Stand Up For California!
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www.standupca.org

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January 13, 2017

Ms. Amy Dutschke
Pacific Regional Director
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, California 95825

RE: FEIS Comments, Wilton Rancheria Fee-to-Trust and Casino Project

Dear Ms. Dutschke:

The following comments are being submitted on behalf of Stand Up For California! (Stand Up), Elk Grove GRASP, the Committee to Uphold Elk Grove Values, and concerned citizens of Elk Grove, regarding the Bureau of Indian Affairs' (BIA) Final Environmental Impact Statement (FEIS) for the Wilton Rancheria's (Rancheria) Fee-to-Trust and Casino Project (Project).

First and foremost, we strenuously object to what is clearly a rush to take the Elk Grove site into trust before the Trump administration takes office. We note in particular that, three years after BIA first initiated its review of this Project, the *first* notice to the general public published by BIA that the proposed action and preferred alternative had changed from the Galt site to the Elk Grove site was the December 14, 2016 Federal Register notice of the availability of the FEIS for public review and comment.[1] In addition, we reiterate our objections to the supervision of BIA's consideration of the Project by Ms. Dutschke, whose family ties to membership of the Wilton Rancheria present a clear conflict of interest, and necessarily taint any final decision. Given that all indications are that BIA has already pre-determined a final decision to take the Elk Grove site into trust, it is not surprising that the FEIS continues to suffer from multiple deficiencies, as we have described in previous comment letters.[2]

[1] 81 Fed. Reg. 90379 (Dec. 14, 2016).
[2] We reiterate and incorporate by reference in their entirety our comments submitted by letters dated January 6, 2014 (scoping comments); February 9, 2016 (DEIS comments and February 12, 2016 amendment thereto); February 12, 2016 (comments regarding authority for gaming); September 27, 2016 (comments regarding change in proposed action); December 21, 2016 (comments regarding title encumbrances on Elk Grove site); December 29, 2016

I. The FEIS fails to consider that the Elk Grove site continues to be encumbered by development agreements.

As we have previously explained, the proposed casino site is encumbered by development agreements approved by the City of Elk Grove, precluding acquisition in trust. In 2005 and 2014, the City approved, by ordinance, executed and recorded development agreements with respect to Parcel Number 134-1010-001-0000 (Portion). Although the FEIS fails to consider their effect, BIA is aware of those development agreements, having previously informed the parties that the United States could not acquire Parcel Number 134-1010-001-0000 (Portion) in trust for the proposed purpose until the encumbrances associated with those agreements were removed. Schedule B to the November 17, 2016 notice of application also identifies those encumbrances as exceptions number 13, 14 and 27.

The development agreements expressly reserve to Elk Grove the right, subject to the vested rights, to:

- grant or deny land use approvals;
- approve, disapprove or revise maps;
- adopt, increase, and impose regular taxes, utility charges, and permit processing fees applicable on a city-wide basis;
- adopt and apply regulations necessary to protect public health and safety;
- adopt increase or decrease fees, charges, assessments, or special taxes;
- adopt and apply regulations relating to the temporary use of land, control of traffic, regulation of sewers, water, and similar subjects and abatement of public nuisances;
- adopt and apply City engineering design standards and construction specification;
- adopt and apply certain building standards code;
- adopt laws not in conflict with the terms and conditions for development established in prior approvals; and
- exercise the City's power of eminent domain with respect to any part of the property.

These encumbrances are not only inconsistent with the federal title standards, they prevent the land from qualifying as "Indian lands" eligible for gaming under the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2703(4). These rights, which are recorded on the deed, establish that the City of Elk Grove has governmental jurisdiction over the site. The City can impose taxes; the City adopts regulations to protect public health and safety; the City will regulate building codes, engineering design standards, etc.; and the City will regulate land use, sewers, traffic, etc. BIA

(seeking assurances that Elk Grove site will not be taken into trust before judicial review is possible); and January 6, 2017 (regarding history of Wilton Rancheria and lack of authority to take land into trust for gaming).

has previously denied gaming determinations based on development agreements that accord local governments some authority over the proposed gaming sites. *See e.g.*, Letter to Michael Toledo from Assistant Secretary L. Echo Hawk Regarding Trust Application of Pueblo of Jemez (Dec. 1, 2011). Here, the authority is part of the deed itself. The land cannot qualify as "Indian lands" under IGRA.

