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November 23, 2020

VIA EMAIL

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Re: FEIS Comments, Tejon Indian Tribe Casino Project

Dear Ms. Dutschke and Mr. Broussard:

Thank you for the opportunity to comment on the Bureau of Indian Affairs' (BIA) Final Environmental Impact Statement (FEIS) for the Tejon Indian Tribe Trust Acquisition and Casino Project. For the reasons discussed in these comments, the environmental review finalized in the FEIS continues to be deficient in numerous respects, and we accordingly ask that the Bureau of Indian Affairs (BIA) prepare a revised draft Environmental Impact Statement for this project.

First and foremost, BIA has short-changed the public's right to comment in this process. In response to comments on the Draft Environmental Impact Statement (DEIS), BIA has substantially revised numerous areas of its analysis, including the Transportation Impact Analysis, the Preliminary Grading, Drainage and Flood Impact Analysis, Economic and Community Impact Analysis, Biological Assessment, and Air Quality Modeling—all of which have now been re-titled as "Refined."[1] In fact, these revisions are substantial enough to make clear that the DEIS failed to "fulfill and satisfy to the fullest extent possible" the requirements for a final EIS, and was "so

[1] See Appendices F, H, I, L, and M.

inadequate as to preclude meaningful analysis."[2] BIA was therefore required by regulation to prepare and circulate a revised *draft* for public comment.[3] The current opportunity to comment on the FEIS does not satisfy this requirement. As well as precluding an additional opportunity for comment on a final EIS, the comment period for the FEIS (30 days) does not satisfy the requirement that comment periods on drafts be no less than 45 days.[4] This substantially longer period required for drafts is critical where, as here, substantial revisions have been made and the assistance of subject matter experts is necessary to fully evaluate highly technical reports. BIA's failure to provide adequate opportunity for public review violates NEPA and requires additional public comment before a final decision may be issued.

Even a layman's review reveals that the substantially revised technical reports still fail to provide a full analysis. For example, a very significant potential impact associated with the project is the risk of flooding.[5] In response to our comments on the DEIS, BIA substantially revised this analysis, preparing for the first time analyses of flood velocities and evacuation times, among other things—significant new analyses that would require additional time for subject matter experts and the public to meaningfully evaluate. Based on the new analyses, BIA still reached the conclusion that the flooding risks of a 100-year flood depth of 1.5 feet would be effectively mitigated by project design parameters that would raise critical project elements by 2.5 feet above ground level or surround them with containment berms of the same height, i.e., 1 foot of "freeboard" above flood level. This analysis is facially inadequate for several reasons.

First, BIA refused to analyse the 500-year flood risk on the grounds that—even though it conceded that "it is possible that the Proposed Action may be defined as a 'Critical Action'" that requires analysis of the 500-year flood risk under FEMA regulations—the FEMA regulations are only legally binding on FEMA, not BIA.[6] Whether these regulations are binding on BIA is not the test under NEPA. Under NEPA, all significant, reasonably foreseeable impacts must be evaluated. BIA provides no reasoned explanation as to why FEMA's expert opinion that 500-year flood risks should be evaluated for this type of project should be discounted. To the contrary, FEMA's regulations should have been applied as expert agency guidance as to the types of risks that should be evaluated for this type of project. BIA should therefore have analysed the 500-year flood risk, and its failure to do so is a violation of NEPA.

Second, BIA refused to evaluate ground subsidence in its evaluation of flood risks, on the grounds that FEMA flood maps are the standard modeling database for the majority of engineering tasks and "[i]t would be speculative to adjust these maps for potential ground subsidence."[7] This reasoning is flawed for several reasons. The DEIS itself acknowledges that ground subsidence in the area has been documented to reach *up to 8 feet.*[8] This is more than enough to swamp

[2] 40 C.F.R. § 1502.9(a).
[3] *Id.*
[4] *Id.* § 1506.10(c).
[5] See Appendix H.
[6] See Appendix V, Response to Comments, at 3-30 to -31.
[7] *Id.* at 3-34.
[8] DEIS at 3-13. This subsidence is attributed to groundwater overdraft. *Id.* The Kern County Subbasin currently continues to be a critically overdrafted basin. *Id.* at 3-14. Personal communications with Kern County water resources staff indicates that local groundwater levels are dropping up to 14 feet per year. Continued overdraft will inevitably lead to increasingly greater ground subsidence.

