disturbing activities associated with Alternative A. There are no water sources onsite or adjacent to either property that would have increased the presence of significant subsistence resources (e.g., plants or wildlife) on either property.” (pg. 3-41).

It is unclear how the EIS reached the conclusion for the Mettler and Maricopa Highway Sites that there is a low potential for buried resources, as Table 3.6-2 indicates that both the Kern Valley Indian Community and Kitanemuk & Yowlumne Tejon Indians have concerns regarding the sensitivity of the area and the Kern Valley Indian Community recommended construction monitoring. More detail should be provided as to how the EIS determined the sensitivity of the site. A higher potential for buried resources would warrant archaeological and Native American monitoring.

The section would also benefit from a discussion of the land use history of the project site, as a means to assess potential for buried resources. This would minimally include a review of historic aerial photographs and topographic maps. A review of geologic mapping conducted as part of this peer review indicates that the project site and alternative site are both mapped as younger Quaternary alluvial fan deposits (Holocene age). These deposits are young enough to contain buried archaeological resources.

Section 3.6.4.1 indicates “no paleontological resources were observed during any of the field surveys”. Previous sections mention that archaeological field surveys were conducted, but do not specify whether paleontological field surveys were conducted. Paleontological surveys would be conducted by qualified paleontologists trained to recognize fossils, and understand the deposition and sensitivity of formations for fossil resources. The section lacks a discussion of the geologic unit(s) of the project site, which is crucial for assessing paleontological resources sensitivity and determining whether paleontological resources could occur within the Mettler and Maricopa Highway Sites.

A review of geologic mapping conducted as part of this peer review indicates that the Mettler and Maricopa Highway Sites are both mapped as younger Quaternary alluvial fan deposits (Holocene age). This geologic unit typically has a low paleontological sensitivity. However, Younger Quaternary alluvium typically transitions to older Quaternary alluvium (Pleistocene age) at greater depths below surface, and older Quaternary alluvium can have a higher sensitivity for paleontological resources. This is particularly relevant since the project site is located within relatively close proximity (5-10 miles) from Pleistocene-age pluvial lakes (especially Buena Vista Lake to the northwest) that have produced significant fossil remains. In addition, Pleistocene older Quaternary terrace deposits and Pliocene-age non-marine sedimentary rocks occur in the hills less than three miles south of the project. These likely are sensitive for paleontological resources, as indicated by the fossil database check summarized in the section (pg. 3-40). Similar geologic deposits could occur at certain depths within the project site. Depending on the depth of proposed excavation, paleontologically sensitive geologic formations could be encountered during project construction, which could warrant paleontological resources monitoring. Regardless, additional detail (including maximum depth of project excavation) is needed in the section to support the impact finding for paleontological resources.

Cultural and Paleontological Resources Mitigation Measure A (pg. 4-5) requires pre-construction surveys of the off-site impact areas. These off-site impact areas are not discussed in Section 3.6, Cultural and Paleontological Resources. If there are indeed off-site areas that have not been subject to a cultural resources study, then there cannot be a full assessment of impacts in the EIS. In addition, these off-site areas likely would be considered part of the Area of Potential Effects (APE) under Section 106 of the National Historic Preservation Act. A Section 106 finding of effect for the undertaking is not possible without this information.

7. Transportation and Circulation

The following comments identify technical issues with the Transportation Impact Analysis (TIA), which is Appendix F of the EIS and the source of the transportation analysis presented in Section 3.8, the Transportation/Circulation section of the EIS.

Table 3-1 (pg. 11 of the TIA) is missing the footnote corresponding to the letter ‘c’ in the first column of the table.

The TIA states on pg. 15, “Since this is casino Project, substantial traffic is generated by the casino on Saturdays. Hence, in addition to weekday AM (7:00 AM to 9:00 AM) and PM (4:00 PM to 6:00 PM) peak hours, this study includes analysis of the Saturday PM (4:00 PM to 6:00 PM) peak hour.” There TIA should explain how it was determined that the peak hour would be between 4:00 p.m. and 6:00 p.m. Does this time period reflect the highest hourly volumes of background traffic on study area roadways/freeways, as reflected in the count data collected for the traffic study? If the analyzed Saturday peak hour reflects the peak of casino traffic and not the peak of traffic on study area roadways/freeways, then the traffic analysis likely misrepresents the potential for significant impacts when off-site roadways would be at their peak, which is a fundamental flaw in the EIS.