On November 9, 2016, the City recorded an amendment to the development agreement, which made it appear that these encumbrances had been removed from an approximately 35.92-acre parcel of land. That recordation was premature and of no legal effect.

Under California law, a city must enact an ordinance approving the execution of a development agreement, which is then recorded as an encumbrance on the title to the property.[3] A city must approve amendments to a development agreement by ordinance, as well. California law requires cities to wait for 30 days before any ordinance goes into effect. The purpose of that delay is to allow aggrieved parties to exercise their rights under Section 9 Article II of the California Constitution (i.e., the referendum right) and/or to file claims arising under State law, including the California Environmental Quality Act. Specifically, with respect to the referendum power, Government Code section 36937 and Elections Code section 9235.2 provide that an ordinance approving or amending a development agreement will not take effect for 30 days, during which time the voters of a jurisdiction are entitled to exercise their right of referendum by presenting a petition protesting the ordinance. *See* Government Code sections 65867.5(a) and 65868 and Elections Code sections 9235 and following.

The City failed to comply with applicable state laws. On October 26, 2016, the City approved an amendment to the development agreement encumbering Parcel Number 134-1010-001-0000 (Portion) by removing the parcel from the existing development agreement. Although State law imposes a 30-day waiting period before an ordinance goes into effect, the City executed the amendment to the development agreement prior to that date and recorded the amendment on November 9, 2016. The City therefore did not have authority to execute the amendment to the development agreement when it did, nor record that amendment.

On November 21, 2016, approximately 14,800 citizens filed with the City Clerk's office a referendum petition protesting the ordinance authorizing the amendment. That petition was verified by the City Clerk on January 6, 2017, and thus the ordinance will not go into effect until such time as a majority of the voters in Elk Grove approve that ordinance. Accordingly, the City was without authority to execute and record the amendment, and the land continues to be encumbered by the development agreement.[4] These encumbrances will remain in place at least until a special election can be held, at the earliest in April 2017.

[3] A development agreement is an agreement between a local jurisdiction and an owner of legal or equitable interest in property that addresses the development of the property it affects. It must specify the duration of the agreement, the permitted uses of property, the density or intensity of use, the maximum height and size of proposed building, and provisions for reservation or dedication of land for public purposes. A development agreement is a legislative act that must be approved by ordinance and is subject to referendum. After a development agreement is approved by ordinance and the City accordingly is enabled to enter into it, the agreement may be executed and recorded with the county recorder, as it was in this case.

[4] In addition, on November 23, 2016, the undersigned filed in state court a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief challenging the City's ordinance under the California

The Department nonetheless appears to be determined to take the Elk Grove site into trust before the Trump Administration takes office on January 20, 2017, despite these encumbrances.[5] The FEIS, however, entirely fails to analyze the effects of taking the Elk Grove site into trust subject to these encumbrances. Instead, the FEIS assumes that by taking the land into trust, state and local jurisdiction will be displaced, allowing the Rancheria to build and operate a casino. As we have explained, however, the land will not be eligible for gaming as long as the encumbrances are in place, precluding the operation of a casino. Moreover, the encumbrances on title are a property interest held by the City of Elk Grove, not the Rancheria. Even if BIA is authorized, despite the encumbrances, to take into trust the Rancheria's property interests in the Elk Grove site, it cannot take into trust the City's property interests. The City will therefore retain all of the powers it reserved in the development agreement, a result that the FEIS does not consider at all. In short, as long as the encumbrances remain in place, the FEIS does not in any way fulfill BIA's duty under NEPA to evaluate the effects of taking the Elk Grove site into trust.

II. BIA must prepare a supplemental EIS to address the change in the proposed action.

As we have previously explained, BIA cannot rely on the draft EIS it prepared to evaluate the Rancheria's trust application for 282 acres of land in Galt to support acquiring trust land in Elk Grove. Those concerns remain. Proceeding without a supplemental EIS will violate NEPA regulations and thwart public notice and opportunity to comment, one of NEPA's two key purposes.

