



MLL 0881

OFFICE OF THE GOVERNOR

April 28, 2008

Via Facsimile (760) 863-2449 & U.S. Mail

Gary Kovall, Esq.
Twenty-Nine Palms Band of Mission Indians
46-200 Harrison Place
Coachella, California 92236

Re: Draft Environmental Assessment for Twenty-nine Palms Casino Project

Dear Mr. Kovall:

We have reviewed the Draft Environmental Assessment (Draft EA) dated March 2008 for the Twenty-nine Palms Band of Mission Indians' (Tribe) casino, hotel and RV park development project (Project) on its Reservation¹ located in the City of Twentynine Palms. Thank you for this opportunity to comment on the Project. From the material submitted in the Draft EA, we are concerned that the Tribe has not considered all of the Project's off-Reservation environmental impacts, or adequately evaluated cumulative impacts.

The Tribe currently operates the Spotlight 29 Casino on the portion of its Reservation located in the City of Indio in Riverside County. The Tribe proposes to construct a second Gaming Facility on a 160-acre portion of its Reservation located within the City of Twentynine Palms in San Bernardino County. The proposed facility includes a 70,000-square foot casino, two restaurants, a sports bar and a bowling center/billiards area. The Tribe also plans to build a 250-room hotel adjacent to the casino, a RV park, a wastewater treatment facility and a solar power system. (Draft EA at p. 1-1 to 1-2.) The Draft EA includes an alternative for an additional 60,000 square feet of casino space and an expanded RV park that is double in size. (*Ibid.*)

The Draft EA states it has been prepared to comply with Compact section 10.8, the National Environmental Policy Act (NEPA) (42 U.S.C. § 4331 et seq.) and Tribal law. (Draft EA at p. 1-1.)

¹ We refer to the Tribe's trust land as a Reservation for ease of reference.



NEPA requires that an environmental impact statement (EIS) be prepared for major actions that “significantly affect the quality of the human environment.” (*Id.* at § 4332(2)(C).) An agency may first prepare an environmental assessment to make a preliminary determination whether the proposed action *may* have a significant environmental effect. (*Nat. Parks & Conservation Assn. v. Babbitt* (9th Cir. 2001) 241 F.3d 722, 730; see 40 C.F.R. §§ 1501.4, 1508.9.) If such an effect is anticipated, a more detailed EIS is required under title 42 United States Code section 4332(2)(C). (*Native Ecosystems Council v. U.S. Forest Service* (9th Cir. 2005) 428 F.3d 1233, 1239.) Essentially, NEPA requires an agency to take a “hard look” at the environmental consequences of its actions and at possible alternatives. (*Kleppe v. Sierra Club* (1976) 427 U.S. 390, 410, fn. 21.)

The critical measure is whether a project will have a “significant” impact. Under NEPA, whether an effect is significant depends both on the project’s context and intensity. (40 C.F.R. § 1508.27.) “Context refers to the scope of the action, while intensity refers to the severity of the impact.” (*Environmental Protection Information Center v. U.S. Forest Service* (9th Cir. 2006) 451 F.3d 1005, 1009, citing 40 C.F.R. § 1508.27.) NEPA’s implementing regulations include a list of ten intensity factors, at least six of which may be applicable to this Project:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
.....
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
.....
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
.....

- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

(40 C.F.R. § 1508.27(b).)

The following areas in the Draft EA require additional discussion and analyses to allow the Tribe to take the required “hard look” at the Project’s environmental consequences. At minimum, a Final EA must respond to these concerns, and an EIS may be necessary.

Aesthetics

The Draft EA indicates the Project will have less than significant aesthetic impacts to nearby off-Reservation residences, the Palm Vista Elementary School located across the street from the Project on Baseline Road, and the hiking trail that begins at the Joshua Tree National Park Headquarters located about one-half mile north of the site, because the casino and hotel will be set back about one-quarter mile from Baseline Road, and all buildings and structures will be screened by dense landscaping. (Draft EA at pp. 3-1, 3-2 & 5-1.) There is, however, no description of the Project’s physical dimensions, including building heights, or what type or quantity of landscaping will be utilized to limit the impact to the off-Reservation view.

Indeed, the Project is located in a community where unobstructed views of the desert panorama are a visual amenity, and the City has imposed building height restrictions to maintain low profiles conducive to the City’s Desert Southwest setting. (City of Twentynine Palms Land Use Plan (May 25, 2004) 25.) The site is relatively flat and moderately covered with varying desert vegetation no taller than three feet. (Draft EA at p. 2-13.) There is not enough information about the type of landscaping to determine whether landscaping will sufficiently mitigate the visual impact or whether the landscaping itself could represent an impact. Nor does it seem reasonable to suggest the nearby residences will experience less than significant impacts simply because they are not oriented to have direct views of the Project (*id.* at p. 3-2)—the residences may be impacted regardless of their orientation.

