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UNITED STATES DEPARTMENT OF THE INTERIOR

BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

STATE OF CALIFORNIA; TAHA SALEH, SHOP N SAVE MARKET, AND COALITION OF RETAILERS; AND COUNTY OF TULARE, CALIFORNIA, Appellants, vs. PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Docket Nos.: IBIA 11-067 11-068 11-071 **APPELLANT COUNTY OF TULARE'S OPENING BRIEF IN SUPPORT OF APPEAL OF DECISION BY PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, TO APPROVE ACCEPTANCE INTO TRUST OF 40.00 ACRES OF LAND IN TULARE COUNTY, CALIFORNIA BY THE UNITED STATES FOR THE TULE RIVER TRIBE**

DATE: July 22, 2011

INTRODUCTION

On January 4, 2011, the Pacific Regional Director ("Regional Director") of the Bureau of Indian Affairs ("BIA") issued Notice of the Proposed Decision ("Notice of Decision" or "Proposed Decision") to grant the application of the Tule River Indian Tribe ("Tribe") to take into trust approximately 40.00 acres of real property located

in the City of Porterville, County of Tulare, California ("Subject Property").[1] The Subject Property is neither contiguous nor within the existing boundaries of the Tule River Indian Reservation.[2] Tulare County filed a timely notice of appeal of the Proposed Decision with the Interior Board of Indian Appeals ("IBIA") on February 7, 2011.[3]

As explained in greater detail below, Tulare County was compelled to appeal the Proposed Decision to IBIA because the grounds upon which BIA based its decision were legally and factually flawed, and, in particular, the Proposed Decision violates the National Environmental Policy Act of 1969 ("NEPA") and conflicts with applicable federal regulations.

ARGUMENT

I. RATHER THAN TAKING THE "HARD LOOK" REQUIRED BY NEPA, BIA TURNED A BLIND EYE TO PREVALENT EVIDENCE THAT THE TRIBE WAS CONSIDERING ALTERNATE USES FOR THE SUBJECT PROPERTY

a. The National Environmental Policy Act ("NEPA").

As stated by Congress, the purpose of NEPA is to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." (42 USC § 4321.) For every major federal action significantly affecting the quality of the human environment, NEPA requires a detailed statement (known as an Environmental Impact Statement or "EIS") by the responsible official on the environmental impact of the proposed action, any adverse environmental effect which cannot be avoided, alternatives to the proposed action, relationships between short-term uses and long-term

[1] See Feb. 7, 2011 Notice of Appeal by Tulare County to Interior Bd. of Indian Appeals ("Tulare NOA"), Exhibit A. See also Administrative Record ("AR"), Binder 2, #82.

[2] *Id.*, for an actual description of the Subject Property.

[3] 43 CFR 4.332.

productivity, and any irreversible and irretrievable commitment of resources involved if the proposed action is approved. (42 USC § 4332.)

If a responsible official finds that the proposed federal action will not significantly affect the quality of the human environment, a Finding of No Significant Impact ("FONSI") may be issued instead, which requires no further environmental analysis. Given that a FONSI cuts off any analysis of environmental effects under NEPA—the goal of which is to prevent or eliminate damage to the environment—responsible officials are required to exercise discretion carefully. Before a responsible official can make a decision to issue a FONSI rather than preparing an EIS, the official must take a "hard look" at potential environmental impacts and determine that issuance of a FONSI is genuinely appropriate.

In the instant case, BIA issued a FONSI on the justification that the Tribe has no intention of changing the use of the Subject Property once it is taken into trust. As explained in more detail below, BIA ignored strong and prevalent evidence that the use of the Subject Property very well may change once it is taken into trust and therefore did not take the required "hard look" at potential impacts in violation of NEPA.

b. The Hard Look Standard Federal Officials Must Apply.

Known as the "hard look," federal courts require responsible federal officials to vigorously and objectively consider whether or not preparation of an EIS is warranted under NEPA. "NEPA does not require that agency officials be 'subjectively impartial.' The statute does require, however, that projects be *objectively evaluated.*" (*Metcalf v. Daley* (9th Cir. 2000) 214 F.3d 1135, 1142. Internal citations omitted, emphasis added.) "In summary, the comprehensive 'hard look' mandated by Congress and required by" NEPA "must be timely, and it *must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.*" (*Id.*, italics and underscoring added.) "If an agency decides not to prepare

an EIS, it must supply a '*convincing statement* of reasons' to explain why a project's impacts are insignificant." (*Id.*; internal citations omitted, emphasis added.) "A 'hard look' includes considering all foreseeable direct and *indirect* impacts." (*Sierra Forest Legacy, et al. v. Sherman, et. al* (9th Cir. May 26, 2011) 2011 U.S. App. LEXIS 10655, at p. 38, emphasis added.)

"NEPA requires an agency to consider not only the direct effects of an action, but also the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." (*National Audubon Society, et al. v. Dept. of the Navy* (4th Cir. 2005) 422 F.3d 174, 196.

c. Rule Applied by Reviewing Courts to Determine Whether Federal Officials Actually Took the Required "Hard Look."

When reviewing federal agency action to determine whether the NEPA "hard look" was actually undertaken according to the standards articulated above, federal courts use the arbitrary and capricious rule of review. "[W]e review substantive agency decisions concerning NEPA under the "arbitrary and capricious" standard, meaning we must determine whether the decision...was based on a consideration of relevant factors, or whether their actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (*Metcalf*, at 1141, underscoring added.)

The Fourth Circuit Court of Appeal recently explained the arbitrary and capricious standard used to review NEPA decisions as follows:

> The "arbitrary and capricious" standard is not meant to reduce judicial review to a "rubber-stamp" of agency action. While the standard of review is narrow, the court must nonetheless engage in a 'searching and careful' inquiry of the record. But, this scrutiny of the record is meant primarily 'to educate the court' so that it can understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. (*Ohio Valley*

Envtl. Coalition v. Aracoma Coal Co. (4th Cir. 2009) 556 F.3d 177, 192-93, underscoring added. Internal citations omitted.)

"The standard of review of agency action alleged to be arbitrary and capricious is not simply whether there exists a rational basis for the action." (*Mobil Oil Corp. v. Department of Energy* (Temp. Emer. Ct. App. 1979) 610 F.2d 796, 801, underscoring added.) "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (*Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 416, underscoring added.)

d. BIA's NEPA Analysis on Application by Tribe to Have Subject Property Taken into Trust.

As stated in BIA's Proposed Decision, Factor 2 – Proposed Land Use, BIA described the current improvements on the Subject Property as consisting of two buildings which are used for the Tule River Economic Development Corp. and the U.S. Department of Agriculture. More importantly, BIA stated that "There is no planned change in land use."[4] The Proposed Decision, in its discussion of NEPA compliance, stated the following:

> After review and independent evaluation, the BIA has determined that the proposed federal action, to approve the Tule River Indian Tribe's request to take the proposed 40.00-acre site into trust for the purpose of operating the Porterville Airpark, *does not constitute a major federal action that would significantly affect the quality of the human environment* within the meaning of NEPA. Therefore, *an Environmental Impact Statement is not required.*[5]

Unfortunately, contrary to these assertions by BIA, the record is riddled with evidence and information that there is a strong likelihood that land uses on the Subject Property will in fact be changed. Despite the prevalence of evidence and information indicating that once the Subject Property is taken into trust the Tribe will seek a change in land use, and has specifically considered, or is considering, engaging in casino gaming and other intense commercial uses on the Subject

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[4] Tulare NOA, Exh. A, p. 5.

[5] Tulare NOA, Exh. A, p. 7. Emphasis added.

Property, BIA refused to deviate from its claim that no change in land use was contemplated. Given the large amount of evidence regarding a likely change in land use to casino gaming after Trust status is achieved and BIA's ardent refusal to evaluate such a change, BIA has failed to take the required hard look under NEPA.

e. The Record is Riddled with Documented Evidence and Information that the Tribe is Strongly Considering Engaging in Casino Gaming on the Subject Property.

BIA's refusal to recognize, or failure to recognize, the strong likelihood of a change in land use at the Subject Property to casino gaming is difficult to explain. As chronicled here, the record is practically overflowing with documented evidence that the Tribe intends to explore casino gaming and other intense commercial uses at the Subject Property.

i. After submission of its original application, the Tribe notified BIA that it wanted explore casino gaming on the Subject Property, and *BIA actively advised the Tribe on how to do so*.

The Tribe submitted its original Fee-to-Trust Application to BIA on March 26, 2002.[6] However, the Tribe eventually approached BIA about changing their application to include gaming at the Subject Property. As demonstrated in the record, James Diaz, Vice Chairman of the Tribe, contacted Terisa Draper at the BIA Pacific Regional Office in February 2009 and "advised her that the 40-acre parcel will [be] used for gaming and that the City [of Porterville] is in support."[7] Mr. Diaz further stated to Terisa Draper that "the 40-acre application should be withdrawn and resubmitted as a gaming app[lication]."