A. NEPA regulations require BIA to prepare a supplemental EIS.

NEPA requires federal agencies to prepare a supplemental EIS if: (i) an agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c).

The federal action that has been under BIA's review for almost three years is the proposed trust acquisition of land in Galt. BIA's December 2013 Notice expressly states that the Rancheria has applied to have "approximately 282 acres of fee land … located within the City of Galt Sphere of Influence Area" acquired "in trust in Sacramento County, California, for the construction and operation of a gaming facility." 78 Fed. Reg. 72928-01 (Dec. 4, 2013). The Notice identifies the parcels (Parcel Numbers148-0010-018, 148-0041-009, 148-0041-006, 148-0041-004, 148-0041-001, 148-0031-007, and 148-0010-060). *Id.*

Environmental Quality Act (CEQA), alleging that approval of the amendment authorizing the removal of Parcel Number 134-1010-001-0000 (Portion) from the development agreement was a discretionary decision subject to review under that Act. Petitioners allege that by entering into the amendment without an effective ordinance in place and recording that amendment, the City violated statutory law and the right to referend. The City has since recorded an acknowledgment that the proposed trust land is still encumbered by the 2014 development agreement—an implicit concession of its illegal action—but the Department appears to be moving forward with the application despite these state proceedings.

[5] The Department has refused to allow a short delay before taking the land into trust to allow the undersigned to seek preliminary judicial relief after a final decision. *See* Exhibit 1, Email from Eric Shepard, Associate Solicitor, to Paul Smyth, counsel for Stand Up (January 9, 2017). The undersigned subsequently have sought emergency preliminary relief in federal court to enjoin the immediate transfer of the land into trust upon the Department's final decision.

The Notice does not identify land in Elk Grove as an alternate application of the Rancheria's. There is no question that the acquisition of land in the City of Elk Grove is a "substantial change[] in the proposed action" from the acquisition of 282 acres of land in the City of Galt that BIA provided notice of in 2013. The change is clearly relevant to environmental concerns. The change in location will obviously have different environmental impacts. Likewise, the Rancheria's application change is also a "significant new circumstance[]" that directly affects environmental concerns. BIA only provided limited notice in November that the Rancheria had submitted a new application to take the Elk Grove site into trust. BIA did not give the general public notice of this until December, when it published in the Federal Register its notice of availability of the FEIS. Proceeding directly to a final EIS, as it appears BIA is planning to do, will violate NEPA.

BIA appears to be relying on the principle that an agency can select an alternative different from the preferred alternative without preparing a supplemental EIS. That principle, however, applies when the proposed action itself is not limited to one specific action. For example, when a proposed action is a transmission line connecting points A and B, there can be several possible routes that would satisfy that action. Accordingly, an EIS will list several alternatives and can readily select an alternative that was not initially the preferred alternative because the notice itself makes that possibility clear. The same is true of highway proposals.

This scenario is entirely different. Because the 2013 Notice of Intent identified the proposed acquisition of land in Galt and only that proposal, no one could have anticipated that the Rancheria would change its application to another location. *cf. California v. Block*, 690 F.2d 753, 772 (9th Cir.1982) (concluding that supplemental analysis is required when the selected alternative "could not fairly be anticipated by reviewing the draft EIS alternatives"). Indeed, the Secretary cannot acquire land in trust unless the applicant owns the land. One reasonably assumes that when a tribe files a trust application, it either owns the land or has an option to own the land. That was clearly not true of the Elk Grove alternative considered in the draft EIS. The draft EIS specifically stated that "an agreement is not currently in place for the purchase of the Mall site by the Tribe." DEIS 2.10.2, 2-34. Thus, the fact that the draft EIS evaluated the acquisition a 28-acre parcel of land at the Elk Grove Mall, *see* DEIS 2.7, 2-25, does not satisfy NEPA.