The TIA states on pg. 20, “Ramp merge/diverge ramp operations were analyzed under AM and PM peak hour conditions” and “The ramp merge / diverge analyses are included in this report for informational purposes only.” The TIA should explain why ramp merge/diverge operations were not evaluated for Saturday peak hour conditions, similar to the other transportation facilities evaluated in the TIA. The TIA should explain why it is the case that the ramp analysis is included for informational purposes, and why it is not relevant/required as part of the impact analysis.

Table 5-1 (pg. 21 of the TIA) includes a column with significance thresholds for ramp metering, but no discussion in the preceding text. This should be discussed in the text. By omitting discussion of ramp metering significance thresholds in the text and providing a source of such significance thresholds, the determination of significance in the EIS is not supported.

Tables 6-4 and 6-5 (pgs. 27 and 28 of the TIA) shows bold text in the speed, density, and LOS columns at two locations, however there is no indication in the table footnotes for what bold text means. Nothing in the preceding text (Section 5.0 Significance Criteria) discusses what is considered acceptable or unacceptable for ramp merge/diverge operations, except for how a project impact is determined. There should be text explaining this and/or a footnote in the tables.

The TIA states on pg. 29 that “The following Transportation projects are identified within the influence area of the Tejon Project.” Neither this statement nor any other text in the TIA reveals what is meant by “influence area”. The geographic reach (i.e., radius in miles) of cumulative projects considered in the analysis should be clearly stated. Without defining the geographic reach of projects considered in the cumulative analysis and providing justification for selecting geographic boundaries, it cannot be determined whether the analysis of potential cumulative traffic impacts in the EIS is adequate.

The TIA states on pg. 32, “In addition to the cumulative projects listed above, a growth factor was applied to the existing traffic to account for any future development projects not yet known at this time. A growth of 2% per year for five (5) years from 2018 to 2023, was applied.” A source (e.g., previous studies, academic research, etc.) of the 2% per year annual background growth rate assumption for 2018-2023 is not provided. Without providing the source of this assumption and a justification for its use in the analysis of future traffic conditions, it cannot be determined whether the analysis of future traffic conditions in the EIS is adequate.

Beginning on pg. 35, the TIA documents assumptions used to establish trip generation rates for the project land uses. Many of the adjustments/assumptions used to establish site-specific trip generation for each of the project land uses are not substantiated, and appear to be somewhat random. Additional justification/documentation needs to be provided to determine whether the trip generation rates established for the project provide a full and accurate accounting of project impacts. Specific comments are below.

- The TIA states on pg. 42:

“Weekday trip rates for Land Use 416 Campground / Recreational Vehicle Park, from the 10th Edition of the Trip Generation Manual, Institute of Transportation Engineers (ITE) is used. Daily trip rates are not available. Hence, the daily [trips] were estimated based on the assumption that peak hour volumes are 10% of the daily trips. Thus, the daily trips were calculated using the average of the AM and PM peak hour volumes. Saturday trip rates are not available for RV park. The weekday PM peak hour rates were used for the Saturday peak hour. Saturday daily volume was calculated based on the assumption that peak hour volumes are 10% of the daily trips.”

What is the source (e.g., previous studies, academic research, etc.) of the 10% peak hour volume-to-daily volume ratio assumption for RV parking? What is the basis of the assumption that Saturday peak hour trip generation for RV parking would be the same/similar to weekday PM peak hour?

- The TIA states on pg. 42 that “Saturday trip rates are not available for Organic Farm. The weekday daily rate is used for Saturday. For the peak hour, 5% is used for the Saturday.” What is the source of the Organic Farm assumptions for Saturday daily and peak hour use? What documentation is there to substantiate the use of the weekday rate for Saturdays, the use of 5% of the daily rate to represent Saturday peak hour, and the use of 10% of the daily rate to represent weekday AM and PM peak hours?

- The TIA states on pg. 43 that “The weekday and Saturday trip rates for Community Park, Land Use 411, Trip Generation Manual, 10th Edition, ITE is used for Community Park. The rates in the Trip Generation Manual are considered too low and based on engineering judgement, the rate was adjusted.” The TIA should elaborate on what methodology was used to adjust the rates upwards.