Furthermore, email correspondence between the legal assistant to the Tribe's Office of General Counsel, Maryhellen Medrano, and Arvada Wolfin of the BIA Pacific Regional Office clearly demonstrates that the Tribe sought assistance from BIA in converting its Trust Application to include gaming.

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6 Administrative Record ("AR"), Binder 1, #38.

7 AR, Binder 1, #42. (Underscoring added.)

For example, in a Apr. 21, 2009, 5:20pm email, Medrano wrote to Wolfin stating "I need another favor...I need flow chart to gaming – the one you sent me is GREAT but it says non gaming. We want to add gaming. Do you have a different one?"[8]

A second email on Apr. 21, 2009, this time at 5:58pm, was sent from Medrano to the BIA's Wolfin asking Wolfin to proofread a note that Medrano wanted to send to the Tribe's Chairman. The email opened with Medrano asking, "Arvada...If I stated this...would it be correct? If not, please explain. Thank you!!!" As indicated in the email, Medrano's draft note to the Chairman stated as follows:

> Mr. Chairman, as you requested I have researched the Fee to Trust application process and have hereby attached the flow chart you requested. The flow chart came from a woman named Arvada. Arvada works for BIA in Sacramento with Fee to Trust applications and has been very resourceful to me.
>
> You will note that the flow chart states it is for "non-gaming" – the process however, is the same. The only exceptions to adding gaming is to simply include the language..."[9]

The email correspondence further proves that BIA was *actively engaged* in assisting the Tribe in preparing to establish in casino gaming on the Subject Property. An Apr. 22, 2009 10:07am email from Wolfin to Medrano included a copy of the 25 CFR 292 regulations—the Part 292 regulations are entitled "*Gaming on Trust Lands Acquired After October 17, 1988.*" BIA's Wolfin counseled Medrano to "take a looked at the attached 25 CFR 292 regulations to see what exception the tribe may be eligible for. It depends on if the property is on or off reservation and what exception you are going to use."[10] An Apr. 22, 2009 4:27pm email from Wolfin to Medrano explains that BIA met with Tribal Vice Chairman Diaz on Feb. 23, 2009 and further provides examples on how to withdraw the

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8 *Id.*, underscoring added.

9 *Id.*, underscoring added.

10 *Id.*

Tribe's original non-gaming application.[11] On Apr. 24, 2009 at 1:25pm, Medrano emailed Wolfin asking whether it would be easier to amend the "airpark application to contemplate gaming."[12] BIA's Wolfin responded at 1:47pm on Apr. 24, 2009 that "it would be best to withdraw the application and start over" and further attached a gaming application for Medrano to use.[13]

Perhaps even more noteworthy is a May 8, 2009 2:48pm email from Medrano to Wolfin recapping an in-person meeting that took place on the same day between tribal representatives and several BIA Pacific Regional Office representatives. As detailed in the email, meeting attendees included Medrano and three BIA Pacific Regional Office officials: Wolfin, Terisa Draper, and Lorrae Dietz. Furthermore, the email contains an explicit discussion of strategy for eventually engaging in casino gaming at the Subject Property:

> **40 Acre Airpark**
> If Tribe wants to have gaming on this property Teresa (*sic*) suggests that we withdraw the application and start all over. The application was original (*sic*) submitted for commercial leasing, not gaming. The application cannot be amended because all notices that have been sent to the public, local governments, etc., were done stating that commercial leasing was the intent NOT gaming. Teresa (*sic*) also stated that this particular piece of property doesn't seem to be eligible to be taken into trust for gaming under the 3 exceptions as described in IGRA (§ 292.16)...If it's determined that the Tribe wishes to move forward with Fee-to-Trust for gaming we should speak to Patrick O'Mallen the Environmental Specialist at (916) 978-6044 for his suggestion on having the EA v. EIS done for the property.[14]

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[11] *Id.*

[12] *Id.*, underscoring added.

[13] *Id.*

[14] *Id.*

ii. The Tribe and the City of Porterville entered into a memorandum of understanding ("MOU") that contemplated casino gaming on the Subject Property.

In January 2008, the Tribe and the City of Porterville ("City") entered into an MOU that explicitly contemplated casino gaming on the Subject Property. The very first paragraph of the MOU stated as follows:

> The City and Tribe desire to work together towards the development of the Tribe's property located within the City of Porterville and subject to the land trust application currently pending before the Bureau of Indian Affairs, *to be amended for gaming and resort use*. *Specifically, the Tribe desires to develop and construct a hotel resort and casino*, and the City is supportive of the concept.[15]

Further, paragraph 5 of the MOU states that the City acknowledges that a proposed amendment to the City's General Plan would allow for "commercial recreation which would include the resort development." Paragraph 6 states that upon adoption of the General Plan Amendment, the Porterville Airport Area Development Association/Agency shall pursue a "Master Plan for the property *for resort and recreational use*."[16]

Paragraph 9 of the MOU goes on to declare that "*The Tribe agrees to move forward with its plans for a hotel resort and casino, including in a future phase, development of a golf course*."[17]

The existence of the MOU and its contents were explicitly brought to BIA's attention in an Apr. 28, 2010 letter from Tulare County's counsel to former BIA Pacific Regional Director Dale Morris.[18]

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15 AR, Binder 2, #66, Attachment #1, pg. 1. (Italics and underscoring added.)

16 *Id.*, italics and underscoring added.

17 AR, Binder 2, #66, Attachment #1, pg. 2. (Italics and underscoring added.)

18 AR, Binder 2, #66.

iii. The new Cooperation Agreement between the City and the Tribe clearly contemplates changes in land use at the Subject Property, with the only "restriction" being that the City must amend its General Plan to accommodate different future uses.

The 2008 MOU between the City and the Tribe expired on Jan. 30, 2010. The City and the Tribe entered into a new Cooperation Agreement on Apr. 1, 2010.[19] Apparently cognizant of the attention that explicit discussions of casino gaming on the Subject Property had generated up to that point, the City and the Tribe "artfully" drafted the Cooperation Agreement in a manner that does not mention casino gaming directly but clearly leaves the door open for gaming once the Subject Property is taken into trust. As stated in the City's letter to BIA Pacific Region, the City and the Tribe contended that the proposed trust conveyance will not result in significant environmental impacts because the "Tribe will not engage in any new development, construction, or new operation of any land use *unless a written agreement is executed by the parties that assures consistency with the City's General Plan, regulations, and policies* in effect at the time of the proposed development."[20]

As can be seen, changes in uses at the Subject Property are not out of the question. To the contrary, they are very much in play, and the only obstacle is conformance with the City General Plan—which can be amended at virtually a moment's notice.[21] (The Cooperation Agreement does not restrict the City from rezoning the Subject Property at any time.) Moreover, given that the City already explicitly agreed to amend its General Plan to accommodate a casino under the 2008 MOU, it is, to say the least, unlikely that a General Plan amendment will be much more than a parchment barrier to development of a casino at the Subject

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19 AR, Binder 2, #76.

20 *Id.*, italics and underscoring added.

21 The Subject Property is currently zoned as "Light Industrial-Airport Safety" with an alternate use of "Commercial Recreation." (AR, Binder 2, #66, pg. 5 [Map: "Draft PAADA LAND USE AREA"]; AR, Binder 2, #79, pg. 4.)

Property. This is particularly the case given that the Cooperation Agreement places no restriction whatsoever on the deed to the Subject Property to prevent gaming or other intense commercial uses.[22]

iv. In 2008, the Tribe sponsored state legislation to create a joint powers authority between the Tribe and the City to advance intense commercial development at the Subject Property.

In 2008, the Tribe sponsored state legislation, Assembly Bill ("AB") 1884, to create a joint powers authority between the Tribe and the City. The proposed legislation is duly noted in the administrative record.[23] As noted in the legislative committee reports, the "bill allow[ed] the Tule River Tribal Council to enter into a joint powers agreement with the City of Porterville for the sole purpose of developing" land in the vicinity of the Porterville Airport.[24] The committee reports further contained a statement from the Tribe's Tribal Administrator, Rodney Martin, conceding that

> [T]he sole intent of AB 1884 is to allow for the collaborative effort between the City of Porterville and the Tule River Tribe in a Redevelopment Project of lands near the Porterville Airport and the creation of the Porterville Area Airport Development Authority (PAADA). The Project calls for the *redevelopment of* approximately 200 acres, *40 of which are tribal owned lands, from industrial to commercial*. Historically the Porterville airport was once a hub of activity, but is now subsidized by the City General Fund and no significant industrial activity has evolved in and around the airport that would allow it to grow and foster. *The PAADA Redevelopment Project between the Tule River Tribe and the City of Porterville will allow for dynamic commercial development including the development of a new golf course and commercial amenities* that will support and revitalize the airport.[25]

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[22] The County is unaware if the Cooperation Agreement was ever submitted to the United States Department of Interior for approval as likely required by 25 U.S.C. § 81. This requirement was not discussed in the Proposed Decision.