In addition, the Elk Grove alternative has changed substantially from what was evaluated in the DEIS. Alternative F in the DEIS described a 28-acre site. The proposed action now includes 36 acres, a *29% increase* in the area proposed to be put in trust. Other changes in the project components are also described, including a new three-story parking garage. The notice of availability and FEIS make conclusory statements that these changes not significant, but these are substantial changes in the proposed action that are relevant to environmental concerns because they go directly to the extent and intensity of development proposed. The 29% increase in land area affected and substantial new project components clearly introduce significant new circumstances or information relevant to environmental concerns, which the draft EIS entirely failed to address. *See Natural Resources Defense Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) ("Where the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of the EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA." (quoting *Animal Def. Council v. Hodel*, 840

F.2d 1432, 1439 (9th Cir.1988))). A supplemental EIS is therefore required under 40 C.F.R. § 1502.9(c).

B. The history of the review process and public opposition underscore the need for a supplemental EIS.

The regulations implementing NEPA require a supplemental EIS in circumstances such as these precisely because the public notice and participation requirements of NEPA are not satisfied when the public did not have adequate notice of the action under consideration. If the public has not had adequate opportunity to comment on a proposed action at the draft stage of the environmental review process, a supplemental EIS is required. *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). Indeed, the Ninth Circuit has struck down federal agency action when the agency has failed to provide notice of the action in question. *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982) and *Western Oil & Gas Association v. U.S. Environmental Protection Agency*, 633 F.2d 803 (9th Cir. 1980).

The residents of Elk Grove obviously did not have notice of a proposed trust acquisition in Elk Grove until June of 2016, at the earliest, as the history of the review process establishes. As set forth above, when BIA published its Notice of Intent, it described a trust acquisition in Galt. *See* 78 Fed. Reg. 72,928-01 (Dec. 4, 2013). BIA offered a 30-day public comment period, which ran from December 6, 2013, to January 6, 2014, and a December 19, 2013 scoping meeting in Galt. No one from the City of Elk Grove attended the scoping meeting, including the City of Elk Grove. Nor did anyone from Elk Grove provided comments in response to the scoping notice. Similarly, when BIA issued a Notice of Availability for the draft EIS on the proposed Galt acquisition, *see* 80 Fed. Reg. 81,352 (Dec. 29, 2015), it appears that no citizens from Elk Grove responded raising issues related to the Elk Grove alternative.

Significantly, the draft EIS does not include the City of Elk Grove among the governmental entities that were invited to be cooperating agencies. Any municipality that is expected to be directly affected by a proposed action—particularly one that results in the loss of jurisdictional and regulatory control and a reduction in its tax base—is typically extended an invitation to participate as a cooperating agency by the BIA, as required by its own NEPA guidance. Indeed, the trust regulations require notice to the City.[6] The City itself did not request to become a cooperating agency until May 13, 2016, a request granted by the BIA on May 19, 2016.

In fact, the change in the preferred project is of great public concern. At a public meeting held by the Rancheria in July (not by BIA, as federal regulations require), over 300 local residents showed up to express their concerns about the Rancheria's announcement. Many of the comments focused on the fact that the Rancheria was changing its application and that the commenters did not know of the change nor have an opportunity to participate in the process. As

[6] It was not until February 18, 2016, that the City of Elk Grove participated in any fashion. Even then, the City stated that "[w]hile there is not an application at this time to take the Alternative F site into trust, our understanding is that this is still the appropriate time to comment on the Alternative F site." FEIS Comment letter A8. The City appears to have based these comments on preliminary discussions with the Rancheria regarding its interest in the Elk Grove site.

previously noted, the draft EIS specifically stated that no agreement was currently in place for the purchase of the Mall site by the Rancheria. DEIS at 2-34.

Furthermore, the Elk Grove alternative is the only site for which multiple alternatives, including a reduced intensity casino and/or commercial retail development, were not considered. These alternatives were rejected for the Elk Grove site for nonsensical reasons, resulting in both an inadequate range of alternatives, and a clear signal that the Elk Grove site was not being seriously considered.[7] Significantly, many of the deficiencies in the analysis of the Elk Grove site, detailed below, are not correspondingly found in the analysis of the Galt site—a clear indication that BIA initially assumed the Tribe's Proposed Action to take the Galt site into trust would be its final decision, and gave the Elk Grove site short shrift in the draft EIS.