the 1-foot of freeboard that the FEIS relies on. The effect of ground subsidence on site elevations is therefore a critical parameter to a full analysis of flood risks and is thus essential to a reasoned choice among alternatives.[9]

Furthermore, while it is reasonable to rely on FEMA maps in the absence of countervailing information, it is not "speculative" to recognize the need for additional information when up to 8 feet of ground subsidence has been documented in the area.[10] Nor is it sufficient to complete a topographic survey or to develop a Base Flood Elevation at the final design phase.[11] As previously explained, accurate elevation data is critical to the analysis of impacts and a reasoned choice among alternatives. Incomplete or unavailable information such as this is governed by 40 C.F.R. § 1502.22. That regulation requires BIA to obtain the information if "the overall costs of obtaining it are not exorbitant." The cost of a topographical survey of the site is not exorbitant; such surveys are in fact routine for construction projects. Indeed, the FEIS itself acknowledges that a topographical survey would be completed prior to construction in conjunction with the design of the final grading and drainage of the site.[12] BIA was therefore required to complete a topographical survey and incorporate that information in its analyses before finalizing the EIS.[13]

And flood risks are but one example. *All* of the "Refined" technical reports would require additional time for meaningful public review, especially because they would require review by subject matter experts for thorough evaluation. This is precisely why a minimum 45-day review period is required for revised drafts. The revisions to the DEIS were substantial. BIA must therefore provide the public with the public comment period required by the NEPA regulations.

Even apart from the revised technical reports, fundamental flaws in the FEIS remain apparent even to the layman. The FEIS generally fails to present reasoned responses to comments. This is perhaps most glaring with respect to comments regarding the "heart" of the environmental impact statement: a reasonable range of alternatives, which flows from the purpose and need. Stand Up submitted extensive comments regarding these issues, as well as the closely related issue of the enforceability of the mitigation measures and design parameters of the alternatives considered.[14] These comments remain substantially unaddressed in the FEIS. A few examples are described below as illustration.

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[9] It is also a potentially critical parameter in other respects, as well. As a matter of elementary mathematics, the volume of fill required to elevate the project components (or construct containment berms around them) will increase *exponentially* with increasing height. It is not at all clear whether raising the project or berms up to possibly an additional 8 feet is even feasible or economically practicable. The volume of fill would also affect the flood modeling itself because it would occupy a greater area and volume of the floodplain. It would also affect construction impacts, especially if the fill would have to be trucked in from off-site. Aesthetic impacts would also be significantly different if a 10.5-foot earthen berm would need to be placed around the casino.

[10] The FEIS clarifies that existing elevations were based on USGS data. DEIS App. V at 3-35. USGS quad maps, however, depict 10-foot contours, and are therefore only accurate to 5 feet—still more than enough to swamp a 1-foot freeboard.

[11] See FEIS App. V at 3-35.

[12] *Id.*

[13] Even if the cost were exorbitant, BIA also failed to include a statement regarding the missing information that complies with 40 C.F.R. § 1502.22.

[14] With respect to enforceability, the FEIS asserts that mitigation measures included in a ROD are enforceable by BIA, but fails to reconcile that assertion with BIA's long-standing position that it has no authority to condition or

First, with circular logic, the FEIS asserts that alternative sites outside of the Kern County community were not considered because "[i]t is not clear that alternative sites outside of the County would be 'practical or feasible from the technical and economic standpoint' or result in new information that would inform the NEPA process."[15] This, of course, is precisely why potential alternatives should be considered in the first place. A determination of feasibility or practicability should flow from a reasonable screening process, not the other way around. The FEIS continues, noting that Kern County "is quite large" and asserts that no reason has been presented to include sites outside of the County. This assertion is thoroughly contradicted by Stand Up's extensive comments on the issue, which will not be repeated here. BIA's response, however, brings up yet another flaw in BIA's analysis: the statutory mandate is to avoid detriment to the "surrounding community," yet nowhere does BIA explain how it defines the relevant "surrounding community." BIA may, in fact, be correct that Kern County is so large as to be more extensive than the relevant "surrounding community." BIA must therefore explain and allow public comment on why alternative sites within Kern County, yet outside of the relevant "surrounding community," were not considered. Instead, BIA claims that the public need not be informed about the screening criteria that were used to evaluate alternative sites.[16]

The FEIS further states that the number of suitable alternative sites is limited because reasonable criteria, such as access to major roadways, "substantially reduce the number of available sites suitable for commercial development."[17] That no doubt is a truism—real estate is nowhere unlimited—but it by no means establishes that such sites are not available. Again, such a determination should have been made at the scoping stage, not speculated upon in the FEIS.