[23] AR, Binder 2, #80, pg. 7.

[24] Senate Rules Com., Ofc. of Senate Floor Analyses, AB 1884 (Maze), Jun. 20, 2008. http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1851-1900/ab_1884_cfa_20080620_094211_sen_floor.html.

[25] Asm. Com. on Local Gov., AB 1884 (Maze), Apr. 29, 2008. http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1851-1900/ab_1884_cfa_20080429_140219_asm_comm.html. (Italics and underscoring

The California Senate Local Government Committee analysis was even more to the point, explaining that

> The Porterville Airport is a general aviation airport owned and operated by the City of Porterville (Tulare County). The Tule River Indian Tribe owns 40 acres in the nearby Porterville Airport Industrial Park. *The Tribe and the City want to work together to promote commercial and recreational development in the area surrounding the Porterville Airport*.
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> **********
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> [T]he Tule River Tribe and City of Porterville want to collaborate to advance their mutual interests in developing land around the Porterville Airport. As the City promotes development in the airport area, *the Tribe is seeking to transfer 40 acres of land it owns* in the Porterville Airport Industrial Park *into trust status, which would allow it to pursue **gaming** and recreational development on the property*.[26]

Although the both houses of the state Legislature approved AB 1884, Governor Schwarzenegger eventually vetoed the bill. That notwithstanding, the Tribe publicly sponsored the bill and promoted it as a way to achieve "gaming and recreational development" on the Subject Property in addition to other "dynamic commercial development." The Tribe's own Administrator is publicly on the record with the statement that the bill was to facilitate a change in use of the Subject Property from "industrial to commercial." Yet, somehow this information slipped past BIA so completely that BIA still maintains that there is no possibility of a change in land use at the Subject Property.

BIA's Amended FONSI described AB 1884 as an attempt by the Tribe to "create an unprecedented relationship with Tulare County and the City of Porterville."[27] What is truly unprecedented is that BIA could reference AB 1884 IN THE SAME DOCUMENT that it asserts the proposed Trust Application will have no significant impact on the human environment. The very purpose of the Tribe's and

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added.)

[26] Sen. Com. on Local Gov., AB 1884 (Maze), Jun. 12, 2008. http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1851-1900/ab_1884_cfa_20080612_140119_sen_comm.html. (Italics and underscoring added.)

[27] AR, Binder 3, #8, pg. 6.

the City's efforts throughout the MOU, Cooperation Agreement, and AB 1884 is to DRASTICALLY ALTER the human environment.

v. BIA's Environmental Assessment ("EA") and Amended FONSI both point to Tulare County Indian Gaming Local Community Benefit Committee funds that will be used to offset adverse impacts of gaming.

Difficulty in understanding BIA's issuance of a FONSI is also derived from the fact that BIA's EA and Amended FONSI both refer to grant funding from the Indian Gaming Local Community Benefit Committee ("LCBC"). As noted in the EA itself, such funds are made available to offset impacts from *tribal gaming*: "Senate Bill 621...makes grant funding available to counties, cities, and special districts impacted by *tribal gaming*...Although the proposed conveyance of the property is not *directly* attributable to gaming, the indirect effects of S.B. 621 contributions do affect the proposed undertaking."[28]

BIA's ruse is fairly evident in the foregoing passages. In order to push the proposed Trust application through as easily as possible, the EA and Amended FONSI do not *directly* admit that gaming will take place on the Subject Property, but also state that LCBC monies—only provided to offset gaming impacts—will be provided to cover local government losses. Reading between the lines, BIA is basically saying that gaming isn't in play *today*, but it will be once trust status is achieved, and LCBC monies can be relied upon to mitigate eventual gaming impacts. This is hardly a strong endorsement by BIA of the position that no change in land use is contemplated at the Subject Property.

vi. The Tribe actually ran radio advertisements in Tulare County to build support for constructing a casino on the Subject Property.

As recently as January of this year, the Tribe has run radio advertisements in Tulare County indicating the Tribe's plans to move its Eagle Mountain Casino to the

[28] AR, Binder 3, #34, pg. 24. The Amended FONSI further refers to LCBC funds as replacement for lost property taxes. See also AR, Binder 3, #8, pg. 7. (Italics and underscoring added.)

Subject Property. The Southern San Joaquin Valley radio station, KTIP AM 1450 located in Porterville, CA (internet address: http://www.ktip.com/site/), broadcast a daily advertisement from the Tule River Tribal Council indicating plans "...for the move of Eagle Mountain Casino to its intended home near the Porterville airpark. This will bring hundreds of construction jobs and more positions at the new casino..."[29]

This is further proof of the Tribe's intentions for the Subject Property to be developed as a casino and clearly discredits the statement by the BIA that the County's concerns of plans for a casino are mere speculation.

vii. BIA has also publicly admitted that the Subject Property could also be used for housing, which also constitutes a change in use impacting the human environment.

In its own EA, BIA states that a purpose of the Trust Application is to "satisfy Tribal needs in the areas of Tribal self-determination, *housing*, economic self-sufficiency, and alleviation of poverty."[30] Other portions of the EA also state that housing will be created at the Subject Property.[31]

BIA has a clear conflict between its statement in the Proposed Decision that no change in land use is contemplated and the declaration in the EA that the purpose of the application is to provide, among other things, additional housing. The Subject Property is currently used for industrial purposes and as of today is zoned as "Light Industrial-Airport Safety" with an alternate use of "Commercial Recreation."[32] Housing is not consistent with that existing use, so issuance of a FONSI was inappropriate. Any use for housing would currently require a zoning change within the City of Porterville, and therefore must be considered a change in land use and a reasonably foreseeable alternative use.

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[29] Tulare NOA, pg. 4.

[30] AR, Binder 3, #34, pg. 4.

[31] AR, Binder 3, #34, pg. 37.

[32] AR, Binder 2, #66, pg. 5 (Map: "Draft PAADA LAND USE AREA"); AR, Binder 2, #79, pg. 4.

f. Multiple responses provided by BIA were simply cut-and-pasted word-for-word from information supplied by the Tribe.

The Tribe's original March 26, 2002 Fee-to-Trust Application included the following discussion of the Tribe's need for additional land:

> The current reservation was established by executive Orders of January 9, 1873, October 3, 1873, and August 3, 1878. The current acreage of the reservation covers 55,396 acres, which is held in trust by the United States. The reservation is located in south-central California, approximately 75 miles south of Fresno in Tulare County. The reservation is situated on the Western slope of the Sierra Nevada Mountains and lies almost entirely within the South Fork Tule River drainage basin. The topography is generally steep, with elevations from about 1,000 to 7,500 feet. Most of the inhabited land is along the lower head of the South Fork Tule River on the Western side of the reservation.[33]

In its Jan. 4, 2011 Notice of Decision, BIA described the "Need for additional land" as follows:

> The current reservation was established by executive Orders of January 9, 1873, October 3, 1873, and August 3, 1878. The current acreage of the reservation covers 55,396 acres, which is held in trust by the United States. The reservation is located in south-central California, approximately 75 miles south of Fresno in Tulare County. The reservation is situated on the Western slope of the Sierra Nevada Mountains and lies almost entirely within the South Fork Tule River drainage basin. The topography is generally steep, with elevations from about 1,000 to 7,500 feet. Most of the inhabited land is along the lower head of the South Fork Tule River on the Western side of the reservation.[34]

As can be seen, the language in the Notice of Decision is IDENTICAL to the language in the Tribe's trust application.

Additionally, the Tribe sent a letter to the BIA Pacific Region Acting Director on Aug. 26, 2010 regarding Tulare County's Jul. 26, 2010 response to the Fee-to-Trust Application.[35] In that Aug. 26, 2010 writing, the Tribe attacked a letter from Tulare County's outside counsel, claiming that Tulare County "does completely fail to mention that the City of Porterville will be required to approve ANY development

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33 AR, Binder 1, #38, pg. 7.

34 Tulare NOA, Exh. A, pg. 4.

35 AR, Binder 3, #20, pg. 1.

at the Porterville Airpark property, which such MOU also requires the Tribe to follow all applicable City of Porterville planning requirements."[36]

Not coincidentally, BIA's Amended FONSI refers to the same letter from Tulare County's outside counsel and responds that Tulare County "completely fails to mention that the City of Porterville will be required to approve any development at the Porterville Airpark property, which such MOU also requires the Tribe to follow all applicable City of Porterville planning requirements."[37]

Again, the language in the Tribe's Aug. 26, 2010 is IDENTICAL to the language included in BIA's Amended FONSI.

g. Similar situations with substantially less egregious facts have been found to have failed to take an adequate "hard look" under NEPA.

i. *Metcalf v. Daley* (9th Cir. 2000) 214 F.3d 1135.