The lack of participation from Elk Grove residents until July of 2016 stands in contrast to the participation from those living in Galt. The obvious reason for that lack of participation is that the residents of Elk Grove did not know that a site in Elk Grove was under consideration and accordingly, they did not participate. After spending more than three years processing the Rancheria's proposed casino project in Galt, the BIA is now determined to take the Elk Grove site into trust with only 30 days notice to the general public. That is the very definition of a bait-and-switch.

"[A]n agency's failure to disclose a proposed action before the issuance of a final EIS defeats NEPA's goal of encouraging public participation in the development of information during the decision making process." *See Half Moon Bay*, 857 F.2d at 508. This case is a perfect example of this legal violation.

C. A supplemental EIS would allow BIA to correct its public participation missteps.

BIA's actions here meet neither the letter nor the spirit of NEPA. Pursuant to CEQ's NEPA regulations:

> Federal agencies shall to the fullest extent possible:
> (a) Interpret and administer the policies, regulations, and public laws of the United *States in accordance with the policies set forth* in the Act and *in these regulations*.
> (b) Implement procedures *to make the NEPA process more useful to* decisionmakers and *the public*;
> …

[7] A reduced-intensity development was eliminated from consideration on the grounds that the environmental effects of the Mall site were likely relatively low since the site is already developed. DEIS at 2-31. This entirely ignores the difference in socioeconomic and other effects that would result from a reduced intensity casino or retail development. A non-gaming alternative was eliminated on the grounds that competitive effects would affect other retailers. *Id.* The existence of socioeconomic effects, by itself, is obviously not a logical basis to exclude an alternative. All of the action alternatives evaluated in the draft EIS have socioeconomic effects. In particular, competitive effects on other gaming providers were not considered a basis to exclude gaming alternatives, and there is no legitimate reason to reject a viable alternative simply to protect non-gaming businesses from competition.

> (d) *Encourage and facilitate public involvement* in decisions which affect the quality of the human environment.

40 C.F.R. § 1500.2 (emphases added). Federal agencies are also required to:

> (a) *Make diligent efforts to involve the public* in preparing and implementing their NEPA procedures.
> (b) *Provide public notice* of NEPA-related hearings, public meetings, and the availability of environmental documents *so as to inform those persons and agencies who may be interested or affected.*
> …
> (3) In the case of an action with effects primarily of local concern the notice may include:
> …
> (iii) *Following the affected State's public notice procedures for comparable actions*.
> (iv) *Publication in local newspapers* (in papers of general circulation rather than legal papers).
> (v) Notice through *other local media*.
> (vi) Notice to *potentially interested community organizations* including small business associations.
> (vii) Publication in *newsletters that may be expected to reach potentially interested persons*.
> (viii) Direct mailing to *owners and occupants of nearby or affected property*.
> …
> (c) *Hold or sponsor public hearings or public meetings whenever appropriate* or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:
> (1) *Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing*.
> …
> (d) *Solicit appropriate information from the public*.

40 C.F.R. § 1506.6 (emphases added).

BIA implemented none of these actions with respect to Elk Grove. Instead, BIA's actions have had the practical effect of blindsiding the people of Elk Grove. In addition, the City of Elk Grove should have been invited to be a cooperating agency from the start, *see* 40 C.F.R. § 1501.7(a)(1), which would also have allowed time for the involvement of citizens through their elected officials. The fact that over 14,000 citizens signed a petition to referend the City ordinance allowing the land to be put into trust is a measure of the magnitude of the lack of notice and cooperative communication among and between the BIA, the City, and the citizens of Elk Grove. A supplemental EIS, along with additional public participation measures, would help correct these violations of the letter and spirit of NEPA and its implementing regulations.