The Tejon's preference for a site in relative proximity to the 1851 Treaty area is cited, but BIA does not address Stand Up's comments regarding the applicability of the 1851 Treaty.[18] Similarly, the FEIS asserts that Stand Up's comments regarding the Tejon's right to reside and conduct gaming at the Tule River Reservation is dismissed as a non-NEPA issue, as well as on the grounds that Stand Up did not attach to its comments certain referenced documents that are in BIA's possession.[19] Those documents are attached to these comments.

The Tejon's right to the Tule River Reservation, however, is most certainly a NEPA issue because, as explained in Stand Up's comments on the DEIS, it goes straight to the adequacy of the range of alternatives considered. To put it simply, if the Tejon have rights to the Tule River Reservation, alternatives on or near that Reservation should have been considered. If, however, the Tejon do not, then the legality of the Tejon's "reaffirmation" is necessarily brought into doubt. The attached correspondence describes some of the grounds to doubt the legal and factual basis for that "reaffirmation."[20] Stand Up reserves the right to supplement these comments regarding the Tejon's "reaffirmation" and to challenge any final decision to take land into trust for the

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restrict the use of trust lands through the trust acquisition process. See FEIS App. V at 3-26 to -27. The FEIS also asserts that the impacts that would occur without mitigation measures are described in the DEIS, but ignores the point that BIA assumes the enforceability of project parameters included in the project description.

[15] FEIS App. V at 3-22.

[16] *Id.* at 3-24 ("the presentation of a specific list of screening criteria in the EIS is not warranted").

[17] *Id.* at 3-23.

[18] *Id.* at 3-24 to -25.

[19] *Id.* at 3-25.

[20] See also Stand Up's letter of August 17, 2020 regarding the *Carcieri* analysis for Tejon.

Tejon on the grounds that the Tejon's "reaffirmation" lacks basis in law, and the Department therefore lacks legal authority to take land into trust for gaming for the benefit of the Tejon.

There are other glaring inadequacies throughout the FEIS, as well. A preliminary geotechnical feasibility report is not included, despite the close proximity of multiple, major, active earthquake faults—as close as 240 feet away—on the grounds that seismic risks can be addressed at the final design phase.[21] But without even a preliminary feasibility report, whether the project is feasible at any given site is conjecture, not reasoned analysis. Regarding groundwater impacts, the FEIS now relies on a new agreement between the Tejon and the local water district.[22] That agreement, however, relies on future agreements with other water users, the feasibility of which is not evaluated. The agreement also relies on highly technical assumptions[23] that, again, demand a full opportunity for public review and comment. The FEIS also does not evaluate whether the local groundwater is contaminated with 1, 2, 3 trichloropropane (TCP), as has been reported for the local water district, or other "forever chemicals."[24] The revised Transportation Impact Analysis does not address impacts to I-5—which are particularly relevant to evacuation times, especially in flooding emergencies—or reflect that when there is snow, ice or fog, it is necessary for CHP to lead cars over the Grapevine or to close the highway entirely. The FEIS continues to side-step the public health risks of the use of hazardous agricultural chemicals on surrounding properties, as well as the accumulation of pesticide residues from long agricultural use.[25]

In short, the FEIS remains fundamentally flawed, even apart from its inadequate technical analyses and evaluation of impacts. BIA must therefore prepare a revised draft EIS and afford the public the full review and comment period required by law.

Respectfully submitted,

Cheryl Schmit
Director, Stand Up for California!

Att.

[21] FEIS App. V at 3-29 to -30.
[22] App. W.
[23] FEIS App. V at 3-15 to -17.
[24] See https://www.bakersfield.com/columnists/lois-henry-tainted-valley-groundwater-could-stymie-banking-deals/article_a7b50638-ee48-11ea-87be-535a106d4220.html. See also https://calmatters.org/projects/california-water-contaminated-forever-chemicals/.
[25] *Id.* at 3-55 to -56.