Also, the dimensions of the alternative “larger, and possibly taller” casino and hotel are unspecified. (Draft EA at p. 3-2.) In fact, the Draft EA includes inconsistent descriptions of this project alternative. In the Project Overview, it is described as including an additional 60,000 square feet of casino space and related restaurant uses, plus an expanded RV park nearly double in size. (*Id.* at p. 1-2; see also *id.* at p. 3-23.) Elsewhere it is identified as also including a “larger hotel.” (*Id.* at pp. 3-2, 3-26, 4-4.) This alternative’s scope needs to be clarified before further action can be taken. Without more, the effects on the off-Reservation environment are highly uncertain and involve unknown risks.

We are encouraged that the Tribe intends to comply with the City’s Night Sky Ordinance “to the extent feasible” (Draft EA at p. 3-2), but we believe that the Tribe’s unqualified compliance would best serve the surrounding community. This is particularly true considering that an astronomical observatory

is currently being constructed for public education and research purposes on the east side of Utah Trail at the entrance to Joshua Tree National Park. The observatory will depend upon dark skies to conduct its astronomical programs. The final environmental document should include a discussion of the potential light pollution impacts, if any, the Project may have on the observatory and its scientific mission.

Traffic and Circulation

The Project plus cumulative conditions utilized in the traffic and circulation analysis is limited to the Project's proposed opening in 2009, with the larger Project having an alternative build-out year of 2013. (Draft EA at pp. 3-7 & 3-23.) The analyses for both Project alternatives should include build-out to at least the end of the Compact term in 2020, and incorporate local and regional growth forecasts both with and without the Project. In addition, there is no discussion regarding the Project's parking demands during operation, what facilities are proposed to accommodate the demand, or whether off-Reservation parking will be necessary. Without this information, we cannot accurately evaluate the Project's long-term, cumulative impact.

Water Resources

The conclusion that the Project will not result in any significant impacts to off-Reservation water resources (Draft EA at p. 3-25) is not supported by information provided in the Draft EA. The Draft EA provides limited information regarding available water resources in the Twentynine Palms Water District (District), but while the Draft EA suggests the Tribe intends to obtain a service letter from the District (*id.* at p. 3-27), the details of any service agreement are presently unknown, which creates uncertainty regarding the Project's off-Reservation impacts. At a minimum, the letter needs to confirm the District has adequate water supply to provide the required peak fire flow and domestic flow necessary to serve the Project at least through the Compact's conclusion in 2020. It also needs to confirm the verbal representation by District staff that the pipeline located along Baseline Road could deliver adequate flow for fire suppression, and that no on-site water storage would be necessary. (See *ibid.*)

Also, the Draft EA provides no empirical data to support the Project's estimated water demand, and the estimates fail to differentiate between construction and operation, or factor in the City's estimated annual water usage increase of about 1.5 percent, at least through the Compact's conclusion in 2020. (Draft EA Table 3-27; City of Twentynine Palms Conservation Plan (Feb. 26, 2002) V-2.) In addition, the estimates are for a 60,000 square foot casino and a 125-room hotel (Draft EA Table 3-7), which are inconsistent with the proposed action to build a 70,000 square foot casino and a 250-room hotel (*id.* at p. 1-2), and do not estimate demand for the larger Project alternative. Nor is there documentation or hydrological data demonstrating the extent to which the Project will impact off-Reservation users that draw from the same sub-basin, or whether at some point the Tribe must resort to other off-Reservation resources to satisfy demand.

Moreover, it appears unreasonable to suggest that the Project alternative that includes a larger casino, larger hotel, additional restaurants and a larger RV park, all of which presumably would attract more patrons, include additional restrooms and increase groundwater demand, would have no greater impact on water resources than the smaller Project alternative. (Draft EA at p. 3-26.) Without more information regarding the scope of the larger Project alternative, it is unknown how the alternative may affect off-Reservation water resources.

Last, the Draft EA indicates the Tribe will prepare a Storm Water Pollution Prevention Plan (SWPPP) that will consider best management practices (BMPs) to protect structures on the site and control off-Reservation runoff to Baseline Road. (Draft EA at p. 4-2.) Neither the SWPPP nor the BMPs are included or described in the Draft EA, which renders the impact to hydrology and water quality uncertain. Accordingly, we are unable to evaluate the Tribe's efforts to mitigate off-Reservation impacts to water quality, and the conclusion that the Project will not cause significant impact appears unsubstantiated.