III. The analysis in the FEIS of the Elk Grove alternative is inadequate.

A. The mitigation discussion is inadequate.

As we previously explained, there are fundamental flaws in the treatment of mitigation in the EIS. These flaws remain unaddressed in the FEIS. One overarching deficiency is the unsupportable presumption that project design parameters and recommended mitigation measures are enforceable. The EIS assumes that all design parameters and mitigation measures are enforceable because they are either inherent in the project design; subject to the terms of the Rancheria's Memorandums of Understanding (MOUs) with the City of Elk Grove and Sacramento County[8] (or other agreements yet to be negotiated); and/or required under federal or state law. In fact, once the land is taken into trust, the Rancheria is under no obligation to build the project as proposed, nor is it required to implement the mitigation measures described.

While mitigation measures that might be required under federal law would indeed be enforceable, no federal approvals have yet been issued. The exact nature of the mitigation that might be required in such federal approvals or permits is therefore uncertain. Nor would such federal permits or approvals include all of the mitigation measures relied upon by the final EIS. State law, of course, would generally not apply once the proposed site is taken into trust. To the extent Tribal law is relied upon, it is subject to unilateral change by the Rancheria itself, and therefore cannot be considered an independent source of authority to enforce mitigation requirements. Tribal sovereign immunity is a significant limitation on enforcement actions, the effect of which has not been considered in the EIS.

More fundamentally, the EIS is premised on the enforceability of design parameters of the proposed project, yet there is no explanation of how that is true. It is irrelevant that certain parameters and mitigation measures are described as part of the project design, if there is no mechanism to require the Rancheria to adhere to the project design for the alternative chosen. Once the land is taken into trust, there is nothing preventing the Rancheria from changing its proposed design. The EIS does not explain how the Rancheria would, or even could, be required by BIA to build the alternative chosen in the Record of Decision (ROD). Without such an explanation, it is entirely uncertain what the actual effects of the proposed federal actions will be, and there is no way to comment on the adequacy or effectiveness of any proposed enforcement mechanism. *See* Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,026, 18,032-33 (March

[8] With very little public notice, the City of Elk Grove and the Sacramento County recently entered into Memorandums of Understanding (MOU) with the Rancheria regarding the mitigation of impacts resulting from the casino project in Elk Grove. *See* FEIS App. B. Those MOUs cannot be assumed to adequately mitigate impacts, given the deficiencies in mitigation identified in these comments; each MOU is explicitly based on the evaluation of impacts and mitigation in the DEIS. *See* 2016 Elk Grove MOU at 3; 2016 County MOU at 3. In addition, approval of the MOUs is subject to the California Environmental Quality Act, and the City and County have not complied with the requirements of that Act.

23, 1981) ("the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies.") (citing 40 C.F.R. §§ 1502.16(h), 1505.2).

The FEIS offers inadequate explanations of enforceability and its likelihood. *See* Response to Comment A16-152. BIA asserts that it will include an enforceable mitigation monitoring and reporting plan in the ROD, but this does not alleviate its responsibility to identify the specific mechanisms it proposes for enforcement, to evaluate the likely effectiveness of those mechanisms, and to allow public review and comment on that analysis. BIA also asserts that mitigation monitoring will be available "through tribal environmental laws that would be developed for trust land," but as previously noted, tribal law is subject to unilateral change by the tribe itself, tribal sovereign immunity is a substantial bar to third-party enforcement (which the EIS does not consider), and in any case, no specific laws are identified or evaluated for effectiveness.[9]

Similarly, there is no explanation of how the NIGC regulations at 25 C.F.R. Parts 522, 571, 573, 575, 577 (sic; Part 577 is reserved), and 559—none of which even mention mitigation—could be used to make enforceable the mitigation measures identified in the FEIS, or the likelihood of their effectiveness. Certain provisions of these regulations speak of a tribe's obligations to operate and maintain gaming facilities in a manner that is protective of environmental and public health and safety, *see, e.g., id.* §§ 222.2(i); 222.4(b)(7); 573.4(a)(12); but such generic statements do not meet the requirement under NEPA to identify specific enforcement mechanisms and to evaluate their likely effectiveness. Furthermore, each of these provisions is in terms of *the tribe's own gaming ordinance/resolution and enforcement*. Indeed, the most detailed of these general statements in the NIGC's regulations speaks of a tribe's obligation to *self-certify* enforcement of applicable laws *by the tribe itself*. *See* 25 C.F.R. § 559.4. As previously noted, reliance on self-enforcement by the tribe is inherently problematic, and in any case, the FEIS identifies no tribal laws that might apply, nor evaluates their likely effectiveness.