- The TIA states on pgs. 43 and 44 the following:

“The community center is meant for the use of tribal members and members of the general public will not use generally this center. Hence, the rates in the Trip Generation Manual are considered high. Therefore, 50% of the rate is used.”

“The Health Center is meant for the use of tribal members and members of the general public will not generally use this center. Hence, the rates in the Trip Generation Manual are considered high. Therefore, 50% of the rate is used.”

“The Tribal Administration office is meant for the use of tribal members and members of the general public will not generally use this center. The tribal membership is small, approximately 900 members, which would be an equivalent of approximately 300 families. It may be noted that most members (families) would not visit the Tribal Administration office every day. Hence, the rates in the Trip Generation Manual are considered high. Therefore, 50% of the rate is used.”

The TIA does not provide a justification for why selecting a 50% reduction in the ITE rates for the community center, health center, and tribal administration building was the appropriate reduction.

- The TIA states on pg. 44 that “Trip rates for a sheriff station is not available. ITE provides only a weekday PM peak hour trip rate for a fire station. However, no daily rates are provided.” The TIA is missing detail of how trip generation was calculated for this land use. Also, actual trips generated by this land use do not appear to be accounted for in project analysis. While this land use would probably not generate a large number of trips, the absence of it from the analysis means that the analysis does not fully reflect the potential impact of all vehicle trips that would be generated by the project. As such, the traffic analysis misrepresents the potential for significant impacts which is a fundamental flaw in the EIS.

Table 9-1 (pg. 48 of the TIA) includes a Diverted Link reduction of 10%. It is not clear in the text introducing the table or in the Table 9-1 footnote what exactly a diverted link trip is, and how it was determined that 10% is an appropriate reduction. The EIS should include the definition and a discussion of the methodology used to arrive at 10% that is included on pg. 3-61 of EIS.

Beginning on pg. 74 of the TIA, Year 2040 traffic conditions for Alternative A1 are analyzed. This section is missing the entire discussion/analysis/tables/figures representing the Saturday peak hour. By not including an analysis of Saturday peak hour traffic conditions, the traffic analysis misrepresents the potential for significant impacts which is a fundamental flaw in the EIS.

Beginning on pg. 108 of the TIA, Year 2040 traffic conditions for Alternative A2 are analyzed. This section is missing the entire discussion/analysis/tables/figures representing the Saturday peak hour. By not including an analysis of Saturday peak hour traffic conditions, the traffic analysis misrepresents the potential for significant impacts which is a fundamental flaw in the EIS.

The TIA states on pg. 130 that “The Project has no significant impacts on these freeway and roadway segments in Alternative B.” This statement is not consistent with the results shown in Tables 16-2 and 16-3, which show several impacts.

Beginning on pg. 140 of the TIA, Year 2040 traffic conditions for Alternative B are analyzed. This section is missing the entire discussion/analysis/tables/figures representing the Saturday peak hour. By not including an analysis of Saturday peak hour traffic conditions, the traffic analysis misrepresents the potential for significant impacts which is a fundamental flaw in the EIS.

Page 140 of the TIA states: “The Project has no significant impact on this segment in Alternative B.” This statement is not consistent with the results shown in Table 17-2, which shows an impact.

Page 151 of the TIA states:

“Intersection Control Evaluation (ICE) studies will be conducted prior to the Project construction time to determine the appropriate intersection control for the intersections within Caltrans jurisdiction. ICE refers to the “evolved” decision-making process and framework that a growing number of transportation agencies are adopting to provide a more balanced or holistic approach to the consideration and selection of access strategies and concepts during transportation planning, project identification and initiation processes that contemplate the addition, expansion or “full control” of intersections.

In advance of conducting the ICE studies, the following improvements are recommended to mitigate the direct and cumulative impacts. Section 18.3 includes the fair share calculations for each of the impacts for which a fair share is recommended.”

Conceptual drawings should be prepared to illustrate the proposed mitigation measures. Conceptual drawings would provide evidence about the preliminary feasibility of implementing the proposed mitigation measures, and would highlight any secondary adverse effects to the environment that might occur as a result of implementation. Future ICE studies could build upon conceptual drawings developed for the EIS. By not including a preliminary analysis the feasibility of the proposed mitigation measures, the EIS does not provide adequate support for the proposed mitigation measures and does not fully disclose potential secondary impacts that could result from their implementation, which is a fundamental flaw in the EIS.