In *Metcalf*, a coastal Indian tribe sought approval to hunt whales and asked the National Oceanic and Atmospheric Administration ("NOAA") for assistance in securing authorization from the International Whaling Commission ("IWC"). (*Id.* at 1138.) Between Jan. and Mar. 1996, NOAA decided to support the tribe's application and entered into a formal written agreement with the tribe to advocate for the proposal at the IWC. NOAA also further agreed to cooperate with the tribe in the whale harvest. (*Id.* at 1139.)

In Jun. 1997, an environmental protection group wrote to NOAA indicating that NOAA has violated NEPA by agreeing to promote the whaling proposal without preparing an EA or an EIS. NOAA finally prepared an EA in Aug. 1997. (*Id.* at 1139.)

In Oct. 1997, NOAA and the tribe entered into a new written agreement which, in most respects, was identical to the agreement signed in 1996. (*Id.* at 1139.) Four days after signing new written agreement, NOAA issued a FONSI. (*Id.*

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[36] *Id.*

[37] AR, Binder 3, #8, pg. 8.

at 1140.) The Ninth Circuit noted, "the longer NOAA worked with the tribe toward the end of whaling, the greater pressure to achieve that end," and "an EA prepared under such circumstances might be subject to at least a subtle pro-whaling bias." (*Id.* at 1144, quoting federal district court.) The Court held that by making such a firm commitment to the whaling proposal before preparing an EA, "the federal defendants failed to take a 'hard look' at the environmental consequences of their actions, and, therefore, violated NEPA." (*Id.* at 1145.)

ii. *Southern Utah Wilderness Alliance v. Norton* (Dist. D.C. 2002) 237 F.Supp.2d 48.

In *Norton*, a hydrocarbon company filed a notice of intent to conduct a seismic exploration of an area in southern Utah to determine the extent of oil and gas reserves in the area. The exploration would include the use of "vibroseis" data, whereby specially-fitted trucks would traverse the area and vibrate the ground. (*Id.* at 50-51.)

The Bureau of Land Management ("BLM") issued a final EA with a FONSI, and attached a condition that the trucks should not operate in wet conditions so that soil ruts in excess of four inches would be avoided. (*Id.* at 51.) After an unsuccessful appeal to the Interior Board of Land Appeals ("IBLA"), plaintiff Southern Utah Wilderness Alliance challenged the IBLA decision arguing, among other things, that IBLA ignored and refused to consider evidence that the tire chains used in the vibroseis process made 15 inch deep ruts, not the four inches anticipated by the EA. (*Id.* at 51.)

The district court held that IBLA's refusal to consider such evidence was "hard to understand," and that IBLA "should have considered the bearing of plaintiff's evidence on the question whether BLM had adequately considered the consequences" of the seismic exploration. The court concluded that the failure to do so was "arbitrary and capricious" since the "proof of 15 inch ruts surely tended to

show that BLM had made unsupportable assumptions" and that such a "hurried analysis was not the 'hard look' required by law." (*Id.* at 55.)

iii. *Hoosier Environmental Council, et al. v. U.S. Army Corps of Engineers* (Dist. Ind. 2000) 105 F.Supp.2d 953.

In May 1994, citizens of Harrison County, Indiana voted to authorize riverboat gaming. (*Id.* at 962.) In an attempt to take advantage of the new authorization, Caesar's Resorts applied for a riverboat gaming permit for the adjoining Ohio River. (*Id.*) Thereafter, the Corps of Engineers ("COE") district engineer, Colonel Spear, issued an EA concluding in a FONSI. (*Id.* at 963.) However, in response to comments and additional information, Colonel Spear added numerous special conditions to the permit to limit, prevent, or mitigate environmental impacts identified in the EA. (*Id.*)

Plaintiff Hoosier Environmental Council filed suit, claiming among other things that COE failed to identify and evaluate reasonably foreseeable indirect effects of the project. (*Id.* at 971.) In describing "direct" effects, the court noted that "direct" effects of COE granting the permit were that (1) Caesar's would begin dredging a harbor on the Ohio River, (2) Caesar's would be eligible for a state gaming license, and (3) actual operation of the riverboat casino would someday commence. Indirect effects were described by the court as including construction of a hotel, pavilion, golf course, and parking and utility facilities around the harbor. The court explained that "[t]hese indirect effects are *foreseeable*..." (*Id.* at 972, emphasis added.) However, the court also found that COE thoroughly analyzed those foreseeable indirect effects in issuing the FONSI and granting the permit. (*Id.*)

Alternatively, plaintiffs argued that the "fundamental purpose" of the riverboat casino was actually to "stimulate economic development over a large geographic area" and that the COE was obliged to analyze environmental effects of potential secondary development in light of this purpose. In response, the court

noted that "[w]ithout some *specific document, report, or comment* in the record to call the COE's attention to the foreseeable secondary development, its decision not to consider such effects cannot be found" to be arbitrary and capricious. (*Id.* at 973, emphasis added.) The court criticized plaintiffs' position because "[r]ather than direct the Court to evidence in the record that would show that the District Engineers' finding was arbitrary or capricious, such as evidence of a proposed secondary commercial development in the area, the plaintiffs merely point to the stated aspirations of the riverboat gaming law passed by the state legislature." (*Id.* at 974.)

Unlike *Hoosier*, where specific documents, reports, or comments were not provided regarding alternative secondary impacts and only a generic statement that "economic development over a large geographic area" would be a secondary impact was advanced, here BIA was presented with a plethora of specific documented evidence indicating the strong possibility that casino gambling would someday take place on the property. Nonetheless, BIA turned a blind eye to such hard evidence.

iv. *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661.

In *City of Davis*, the controversy surrounded a proposed freeway interchange, known as the Kidwell Interchange, on Highway 80 near the town of Davis, California. (*Id.* at 665.) After the project began, Davis sought injunctive relief, arguing that the Federal Highway Administration ("FHA") failed to prepare an EIS in violation of NEPA. (*Id.* at 666.) The Kidwell Interchange would have made access to the University of California, Davis and the cities of Davis and Dixon abundantly more convenient. (*Id.* at 666-67.) Solano County had proposed a "University Research Park" near the interchange, taking advantage of the proximity to UC Davis. (*Id.* at 668.) Without the Interchange, access from the Research Park to the University would be much more difficult, thereby making the Kidwell area less attractive to development. (*Id.*) However, the Highway Division of the California Department of Public Works ("CDHW") and FHA portrayed the Kidwell

Interchange as a mere accessory to "inevitable industrial development" that would take place with or without the Interchange project. (*Id.* at 674.)

The Court was skeptical of that assertion, pointing to statements by the Solano County Industrial Development Agency that the interchange was an indispensable prerequisite to rapid development of the Kidwell area, and that without it the costs for industrial plants and the driving distance to UC Davis would increase substantially. (*Id.*) As the court put it, "[w]ithout the Kidwell Interchange, development may not be inevitable; with it, development may be inevitable." (*Id.* at 674.) The court stated that situations where "substantial questions have been raised about the environmental consequences of federal action" were precisely the kind which Congress had in mind when it enacted NEPA, and responsible agencies "*should not be allowed to proceed with the proposed action in ignorance of what those consequences will be.*" (*Id.* at 675-76, emphasis added.)

Further, the court rejected CDWH's position that the "uncertainty" of development in the Kidwell area made the "secondary" environmental effects of the interchange too speculative for evaluation. The court conceded that the development potential which the interchange will create comprehends a range of possibilities, and that the ultimate outcome would depend on the "plans of private parties and local governments outside the direct control of state and federal government." (*Id.* at 676.)

However, the court declared that just because the exact type of development is not known is not an excuse for failing to file an [environmental] impact statement at all. Uncertainty about the pace and direction of development merely suggests the need for exploring in the EIS alternative scenarios based on these external contingencies. Drafting an EIS *necessarily involves some degree of forecasting.* (*Id.*, emphasis added.)

The court continued that while "foreseeing the unforeseeable" is not required, an agency still "must use its best efforts to find out *all that it reasonably can.*"

Quoting from *Scientists' Institute for Public Information v. A.E.C.* (D.C. Cir. 1973) 481 F.2d 1079, 1092, the court stated

> It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.' (*Id.* at 676.)