Waste Management

According to the Draft EA, the landfill nearest the Project has available capacity through 2013, seven years before the Compact expires. (Draft EA at p. 3-26; Compact, § 11.2.1(a).) The projected closure date does not appear to include waste estimates for construction and operation of both Project alternatives, which could accelerate closure. The landfill shortage may also be exacerbated by development of cumulative projects. (Draft EA at p. 4-3.) The Draft EA indicates the county is considering expanding the landfill and the Tribe could utilize another county landfill. (*Id.* at p. 2-22.) It also suggests the Tribe implement a recycling plan during construction and request the local hauler implement a recycling program to mitigate operational waste. (*Id.* at p. 5-2.) There is, however, no discussion regarding potential impacts to a different county landfill, and no indication of the extent to which the proposed mitigation measures will reduce the impact. At this point, too many variables exist to support a conclusion other than the Project will likely cause a significant off-Reservation impact. Additional alternatives to mitigate the impact should be addressed in the final environmental document.

Utilities

No empirical data is provided to support the Draft EA's operative estimates regarding the Project's natural gas and electricity consumption. (Draft EA at p. 3-26.) Nor is any information provided regarding the proposed solar energy system, or the extent to which it might reduce the Project's impact to off-Reservation energy supplies. Consequently, additional information is needed to evaluate the off-Reservation impact to energy sources, including, without limitation, a discussion of the Project's individual and cumulative impact on the State's electrical grid, particularly during peak summer hours when demand surges, and the energy conservation measures the Tribe proposes to reduce wasteful and inefficient energy consumption. To the extent the Tribe intends to obtain service agreement letters from

utilities providers, the details are presently unknown, which renders the Project's off-Reservation impacts uncertain.

Police, Fire and Emergency Services

The Draft EA asserts no significant impacts will result to off-Reservation police, fire and emergency services because the Tribe intends to obtain service agreements with the San Bernardino County Sheriff's Department, a local ambulance provider and the Twentynine Palms Fire Department. (Draft EA at pp. 3-28 to 3-29, 5-2 to 5-3.) As with other service provider agreements referenced in the Draft EA, the details are presently unknown; this renders the Project's off-Reservation impacts highly uncertain. The Draft EA details the staff and equipment available within the Sheriff's Department, the fire department and the ambulance company (*id.* at pp. 2-24 to 2-25), but there is no baseline data to objectively evaluate whether each agency has the capacity to safely provide services to the Project during construction and operation. For example, there is no indication whether fire department staff are properly trained or certified in multi-story fire suppression, or how the addition of a single ladder truck may adequately provide service to the Project. (*Id.* at p. 3-28.) Nor is sufficient information included to evaluate whether the assignment of a single Sheriff's deputy to the Project would be sufficient to mitigate "the increased crime potential associated with the proposed project" (*ibid.*), how off-Reservation communities will be impacted if increased service to the Project results in decreased service elsewhere, or whether personnel assigned to the Project must leave the Reservation to assist in a mutual aid response to a neighboring jurisdiction. The California Highway Patrol, which provides service to unincorporated county areas and nearby State Route 62, would also be expected to experience an increase in service calls and traffic enforcement due to the Project, yet the Draft EA does not factor this into the analysis. The environmental document must also analyze how the expected increase in criminal activity will impact the State's criminal courts.

In addition, the Draft EA states that a ladder truck may be necessary "to adequately respond to potential fire emergencies due to the broad reach and elevation that may be needed for larger, multi-story structures such as the proposed hotel and casino." (Draft EA at p. 3-28.) The document, however, fails to specify any of the Project's buildings' dimensions. Absent this information, we cannot objectively evaluate the Project's off-Reservation impacts.

With respect to its discussion of emergency medical services, the Draft EA fails to identify existing nearby off-Reservation hospitals, or discuss the potential impacts to those facilities, including whether hospitals are, or will be, adequately staffed and equipped to meet any increase in services generated by the Project.

Without such information, it is difficult to evaluate the Project's impacts, or the reasonableness of the proposed mitigation measures. Also, the Compact requires the Tribe to "make reasonable provisions for adequate emergency, fire, medical and related relief and disaster services for patrons and employees of the Gaming Facility." (Compact, § 10.4.) Thus, the final environmental document must detail the

provisions the Tribe has made for emergency access and availability at the Project site during construction and operation.

Air Quality

With construction and operation of a wastewater treatment facility, there is a potential to expose off-Reservation residents to unwelcome odors that could disrupt normal activities or diminish the quality of the environment. The environmental document needs to evaluate the potential odor impact to off-Reservation receptors, and identify plant location, prevailing wind patterns and design features that will be implemented to mitigate any impact. The State also requests the Tribe incorporate appropriate measures, such as the use of water trucks, to mitigate transient dust during Project construction.