Tables 3.8-3 (pg. 3-60 of the DEIS), 3.8-4 (pg. 3-62 of the DEIS), and Table 3.8-6 (pg. 3-64 of the DEIS) provide level of service results for the traffic analysis scenarios. No analysis is presented for Saturday peak hour conditions on any of the study facilities in Year 2040, and there is no explanation as to why this analysis was not completed as part of the EIS. By not providing this information, the EIS does not fully disclose potential project impacts.

Page 3-62 of the DEIS states that “During construction, there would be an estimated maximum of 1,824 trips (1,298 one-way worker trips and 526 one-way material haul trips) to and from the Mettler and Maricopa Highway Sites (Appendix F).” The discussion of Construction Traffic references Appendix F, but no analysis of construction traffic is provided in Appendix F or its appendices. The source of the numbers/analysis should be given.

Page 3-63 of the DEIS states that “Implementation of the BMPs described in Section 2.2.2 would minimize any remaining potential impacts of project construction to transportation/circulation.” This discussion references BMPs but does not indicate how the BMPs would address specific potential impacts of project construction. In order to conclude that impacts would be minimized, it is necessary to provide justification and/or evidence to support such conclusions.

Table 4-1 (pg. 4-6 of DEIS) states “Mitigation measures are illustrated in Figure 4-1.” Figure 4-1 provides a general location of improvements but does not provide a meaningful illustration of the full extent and configuration of the proposed measures.

8. Noise

Under Construction Noise for Alternative 1 and Alternative 2 at the Mettler Site (pg. 3-89), construction noise level was estimated to reach 77.5 dBA Leq at the nearest residence 850 feet away, exceeding the 72 dBA Leq threshold recommended by the FHWA and would exceed the ambient noise levels measured at this residence by more than the 5 dBA allowance. The EIS then states that

“BMPs provided in Section 2.0 would reduce the potential for stationary construction noise effects. Additionally, construction would be temporary and intermittent in nature. Therefore, with implementation of BMPs, construction noise associated with Alternatives A1 and A2 would not result in significant adverse effects associated with the ambient noise environment.”

It should be noted that, BMPs presented in Section 2.0 do not provide any quantified reduction in construction noise levels that would be experienced by this residence with the implementation of these BMPs, and there is no proof that these BMPs would reduce the projected construction noise level from 77.5 dBA Leq to 72 dBA Leq or lower. The EIS should provide substantiation that Alternatives A1 and A2 would not result in significant adverse effects associated with the ambient noise environment.

Under Construction Traffic for Alternative 1 and Alternative 2 at the Mettler Site (pg. 3-89), the EIS stated that

“The existing ambient noise level in the vicinity of sensitive noise receptors is approximately 51 dBA Leq at the Mettler Site (Table 3.11-2). Construction trips would increase traffic volumes on roads near sensitive receptors by approximately 1,188 vehicles during the AM peak hour. This would result in an increase in the ambient noise level at residential receptors of approximately 0.10 dBA Leq along construction roads at the Mettler Site. The ambient noise level due to the increase in vehicles on area roadways during construction would be approximately 64 dBA Leq, which is less than the FHWA noise

thresholds for residential of 72 dBA Leq. Therefore, noise resulting from increased construction traffic for Alternatives A1 and A2 would not result in a significant adverse effect.”

There was no calculation included that demonstrates the 1,188 vehicles during the AM peak hour would result in an increase in the ambient noise level at residential receptors of approximately 0.10 dBA Leq along construction roads at the Mettler Site. It is also not clear how this 0.10 dBA Leq increase in the ambient noise level would result in the ambient noise level increase from 51 dBA Leq to 64 dBA Leq. Even though the 64 dBA Leq is still below the FHWA recommended 72 dBA Leq threshold, the increase of 13 dBA is a substantial increase in the ambient noise levels which may be a significant impact.

Under operational impacts (pg. 3-90), the EIS states:

“S. Sabodan Street: The Mettler Site is located between SR-99 and SR-166, which accommodate between 49,000 and 4,300 vehicles per day, respectively, (Appendix F) and create an ambient noise level of 48.4 dBA (Table 3.11-2, Site 2). South Sabodan Street would add approximately 13,700 trips to the area. Due to the lower traffic volume compared to SR-99, the ambient noise would be negligible compared to SR-99. Therefore, Alternatives A1 and A2 would result in a less-than-significant impact to ambient noise.”