In ultimately finding that FHA and CDHW did not satisfy the requirements of NEPA, the Court further pointed out that "Nor does the characterization of industrial development as a 'secondary' impact aid the defendants. As the Council on Environmental Quality only recently pointed out, *consideration of secondary impacts may often be more important than consideration of primary impacts.*"[38] (*Id.* at 676, emphasis added.)

h. The Department of Interior Itself has Recognized that Tribes often Apply for Land to be Taken into Trust for Non-gaming Purposes only to Convert it to Gaming Uses Later on.

In a September 2005 Evaluation Report issued by the U.S. Department of Interior ("DOI") Office of Inspector General entitled, "Process Used to Assess Applications to Take Land into Trust for Gaming Purposes,"[39] the Inspector General "found that some tribes had converted the use of non-gaming trust lands to gaming

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[38] The *Fifth Annual Report of the Council on Environmental Quality* (Dec. 1974) at 410-11 stated: "Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. *For many projects, these secondary or induced effects may be more significant than the project's primary effects...While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable.* If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. *Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate.* As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase." (*City of Davis*, at 676-77, emphasis added.)

[39] Report Number: E-EV-BIA-0063-2003. http://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-2005-g-0030/html/GPO-DOI-IGREPORTS-2005-g-0030.htm.

uses and that the Department [of the Interior] and the National Indian Gaming Commission ("NIGC") lack a process for ensuring that all lands used by Indian tribes for gaming meet the requirements of the Indian Gaming Regulatory Act."[40]

The Inspector General's Report continued that in the course of the evaluation, the Inspector General

> found that certain tribes had converted the use of land acquired for them in trust by the Secretary for economic development (other than gaming) to gaming. This was done without a determination of eligibility of the land for gaming. Furthermore, the Department and NIGC do not have a process for ensuring that all lands used by tribes for gaming are eligible under IGRA.[41]

The Inspector General further reported on 10 instances as of September 2005 in which tribes converted the use of lands that were taken into trust after Oct. 17, 1988 from non-gaming to gaming operations.[42] Moreover, two of those situations occurred in California: (1) 34.59 acres in Butte County were brought into trust for HUD tribal housing on Jul. 26, 1994 for the Mooretown Indians, but the land was converted to gaming on Jun. 11, 1996; and (2) 6.45 acres in Del Norte County were brought into trust for HUD tribal housing on Apr. 13, 1989 for the Smith River Rancheria, but the land was converted to gaming in Aug. 1996.[43]

For the Tribe, BIA, or anyone else to claim the possibility of gaming being developed on the Subject Property is nothing more than mere speculation is simply nonsensical and not consistent with reality.

i. CONCLUSION: BIA Failed Under Any Standard to Take the "Hard Look" that NEPA Requires.

As explained above, as the responsible federal agency BIA was required under NEPA to take a "hard look" at the potential environmental consequences of taking

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40 *Id.*, cover memo.

41 *Id.* at 7.

42 *Id.* at 7-8.

43 *Id.* at Appx. 6, pp. 18-19.

the Subject Property into trust. And while BIA is not required to be 'subjectively impartial' in the hard look review, it must *objectively evaluate* the Fee-to-Trust Application (*Metcalf*) in order to "prevent or eliminate damage to the environment... stimulate the health and welfare of man." (42 USC § 4321.)

Unfortunately, BIA utterly failed to satisfy NEPA's hard look requirements. Rather than preparing an EIS to honestly evaluate environmental impacts, BIA issued a FONSI that has no support in fact, law, or common sense. The assertion that no change in land use will occur, or is likely to occur, borders on the absurd. During the first half of 2009, BIA was contacted multiple times by the Tribe and notified of the Tribe's intention to convert their application to include gaming. Beyond that, BIA Pacific Region actively counseled the Tribe on how to accomplish gaming on the Subject Property. Prior to that, the Tribe and the City of Porterville very publicly entered into an MOU that included an expressly stated goal of bringing casino gaming to the Subject Property. Even the new Cooperation Agreement between the Tribe and the City does nothing to exclude casino gaming from the Subject Property, and in fact probably encourages it given the City's involvement and its longstanding support for casino gaming on the Subject Property.

BIA's head-in-the-sand approach is even more remarkable in light of the fact that the Tribe actually sponsored state legislation with the explicit purpose of creating a joint powers authority with the City so that the use of the Subject Property could be converted from "industrial to commercial" including a golf course and "***gaming*** and recreational development." Furthermore, BIA acknowledges that LCBC funds would be used to offset adverse impacts of taking the land into trust, but attempts to avoid the fact that LCBC funds are actually specifically used to offset *gaming* impacts—and this information is contained in BIA's own documents.

In addition, the Tribe ran PUBLIC RADIO announcements touting its plans for gaming on the Subject Property. It is unclear whether BIA had the opportunity

to review these radio ads *before* issuing the Notice of Decision. The County became aware of the announcements *shortly after* the Notice of Decision was issued.[44] Regardless of the timing, this does not preclude IBIA from taking existence of the radio ads into consideration.[45]

At the bare minimum, even setting aside the overwhelming evidence with respect to gaming at the Subject Property, BIA's *OWN WORDS* concede that housing is also being considered at the Subject Property. As explained, the Subject Property is currently comprised of light industrial uses, so this basis alone should have triggered the preparation of an EIS.

Under no definition could BIA's actions be described as *taken objectively and in good faith*. Rather, they are merely an *exercise in form over substance and a subterfuge to rationalize a decision already made*. (*Metcalf*.) No *convincing statement* has been provided explaining why the project's impacts are insignificant. If anything, the administrative record demonstrates that the project's impacts will indeed be significant.

Nor can BIA hide behind the lame excuse that its review is limited strictly to the impacts of moving the Subject Property into trust. Federal courts have clearly established that BIA has a duty to consider foreseeable direct *and indirect* impacts. (*Sierra Forest Legacy*.) If gaming is a potential second step to come after the Subject Property is moved into trust—and the Inspector General's Report confirms that it most likely is—then BIA has a mandatory duty to analyze that indirect impact as well. Similarly, BIA cannot plead that a future action by the Tribe to seek gaming for the Subject Property is beyond its control so analysis is not required. To the contrary, NEPA requires an agency to additionally consider foreseeable *incremental*

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[44] The Notice of Decision was issued on Jan. 4, 2011. The County became aware of the radio ads on or about Jan. 24-25, 2011. (See Tulare NOA, Exh. C.)

[45] 43 CFR § 4.318 states that, "An appeal will be limited to those issues that were before the...BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, *the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate*." (Italics and underscoring added.)

impacts of the action (see the Inspector General's report on the incremental approach to achieving gaming on non-gaming trust lands), when added to other past or present actions (like taking the Subject Property into trust) *regardless of what agency or person undertakes such other actions* (like the Tribe converting the property to gaming post-trust status). (*National Audubon Society.*)

When viewed in light of similar federal court precedent, the conclusion that BIA failed to take the hard look required by NEPA becomes unavoidable. In *Metcalf, supra*, 214 F.3d 1135, the Court concluded that where (1) preparation of an EA occurs *after* the federal agency agrees to the action in question, (2) evidence exists that the federal agency is simply regurgitating information that was spoon-fed to it by interested private parties, and (3) pressure increases on the federal agency to achieve a particular end, the EA is almost invariably subject to at least a *subtle bias* and that making such a firm commitment demonstrates that the federal agency failed to take the required hard look.

The same situation is present here. As demonstrated by the various meetings and email exchanges between the Tribe and BIA Pacific Region officials *in the first half of 2009*, BIA had committed to establishing gaming on the Subject Property. The commitment here appears to be even stronger than the one found in *Metcalf*, since BIA Pacific Region went so far as to *actively advise and counsel* the Tribe on accomplishing gaming on the Subject Property. This is also noteworthy in light of the fact that face of the EA is dated "*January 2010*" and "*May 2010*."[46] That means that, just like in *Metcalf*, BIA committed to gaming on the Subject Property several months ***BEFORE*** preparation of the EA was complete. Furthermore, as also seen in *Metcalf*, instead of providing independently evaluated information, important parts of the Notice of Decision and EA were simply parroted word-for-word from statements supplied by the Tribe.

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[46] AR, Binder 3, #34.

In summary, as was done in *Metcalf,* BIA made a prior commitment to the Fee-to-Trust proposal and sought to rationalize a decision already made by developing a subtle bias in favor of a particular result, by relying *word for word* on tribal information in the Proposed Decision, and by ignoring compelling and prevalent information regarding foreseeable future uses of the property. By doing so, BIA failed to take the required "hard look."

In *Norton*, BLM and IBLA were criticized for *ignoring and refusing to consider* relevant evidence and the court described such refusal as "hard to understand" and admonished BLM and IBLA for not considering evidence that tended to show different outcomes were likely. The court described that sort of hurried analysis as failing to satisfy the "hard look required by law." In the present situation, BIA was presented with voluminous documented evidence from the County, the Governor's Office, and other interested parties that changes in land use post-trust status at the Subject Property was not only possible but practically certain to occur, in terms of casino gaming, housing, and/or other intense commercial uses. Nonetheless, at every turn BIA ignored the evidence—some of it coming straight out of its own documents—and engaged in the same type of hurried analysis that was disparaged in *Norton*.