Socioeconomics

Population and Housing. The Draft EA suggests the Project would add about 250 full-time employees during operation and 50 workers during construction. (Draft EA at p. 3-35.) There is, however, insufficient information to support the conclusion that no significant impacts on housing or population would occur. (See *ibid.*) As an initial matter, it is unclear what laws, data, or standards were applied to determine that the Project would not significantly impact off-Reservation population and housing factors. Indeed, the Draft EA does not examine local and regional population statistics and growth forecasts both with and without the Project. It also does not identify existing housing supply and demand, and whether and to what extent there are plans for future residential development within Reservation boundaries or surrounding local jurisdictions. Moreover, there is no indication of the number, sector, or skill level of jobs created during Project construction and operation, nor does the Draft EA provide qualitative or quantitative analyses to show the existing unemployed labor pool in surrounding communities could readily fill the unspecified temporary construction positions and permanent operational positions, or whether the Project will create new jobs or simply facilitate lateral shifts from one job to another without labor force replacement.

The analysis also lacks discussion of whether the Project will result in growth inducement, such as economic or social changes that will significantly impact the off-Reservation environment. Project construction and operation, either by itself or when considered in combination with other development in the area, may stimulate commercial and residential development in the region. To the extent these potentially significant impacts have not been considered, the Project's environmental consequences remain uncertain.

Schools. Also absent from the discussion is data or analysis regarding whether the Project will impact off-Reservation schools. Because the Project may result in growth inducement, it may also increase demand for off-Reservation schooling. In addition, the Draft EA provides no indication whether local schools that could be impacted by the Project are at or near capacity, or when they could be, with or without the Project, based upon local and regional population statistics and growth forecasts.

Problem and Pathological Gambling. Although not addressed in the Draft EA, the environmental document should evaluate the potential impact a new casino will have on problem and pathological gambling. The California Research Bureau recently detailed the correlation between casinos and compulsive and problem gambling, and estimated that the costs associated with problem and pathological gamblers is approximately \$1 billion per year in California. (CRB, *Gambling in the Golden State: 1998 Forward* (May 2006) CRB 06-004, 72, 83-85, 127-139.) To combat these social effects, the State has earmarked some revenues from existing compacts to fund state programs for problem and pathological gamblers (see Gov. Code, § 12012.85, subd. (g)(2)), and included many provisions in existing compacts to address problem and pathological gambling. Therefore, the Tribe must evaluate the social impact that this Project will have on its patrons and the off-Reservation environment.

Recreation

The environmental document needs to evaluate whether and to what extent the increased labor force and casino patronage will impact off-Reservation parks and recreation areas. As previously noted, the project includes construction of, among other things, a new hotel with 250 rooms or more, restaurants, and a RV park. The Draft EA suggests the RV park should be considered in conjunction with the use of the casino, therefore it would operate in a different manner from independent camping facilities. (Draft EA at p. 1-1.) At minimum, it appears to be counterintuitive to suggest that operating a casino, hotel and RV park near the entrance to the popular Joshua Tree National Park, which hosts over a million visitors annually (*id.* at p. 3-35), would not impact the park or any other nearby off-Reservation recreational activities—like hiking, camping, bird watching, star gazing, bicycling and rock climbing—in a region that is “already an established tourist destination” (*ibid.*).² In any event, without supporting data, the conclusion cannot properly be evaluated.

The Project’s Effects Appear To Be “Highly Uncertain”

In determining whether a proposed project’s impacts are significant to warrant an EIS, NEPA requires consideration of, among other things, “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” (40 C.F.R. § 1508.27(b)(5).) In explaining the “highly uncertain” standard, the Ninth Circuit stated:

An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain. Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent “speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.” [Citations.]

² See also <http://visit29.org> (last viewed Apr. 28, 2008) for local and regional recreational opportunities.

Gary Kovall, Esq.
April 28, 2008
Page 9

(*Native Ecosystems Council v. U.S. Forest Service*, *supra*, 428 F.3d at p. 1240.)

The Project's effects appear to be highly uncertain within the meaning of NEPA. As detailed above, many of the Draft EA's conclusions appear speculative and create substantial questions about whether the Project may cause significant degradation of the human environment. We believe additional information is necessary to properly assess the Project's environmental effects. (See *Blue Mountains Biodiversity Project v. Blackwood* (9th Cir. 1998) 161 F.3d 1208, 1213 [ordering the Forest Service to prepare an EIS where the EA's treatment of one important environmental factor was "cursory and inconsistent"].)

Conclusion

The Draft EA appears to need work in several areas, including additional information to fully assess the nature and scope of the Project's off-Reservation environmental impacts, and whether proposed mitigation measures are sufficient. These comments do not constitute the entirety of the State's comments on the Draft EA. Other State agencies with specific technical expertise may provide additional comments in separate letters.

Thank you for the opportunity to comment on the Draft EA, and we look forward to your response.

Sincerely,


ANDREA LYNN HOCH
Legal Affairs Secretary

cc: Darrell Mike, Chairman

Gary Kovall, Esq.
April 28, 2008
Page 10

bcc: Bob Mukai
Sara Drake
Randy Pinal