The above stated that South Sabodan Street would add approximately 13,700 trips to the area. Considering that SR-166 carries only 4,300 vehicles per day, adding 13,700 vehicles a day to this road represents adding three times the vehicle trips to this road, would add more than 5 dBA to land uses along this road that are exposed to traffic along SR-166. This traffic noise level increase should be evaluated as a potentially significant impact and not dismissed due to higher traffic volumes on SR-99.

9. Hazardous Materials

The EIS does not address potential health impacts associated with pesticide use and other chemical applications on adjacent agricultural properties. The amount of pesticide use per square mile for the census tract containing the Mettler site is estimated to be higher than 91% of other census tracts in California.³⁷ The amount of pesticide use per square mile for the census tract containing the Maricopa site is estimated to be higher than 85% of other census tracts in California.³⁸ Exposure to high levels of some pesticides can cause illness or conditions such as birth defects or cancer later in life. The EIS should evaluate the potential exposure to persons at the Mettler and Maricopa Highway Sites, particularly for employees who would be frequently exposed over longer periods.

10. Public Health and Safety

³⁷ California Office of Environmental Health Hazard Assessment, 2020. Data for Census Tract 6029003304. <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>

³⁸ California Office of Environmental Health Hazard Assessment, 2020. Data for Census Tract 6029003306. <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>

A COVID-19 health and safety plan should be prepared for the proposed gaming alternatives, which summarizes the protocols that will be in place to reduce the transmission of COVID-19 or similar pandemics. The plan should be included in the EIS appendices for review. The project description should discuss the impact of safety measures on operations, including reduced occupancy/capacity and temporary closures of special events and live entertainment. The EIS should discuss how the health and safety plan would be enforced, as Tribal casinos in California have taken the position that they are not subject to State health requirements.

11. Socioeconomics/Environmental Justice

It is likely that the socioeconomic benefits of the gaming alternatives are overstated in light of the economic effects of COVID-19, which has affected the operations of gaming establishments throughout the U.S. The EIS should quantify the estimated reduction of economic benefits due to COVID-19. This analysis should factor in the reduced number of gaming positions, reduced number of employees, and other operational changes that would be required for public health and safety. Additionally, the employment and income setting discussions should be updated to address the reduced employment and income in the greater Bakersfield area due to COVID-19.

There are fundamental flaws with the environmental justice analysis presented in the EIS. As disclosed in Table 3.7-2, minority ethnicities were defined as: American Indian or Alaskan Native, Asian or Pacific Islander, Black (not of Hispanic origin), Hispanic. In addition, the Census classifications of “two or more races” and “other” were assumed as minority populations for the purposes of the analysis. The analysis miscalculated the percent of minorities within each jurisdiction/census tract by not accounting for Hispanic/Latino populations. For all of the Census Tracts in Table 3.7-1, the Hispanic or Latino population column is higher than the total minority population column, meaning Hispanic/Latino populations were not factored into the EIS calculations of minority population. The Mettler Site for example is within Census Tract 33.04. The American Community Survey 5-year estimates for 2018 (Table DP05) show that the percentage of White alone (Not Hispanic or Latino) persons is 48.7% of the tract population; thus, 51.3% of persons within the tract would be considered part of minority populations.³⁹ The EIS baseline analysis is incorrect and must be corrected to accurately report the environmental justice populations.

Table 3.7-1 provides a distinction between census tracts in the Mettler Site Vicinity and Maricopa Highway Site Vicinity. It is unclear why some census tracts are associated with being in the vicinity of one site and not the other as the alternative sites are less than one mile from each other. Most neighboring census tracts should be considered for both sites.

Figure 3.7-1 shows only 4 labeled census tracts of the 15 considered and shows Census Tract 32.04, which was not considered in the analysis. The figure should be revised or additional figures should be added to show all of the census tracts considered and Census Tract 32.04.