Hoosier Environmental Council provides no support for BIA's actions, either. Unlike plaintiffs in *Hoosier*, Appellants here have pointed to a mountain of *specific documents, reports, and comments* in the record that call BIA's attention to the foreseeable secondary development of the Subject Property for casino gaming and other intense commercial uses. Unlike the *Hoosier* plaintiffs who merely cited to future aspirations, Tulare County and other Appellants have directed both BIA and IBIA to *evidence in the record* demonstrating that BIA's actions were arbitrary and capricious. In *Hoosier*, the "direct effect" of the action was the development of riverboat casino gaming, and the "indirect effects" were construction of nearby hotels, golf courses, and related facilities. Here, the "direct effect" of the action

would be the taking of the Subject Property into trust. The "indirect effect" would be intense commercial development on the Subject Property, most likely including, housing, casino gaming, hotels, and a golf course. The "indirect effects" here are no less *foreseeable* than the indirect effects present in *Hoosier*. However, unlike the situation in *Hoosier*, BIA did <u>not</u> thoroughly analyze those indirect effects as required by NEPA.

Just as in *City of Davis* where the Kidwell Interchange was an *indispensable prerequisite* to the development of the Kidwell area, moving the Subject Property into trust is an *indispensable prerequisite* to casino gaming. Casino gaming is not "inevitable" without the Subject Property being taken into trust, but based on the administrative record it may become inevitable if the Subject Property is moved into trust status. (*City of Davis*, at 674.) At a minimum, substantial questions have been raised about environmental consequences of the proposed action, which is precisely what Congress had in mind when enacting NEPA, and BIA cannot proceed with the proposed action in willful ignorance of the widespread evidence that the most likely secondary impact will be casino gaming or some other intense commercial use. (*City of Davis*, at 675-76.)

BIA cannot hide behind the excuse that secondary development; i.e., a casino, is too "uncertain" to merit analysis. Although secondary impacts do depend on actions of the Tribe, that fact is not an excuse to fail to prepare an EIS. Uncertainty often proves, rather than excuses, the need for an EIS. Drafting an EIS necessarily involves some forecasting and BIA cannot shirk its responsibilities, especially in light of the evidence at hand, by attempt to characterize an analysis of gaming impacts as little more than "crystal ball inquiry." (*City of Davis*, at 676.) Secondary impacts are often <u>*MORE*</u> important that primary impacts. (*City of Davis*, at 676-77.) Clearly, if casino gaming were ever brought to the Subject Property, that would have an immeasurably larger impact on the environment than the primary effect of taking the land into trust.

The 'hard look' includes considering all foreseeable direct and indirect impacts. (*Sierra Forest Legacy.*) BIA has ignored widespread evidence regarding an extremely consequential secondary impact. The fact that the future action may be undertaken by a non-federal agency does not get BIA off the hook. (*National Audubon Society.*) Based on the widespread evidence regarding casino gaming and other intense commercial uses of the Subject Property, BIA's statement of reasons for not preparing an EIS are anything but convincing. (*Metcalf.*) BIA has not lived up to its responsibilities to take a "hard look" at environmental consequences under NEPA.

BIA's decision was arbitrary and capricious because it did not consider all relevant factors; i.e., evidence of plans for gaming. (*Metcalf.*) A careful and searching inquiry of the record will invariably lead the court/IBIA to understand the record, and within that record both (1) widespread evidence regarding gaming; and (2) a similarly widespread effort on behalf of BIA to ignore and avoid that evidence. While addressing several questions, BIA bypassed the most important one—the one with the greatest potential to impact the environment: gaming. (*Ohio Valley Envtl. Coal.*) Relevant factors were willfully ignored when available to BIA (*Mobil Oil*), and the decision to issue a FONSI instead of preparing an EIS was not based on consideration of relevant factors (*Volpe.*) On these grounds, BIA's decision can only be arbitrary and capricious and must be reversed.

II. THERE WILL BE AN IMPACT ON THE STATE AND ITS POLITICAL SUBDIVISIONS RESULTING FROM THE REMOVAL OF THE LAND FROM THE TAX ROLLS IF THE TRUST IS APROVED.

BIA failed to show substantial evidence that it considered impacts on the State and the County, a political subdivision, resulting from removal of the land from the tax rolls. (25 CFR 151.11 (a) and 25 CFR 151.10 (e).) The Proposed Decision indicates there will be no impact on local governments because the City of Porterville has a Cooperative Agreement with the Tribe to compensate the City of

Porterville for lost tax revenues. However, the Proposed Decision fails to acknowledge that the County and State do not have such an agreement with the Tribe and fails to analyze and weigh the impacts to the County and State although each submitted letters to convey concerns for BIA consideration pursuant to 25 CFR 151.11 (a) and 25 CFR 151.10 (e) and should be afforded greater weight given the distance between the Tribe's current reservation and the Subject Property. (25 CFR 151.11 (b).) BIA's inattention to the County and State's concerns is an abuse of discretion and failure to comply with federal regulations.

In particular, BIA failed to consider impacts to the County's property tax proceeds for the Subject Property. The County currently receives 15.9122 percent of the assessed values. Page 23 of the EA states that "Property taxes assessed for the property were $33,459.98 in tax year 2009-2010."[47] So, the County received $5,324 in property tax proceeds. If the Subject Property goes into federal trust and is developed to an intense commercial use, the assessed value of the property would significantly increase but the County would no longer collect any property tax proceeds because the property would no longer be subject to state taxes. As an example of an intense commercial use currently in a city jurisdiction, the 3-acre Horizon/Preferred Outlet Mall in the City of Tulare had a secured assessed value of $215,510.82 in Fiscal Year 2010/2011, and the County received $34,292.51 (15.9122%) of the property tax proceeds. A similar or larger loss of property tax proceeds to the County should be expected if the Subject Property goes into federal trust and is developed to an intense commercial use. Should the Subject Property be developed with a casino or other intense commercial use, the only way the County could be made whole would be to obtain mitigation from the Tribe. To date, no mitigation has been offered or contemplated.

BIA further failed to consider impacts to the County's sales tax proceeds if the Subject Property is placed into trust. The County currently has agreements with

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47 AR, Binder 3, #34, pg. 23.

cities to collect five percent of the cities' one percent sales tax revenues. The 3-acre Horizon/Preferred Outlet Mall in the City of Tulare is one example of an intense commercial use in a city that pays sales tax proceeds to the County. In 2010, the County received approximately $7,733 in sales tax proceeds from Horizon Outlet Mall. If a reasonably foreseeable casino or other intense commercial use is developed on the Subject Property after it goes into trust, the County will lose a similar or larger amount of sales tax proceeds because no state sales taxes will be collected or paid to the City of Porterville or the County. This financial data confirms that the impacts from the proposed casino or other intense commercial use on the County will not be mitigated unless considered, analyzed, and resolved prior to the Subject Property going in to federal trust.

Additionally, failure to consider unmitigated impacts on County and State tax proceeds is another example of BIA's utter failure to take the required "hard look" at potential impacts under NEPA.

a. Impacts on County-Provided Services.

Beyond the direct financial impacts to County tax revenues, moving the Subject Property into federal trust would have other indirect financial consequences for the County. The County currently provides services, infrastructure, and public facilities for the Subject Property, including adjoining County roads. There will be an impact to these County services, infrastructure, and public facilities if the property goes into federal trust and develops to a casino or other intense commercial use.

i. County Road Maintenance.

Should the Tribe develop the Subject Property to a casino or other intense commercial use once it goes into trust, there will be additional traffic impacts to Tulare County roadways in the vicinity, particularly Road 220 (which borders the western edge of the Subject Property), Scranton Avenue, and Teapot Dome Avenue. Both Scranton Avenue and Teapot Dome Avenue connect the Subject Property (via

Road 220) to State Route 65. A portion of these roadways are within the city limits of the City of Porterville or under a maintenance agreement with the City of Porterville; however, a portion is still under County jurisdiction. (See graphic attached hereto as Exhibit 1.) Should the Subject Property be developed with a casino or other intense commercial use, the only way the County could be made whole would be to obtain mitigation from the Tribe unless the City of Porterville assumes maintenance responsibility for all impacted County roadways either by annexation or through a maintenance agreement. To date, no mitigation has been offered or contemplated.

ii. County Fire Service and Public Facilities.