Census Tract 32.04 is adjacent to the Census Tract containing the Mettler Site (Tract 33.04) and is just over a mile north of the Mettler and Maricopa Highway Sites. It is closer than many of the other census tracts considered and no explanation is given for its exclusion from the analysis. The American Community Survey 5-year estimates for 2018 (Table DP05) show that the percentage of White alone (Not His-

³⁹ U.S. Census Bureau, 2019. 2014-2018 American Community Survey 5-year Estimates. Table DP-05 Demographic and Housing Estimates. <https://data.census.gov/cedsci/>

panic or Latino) persons is 42.3% of the tract population; thus, 57.7% of persons within the tract would be considered part of minority populations.

The presence of environmental justice populations amplifies the significant effects identified in the EIS, particularly those associated with air pollution and traffic. For air pollution impacts, the EIS relies on credit purchase to reduce significant effects. While credit purchase may provide future benefits to the air basin as a whole, it will not prevent the increased pollutant emissions for minority populations in the vicinity of the Mettler or Maricopa Highway Site.

12. Public Services

The analysis of impacts to law enforcement services and fire protection services is inadequate. The analysis improperly defers to the Intergovernmental Agreement (IGA) as resolving any impacts on increased law enforcement and fire protection services. The EIS should include a comparison of law enforcement and fire protection demands from existing Tribal gaming facilities or other similar entertainment facilities to substantiate that the amounts proposed in the IGA offer adequate compensation. Further, the IGA does not address compensation to the California Highway Patrol (CHP), which has jurisdiction on the multiple State highway facilities within proximity of the Mettler and Maricopa Highway Sites. The EIS claims that the contributions to State government from tax revenue would offset the impacts to CHP. The EIS should quantify the potential impacts to CHP and provide mitigation to ensure that funds are appropriately allocated to CHP.

13. Aesthetics

The EIS assumes both Alternatives A1 and A2 are approximately 134 feet above ground level and both would be represented by the architectural rendering included as Figure 2-6 of the EIS. The hotel for Alternative A2 has 100 less rooms and 48,500 less square feet than Alternative A1 and thus is likely to have the same massing as Alternative A1. As such, the EIS does not provide an equal level of detail and analysis for the height of structures, particularly the hotel, under Alternative A2.

14. Other NEPA Requirements

The EIS should include a summary of how the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved should the alternatives be implemented, as required by 40 CFR §1502.16.

15. Air Quality

As noted for the comments on Transportation and Circulation, the EIS is missing substantiation for trip generation assumptions. Underestimated traffic impacts, such as for the police and fire stations, would also mean that air quality impacts and noise impacts associated with traffic were underestimated. If trip generation numbers are modified, remodeling of potential emissions would be required, as well as updates to the draft General Conformity determination.

The EIS fails to properly address and analyze Tribal New Source Review (NSR). The applicability of Tribal NSR in accordance with 40 CFR 49.153(a)(1)(i)(A) is made on a source's potential to emit (PTE)

and not the actual emissions estimated. According to an EPA white paper, 500 hours per year should be assumed as an appropriate assumption of “worst case” estimate of annual operating hours for emergency diesel generators on a PTE basis. Table 3.4-3 portrays stationary source emissions from an assumed 30 hours per year operation and should be recalculated and reviewed against the Tribal NSR thresholds in 40 CFR 49.153, especially because the applicable PM_{2.5} threshold is only 0.6 tons per year (tpy).

Additionally, the document fails to list expected equipment at a casino and hotel project that contribute to PTE and would not be exempt from Tribal NSR. For example, the total boiler ratings appear low (total of 2 MMBtu/hr) relative to facility demand. Boilers with a total heat input of 2 MMBtu/hr or less in severe nonattainment areas are exempt from permitting under 40 CFR 49.153(c)(11)(ii). This appears to be a convenient rating when compared to similar projects that have considerably higher boiler ratings.

The document is missing any discussion or analysis on pool heaters, fire pumps and water heaters, all of which are common emission sources at hotels and casinos. It is important that the document analyzes the most realistic project design for significance determinations and not potentially circumvent Tribal NSR requirements. It should be noted that similar tribal projects in EPA Region 9 that have casinos and hotels require minor NSR air permits from the EPA, like Morongo Casino, Red Hawk Casino, San Manuel Casino, and Cache Creek Casino Resort. Based on the presumed missing information, an assertion of no significant impact with regards to Tribal NSR is not supported.