Tulare County Fire currently engages in a reciprocal memorandum of understanding with the City of Porterville for fire service. This memorandum of understanding provides no monetary compensation for the reciprocal services. When increased service calls occur due to a casino or other intense commercial use on the Subject Property, Tulare County Fire services, equipment, and related public facilities will be impacted without compensation from the City of Porterville or the Tribe. Should development of the Subject Property to a casino or other intense commercial use occur, the only way the County could be made whole would be to obtain mitigation from the Tribe. To date, no mitigation has been offered or contemplated.

iii. County Police Service and Public Facilities.

If the Fee-to-Trust Application is approved, the County would become a neighboring jurisdiction to the Subject Property. If the Subject Property is developed to a casino or other intense commercial use, any increased criminal activity will impact the County Sheriff Department as an adjacent jurisdiction to the site. Further, any increased criminal activity would cause use of the County Sheriff and Superior Court facilities. Should development of the Subject Property to a

casino or other intense commercial use occur, the only way the County could be made whole would be to obtain mitigation from the Tribe. To date, no mitigation has been offered or contemplated.

Moreover, failure to consider additional impacts on County-provided services is yet another example of BIA's utter failure to take the required "hard look" at potential impacts under NEPA.

III. BIA'S NOTICE OF DECISION CONFLICTS WITH APPLICABLE FEDERAL REGULATIONS

a. The BIA Abused Its Discretion by Not Giving Sufficient Weight to Local Government Concerns.

The Code of Federal Regulations ("CFR") requires that for off-reservation acquisitions, the BIA must give "greater weight to the concerns raised [by local government]" when a tribe is attempting to place land into trust that is not directly connected to the reservation. (25 CFR 151.11 (h) and (d).) "...[A]s the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition." (25 CFR 151.11 (b).) The Subject Property is located approximately *20 miles* from the Tribe's current reservation.[48] The Notice of Decision does not reflect that any "greater weight" was given to the concerns expressed by local governments, including multiple comment letters submitted by Tulare County[49] and the Office of the Governor.[50]

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[48] Tulare NOA, Exh. A, pg. 5.

[49] See Tulare County letters dated April 28, 2010, July 26, 2010, and September 10, 2010. AR, Binder 2, # 66; AR, Binder 3, #23; and AR, Binder 2, #79.

[50] See Ofc. of the Governor letters dated February 10, 2010 and July 26, 2010. AR, Binder 2, #61; and AR, Binder 3, #24.

b. The Proposed Decision Fails to State a Need of the Tribe for Additional Land.

BIA failed to show substantial evidence to support the need for additional land (25 CFR 151.11(a) and 25 CFR 151.10 (b)) and the necessary determination that "the acquisition of land is necessary to facilitate tribal self-determination, economic development, or Indian housing."[51] (25 CFR 151.3.) Such a finding reflects the policy that there must be a compelling basis to take land into trust that is neither within (or adjacent) to the tribe's reservation or already in tribal ownership. (*Id.*)

The Proposed Decision did not give any findings, analysis, or conclusion to support the need for additional land, and merely made an irrelevant statement on the "Need for additional land" that was, as noted above, *cut-and-pasted verbatim directly out of information provided by the Tribe*. The Proposed Decision lacks the consideration and independent analysis required by 25 CFR 151.11(a) and 25 CFR 151.10 (b).

The Tribe does not need the Subject Property to be taken into trust. There are no current, specific plans for development of the Subject Property—with the exception of the world's worst kept secret that gaming is to be established there. (However, until the Tribe and BIA explicitly acknowledge that fact, it cannot justify the need to take the Subject Property into trust on that basis.) Furthermore, the Tribe already operates the Eagle Mountain Casino so it already has another lucrative basis upon which to generate revenue. Further, if as the Tribe states there are no current plans for economic development on the Subject Property and there will be no change in land use, then the current use on the property is a sufficient use for the Tribe and there is no current, expressed need by the Tribe for the Subject Property to go into trust.

The Amended FONSI states "The Porterville Airpark is in an area of great historical importance to the Tribe as part of its aboriginal heritage and the Tribal

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[51] Tulare NOA, Exh. A, pg. 2.

Council is required by the Tribal Constitution and bylaws to reclaim such lands and assert Tribal self-determination and jurisdiction by taking such lands into trust."[52] The Tribe should not be allowed or encouraged to stockpile land in trust, thereby removing it from sovereign state jurisdiction, which is miles away from its historic reservation with no particular plan or reason to have the land in trust except to reclaim perceived historical territories.

The Amended FONSI also refers to tax credits, accelerated depreciation for power lines, water systems and telecommunication facilities, and tax-exempt financing for economic development, but fails to specify any specific plans for economic development.[53] The Amended FONSI merely made conclusory statements that the land is necessary to facilitate tribal self-determination and economic development without providing plans as to how the land will help achieve this goal as required by 25 CFR 151 .11(c). These statements do not provide substantial evidence of a need for this additional trust land.

This failure to analyze the significant impacts of the proposed trust acquisition and the lack of independent analysis concerning the Tribe's alleged need for land are highlighted by the fact that the Proposed Decision's discussion of the need for additional land simply parrots language provided in the Tribe's 2002 Fee-to-Trust Application. Even after the passage of more than eight years since the application was filed, BIA still cannot come up with its own independent justification for why the Subject Property should be taken into trust. What BIA has *failed* to say with respect to the need to take the Subject Property into trust speaks volumes.

On the other hand, there is probably no need to look any further than the DOI Inspector General's September 2005 Report to find the *true* reason BIA and the Tribe see a need to take the Subject Property into trust. As demonstrated in the

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[52] AR, Binder 3, #8, pg. 5.

[53] AR Binder 3, #8.

2005 Report, the path to circumventing the Indian Gaming Regulatory Act through the two-step process of taking lands into trust for non-gaming purposes and then converting it to gaming post-trust status is well worn. The administrative record overwhelmingly proves that the Tribe and BIA have likely been planning to establish gaming on the Subject Property since at least 2008.

c. The Purposes for which the Subject Property will be Used are Vague and Insufficient.

BIA failed to show substantial evidence for approval of the purpose for which the Subject Property will be used. (25 CFR 151.11(a) and 25 CFR 151.10(c).) BIA only considered the vague concepts of no change of land use and undetermined future projects that may benefit economic development. The EA states on page 4 that, "The purpose of this action is to continue to expand the Tule River Tribe's land base to satisfy needs in areas of Tribal self-determination, housing, economic self-sufficiency and alleviation of poverty."[54] Under "Factor 2- Proposed Land Use," the Proposed Decision merely states: "There is no planned change in land use."[55] These stated purposes are vague and insufficient, making it premature to place the property into trust at this time. The Tribe's purpose of no planned change in land use may be achieved without the Subject Property going into trust.

d. No Plan Has Been Provided to Specify Anticipated Economic Benefits Associated with the Proposed Use.

The Proposed Decision and Amended FONSI state the Tribe's need for economic development on the Subject Property and no change in land use from the current uses, indicating a business purpose. "Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." (25 CFR 151.11 (c).) Here, the Tribe did not submit a financial plan and economic analysis as required by federal

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54 AR, Binder 3, #34.

55 Tulare NOA, Exh. A, pg. 5.

regulation. This information was particularly critical given the DOI Secretary's stated policy for off-reservation land acquisition which specifically considers the degree of economic benefit to the tribe. (See 25 CFR 151.3(a)(3); 25 CFR 151.11(b) and (c).)

The Proposed Decision states on page 7:

> This is consistent with Tule River Tribal Council Resolution No. 83-94 adopted on September 27, 1994, which recognized that 'the Tule River Tribal Council has approved a thirty (30) year Economic Development Plan,' and which same Tribal Council Resolution approved ANA Grant application 93612-951 dated October 21, 1994 and its attached Business Plans No. 1 and No. 2 for the Airport Industrial Park.[56]

There is no indication that the BIA has reviewed "Resolution No. 83-94" or the "thirty year Economic Development Plan" for the consideration and analysis required by 25 CFR 151.11(c). More importantly, the 1994 plan was not submitted to BIA until Nov. 24, 2010[57]—over two months *after* BIA issued the Amended FONSI on Sept. 17, 2010.[58] Therefore, the sequencing guarantees that BIA could not have relied upon this information when issuing the Amended FONSI.[59] Further, these documents were not provided to the County or other commenters on this Fee-to-Trust Application. To the County's knowledge, these documents are not a part of the record for this Fee-to-Trust Application and therefore should not, and cannot, be considered unless provided to all interested parties, including but not limited to Tulare County.

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56 Tulare NOA, Exh. A, pg. 7.