The daily trips generation rates in Table 3 of Appendix M (pg. 10) should specify what factor was used (e.g. trips per thousand square feet or per hotel room). The values in the table appear to be inconsistent with Table 9-1 of Appendix F (p. 48).

Table 4.2 of the CalEEMod output files for Alternative A1 (pg. 271 of the 1,411, Draft EIS Volume 2 Appendices I-U PDF) has much higher trip values than those in Table 3 (pg. 209 of the 1,411, Draft EIS Volume 2 Appendices I-U PDF). The trip numbers presented here also appear to be inconsistent with Table 9-1 of Appendix F (p. 48). The discrepancy between the trip numbers throughout the appendices is concerning with regards to accuracy and impacts calculated.

This mitigation fails to provide adequate details related to the Voluntary Emission Reduction Agreement and its intended purpose and scope (pg. 4-3).

The mitigation measures listed in Appendix M (pg. 13) do not match the Best Management Practices (BMPs) or mitigation in the EIS. For example, Appendix M includes mitigation that “The Tribe shall restrict vehicle speeds on the construction site to 15 miles per hour” (Appendix M, pg. 13), while the EIS BMPs include that “Traffic speeds on unpaved roads will be limited to a maximum of 25 mph” (pg. 2-6).

The air quality discussions for off-site improvements under Alternatives 1A, 2A and B do not quantify construction emissions or compare them to applicable air district thresholds (pgs. 3-106 and 3-109).

16. Cumulative Effects

The cumulative effects provides very little discussion of the effects of the project when considered with the Grapevine Specific and Community Plan, and no specific discussion of Centennial at Tejon Ranch, which are both included in the cumulative projects list (Appendix J, pg. 2, Table 1). For example, the EIS does not assess the cumulative effects to loss/conversion of agricultural land in Kern County or the re-

gion. The EIS should discuss the cumulative impacts of the project in combination with past loss/conversion of agricultural land and proposed development in the region which would displace agricultural land.

The cumulative discussion of groundwater supply (3-19) is inadequate. There is no discussion of the cumulative impacts to increased water demands for the alternatives under consideration when combined with those of the Grapevine Specific and Community Plan. The EIS defers to state and local groundwater management activities that may allow for State intervention if water is not managed well by the local agency. This would not prevent future projects from further drawing down the critically overdrafted basin.

17. Land Use

The EIS states that the project “is generally compatible with the surrounding land uses along the I-5 corridor. Thus, the inconsistency of Alternatives A1 and A2 with existing zoning would not result in significant adverse land use effects” (pg. 3-70). This conclusion fails to consider the incompatibility issues with agricultural land on the I-5 corridor, including odors, noise, and the application of pesticides and other chemicals for agricultural purposes. The EIS relies on the Right to Farm Kern County Ordinance Code 8.56 which allows agricultural activities to continue; however, allowing an activity does not make it compatible with adjacent development.

The EIS states “Alternatives A1 and A2 would be implemented in a manner consistent with most of the policies of the County General Plan, excluding the previous discussed land use and zoning” (pg. 3.71) with no analysis or substantiation. The project does not appear to be consistent with the following General Plan Goal and Policy⁴⁰:

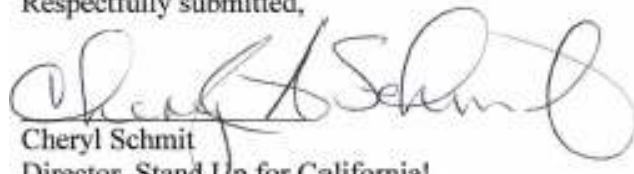
Section 1.9, Resource Goal 5. Conserve prime agriculture lands from premature conversion.

Section 1.9, Resource Policy 7. Areas designated for agricultural use, which include Class I and II and other enhanced agricultural soils with surface delivery water systems, should be protected from incompatible residential, commercial, and industrial subdivision and development activities.

The EIS should include a table of all applicable General Plan goals and policies and assess the project’s consistency with these goals and policies.

Sincerely,

Respectfully submitted,



Cheryl Schmit
Director, Stand Up for California!

⁴⁰ Kern County, 2004. Kern County Land Use, Open Space, and Conservation Element.
<https://psbweb.co.kern.ca.us/planning/pdfs/kcgp/KCGPChp1LandUse.pdf>

Attachment