57 AR, Binder 2, #81.

58 AR, Binder 3, #8.

59 The continuing usefulness of a 17-year old business plan is also questionable at best under any scenario. Part 1 of that plan indicates the desire to construct warehouse-style buildings on the Subject Property. (AR, Binder 2, #81, Business Plan No. 1.) However, the Notice of Decision points out that two warehouses have already been constructed on the Subject Property, currently occupied by the Tule River Economic Development Corp. and the U.S. Department of Agriculture. (Tulare NOA, Exh. A, p. 5.) Part 2 of the 1994 plan calls for a joint venture with the Recyclable Container Corp. (AR, Binder 2, #81, Business Plan No. 2.) *Seventeen years later*, there is simply no evidence that the joint venture plan with Recyclable Container Corp. is still contemplated in its original form.

As stated in the July 26, 2010 letter from Andrea Lynn Hoch, former Legal Affairs Secretary of the Office of the Governor:

> "The EA states that the 'project's contribution to cash is obtained through trust status designation.' There are no details provided regarding how a cash infusion would result from the land being taken into trust status. As we commented regarding the Tribe's application, the DEA provides no information regarding the specific economic benefits to the Tribe with the proposed use of the land."[60]

Ms. Hoch's February 10, 2010 letter also raised this concern with the Fee-to-Trust Application.[61] It is clear that the BIA has consistently ignored concerns of insufficient explanation of economic benefits in approving the Fee-to-Trust Application.

e. The Available Information was Insufficient to Adequately Review Jurisdictional Problems and Conflicts in Land Use that may Arise.

There was not sufficient information provided to allow the Secretary to determine that the establishment of a tribal sovereign enclave within the City of Porterville city limits would not result in jurisdictional conflicts. (25 CFR § 151.10(f) and 151.11(a).) Indeed, the administrative record is barren of any analysis of jurisdictional conflict issues.

f. BIA's Failure to Comply with Applicable Federal Regulations is Reversible Error.

In *McAlpine v. Bureau of Indian Affairs* (10th Cir. 1997) 112 F.3d 1429, the Tenth Circuit Court of Appeal upheld BIA's decision to deny a land trust application where there was no discussion of relevant regulatory factors. The Court approved BIA's denial based on the following findings:

> "...(1) that the 1871 appropriations act cited by Mr. McAlpine as statutory authority did not apply to the two tracts of land because they were not part of the diminished Osage reservation in Kansas; (2) that there was no justifiable reason to place the land in trust status; (3) that Mr. McAlpine failed to demonstrate a need to place the land in trust status; (4) that

[60] AR Binder 3, #24, pg. 3.

[61] AR, Binder 2, #61.

> there was no impelling need for the land to be taken off the local tax rolls; and (5) that because the land was located outside the present Osage reservation in Oklahoma, the BIA office in Pawhuska was not equipped to discharge the additional responsibilities of administering the two parcels of land in Kansas." (*Id.* at 1436.)

It is clear that BIA is required to consider the relevant factors enumerated in applicable federal regulations. (*Id.* at 1435.) In this case, BIA failed to do so and there was a clear error of judgment, making the BIA's Proposed Decision arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. (5 USC § 706 (2)(A).)

CONCLUSION

BIA's actions in the situation at hand do a great disservice to the NEPA process. Rather than taking a hard look, BIA has repeatedly turned a blind eye to compelling evidence regarding environmental impacts associated with the Fee-to-Trust Application. BIA's actions fall far short of what is expected of it under NEPA, applicable regulations, and, most importantly, relevant federal judicial decisions. Based on the administrative record and other information easily accessible in the public domain, BIA's decision to issue a FONSI is nothing short of astounding. The failure to abide by applicable federal regulations, address the revenue and infrastructure impacts on the County and/or the State associated with the Application, or provide a defensible need to take the Subject Property into trust is just as shocking. The aforementioned shortcomings are compounded by the fact that BIA has likewise refused to include a deed restriction to prevent changes in land use in order to compensate for the deficiencies in BIA's analysis.

For the reasons explained here and in Appellant Tulare County's Notice of Appeal, Tulare County respectfully asks IBIA to reverse BIA's Notice of Decision, require BIA to prepare an EIS for the Fee-to-Trust Application, and mandate that

any approval of the Application include a deed restriction to preclude casino gaming or other intense commercial uses on the Subject Property.

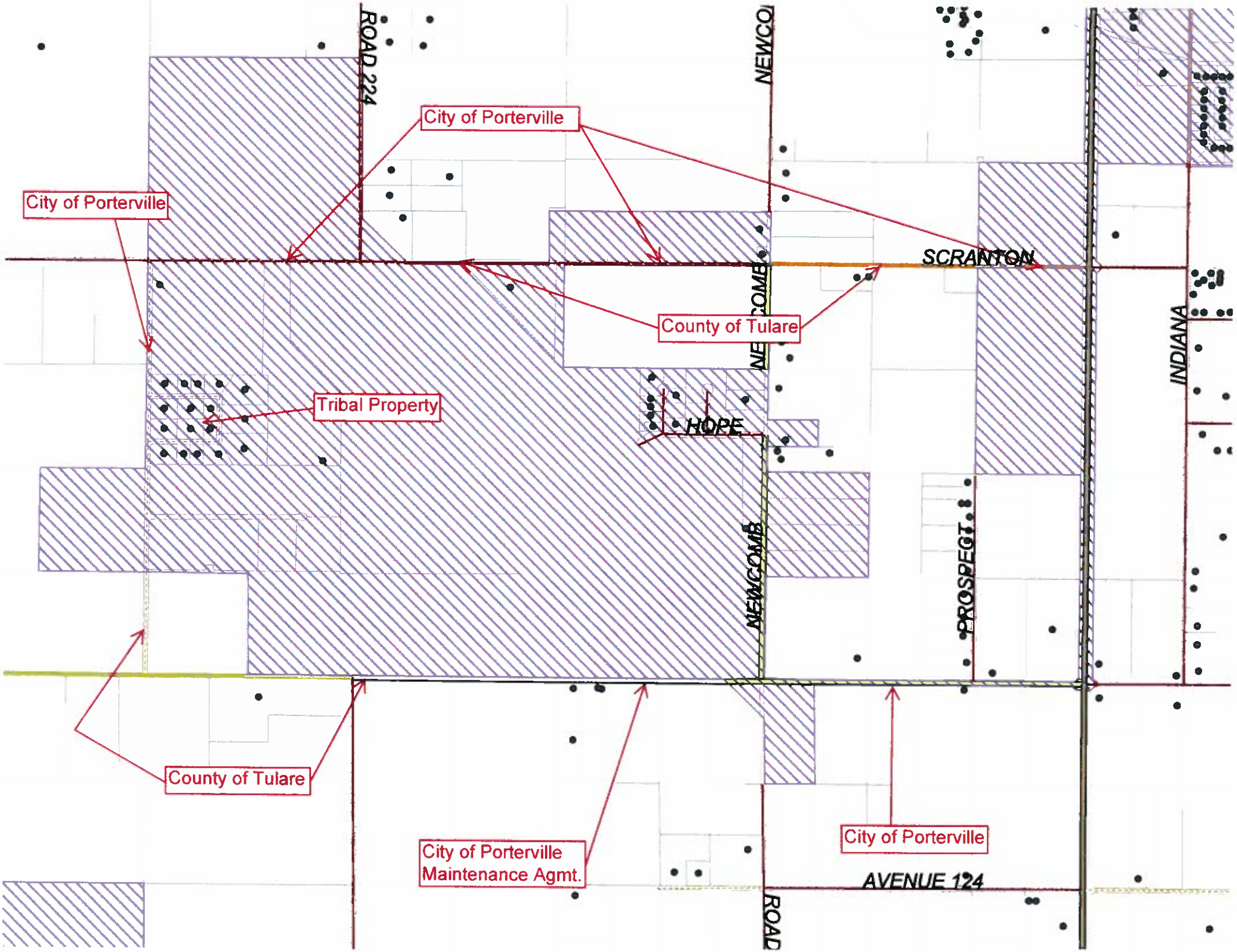
Respectfully submitted,

Dated: July 22, 2011

NIELSEN MERKSAMER PARRINELLO GROSS & LEONI, LLP

By: _____
Cathy Christian
Attorneys for Appellant
COUNTY OF TULARE

EXHIBIT 1


ROAD 224
City of Porterville
City of Porterville
NEWCOMB
SCRANTON
County of Tulare
INDIANA
Tribal Property
HOPE
NEWCOMB
PROSPECT
County of Tulare
City of Porterville
Maintenance Agmt.
City of Porterville
AVENUE 124
ROAD

DECLARATION OF SERVICE

I declare:

I am employed at Nielsen Merksamer Parrinello Gross & Leoni, LLP, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1415 L Street, Suite 1200, Sacramento, CA 95814.

On May 3, 2011, I served the attached LETTER REQUESTING EXTENSION OF TIME by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 3, 2011, at Sacramento, California.

Brenda Wise

Brenda Wise