In the end, BIA seems to assume that anything it puts in the ROD is enforceable—but once the land is in trust (which BIA asserts must be accomplished immediately upon a final decision, pursuant to 25 C.F.R. § 151.12) the ROD does not provide any authority for BIA to take the land out of trust if mitigation measures are not complied with, or to otherwise take actions to ensure that such measures are implemented. BIA has never interpreted a trust acquisition decision to include the power to condition the acquisition or continuing trust status of land upon compliance with continuing conditions. Indeed, any such interpretation by BIA that the ongoing trust status of land is contingent upon compliance with conditions imposed by BIA would raise serious concerns under the Federal trust responsibility to Indian tribes.

BIA's conclusions in the EIS regarding the significance of numerous impacts, therefore, are inextricably bound to the assumption that the described project design and mitigation measures will be implemented. These conclusions are unsupported if those parameters and mitigation measures are not enforceable, because there is otherwise no reason to believe that they will in fact be implemented. Without some reasonable assurance of enforceability, the actual impact of

[9] If no such tribal laws currently exist, that fact must be disclosed and evaluated under 40 C.F.R. § 1502.22.

the proposed project cannot be accurately predicted, analyzed, or commented on. The public has had no opportunity to comment on the adequacy and effectiveness of specific proposed methods of enforcement for each mitigation measure. Without a thorough analysis of this issue—including evaluation of any unavailable or incomplete information, as required by 40 C.F.R. § 1502.22—the FEIS is fundamentally deficient, and must be supplemented and recirculated for public comment before a final decision.

B. Transportation impacts are underestimated.

The FEIS completely ignores our September 27, 2016 comments regarding the fundamental deficiencies in the traffic impacts analysis. A traffic impacts analysis is only as good as the assumptions that go into it. A critical parameter of the Traffic Impact Study (App. O) is the trip generation rates, yet the rate chosen for the Weekday PM peak period (when overall traffic is highest) is far too low to be accurate. The traffic study uses the rate observed at a single casino (Thunder Valley Casino), which the study asserts is a reasonable comparison. The standard Institute of Transportation Engineers (ITE) rate for casinos (which is based on multiple studies) is 13.43 (trips per 1,000 sf gaming floor area), but the rate chosen—9.84— is substantially lower, and therefore will considerably underestimate peak traffic (for perspective, the standard ITE rate is *36.5%* higher than the rate employed). The standard ITE rate was rejected on the grounds that the ITE rate is based on much larger, more urban hotel/casinos "of the nature commonly found in Las Vegas and Reno" and is therefore "generally not applicable to this smaller, more rural project." App. O at 57. This is incorrect. The standard ITE rate is for facilities that expressly "do not include full-service casinos or casino/hotel facilities such as those located in Las Vegas, Nevada or Atlantic City, New Jersey." ITE, *Trip Generation* (9th ed.) at 888. To the contrary, the standard ITE rate is based on much smaller casinos, located in rural regions, that are directly comparable to the proposed project. *Id.* Without a valid basis for rejection, the standard ITE rate should be employed to reevaluate the traffic impacts of the proposed project.

Even assuming, as the Traffic Impact Study does, that the Thunder Valley Casino is a reasonable comparison, the Weekday PM trip generation rate is still too low. The EIS argues that the Thunder Valley trip generation rates are reasonable because the rates "are consistent with the daily customer and employee totals projected for the proposed project." FEIS at 4.8-1; App. O at 59. However, the ratio of projected weekday to weekend patrons suggests that the Weekday PM rate should be at least 11.6—in other words, at least 17.8% higher than the rate employed.[10] The Traffic Impact Study therefore severely underestimates traffic impacts.

Finally, the FEIS confirms that the Tribe changed its proposed action from Alternative A to Alternative F based on new information that the necessary improvements to accommodate traffic impacts at the Alternative A site would cost substantially more than previously thought and involve further delay. FEIS at 2-36. Such new information has not been analyzed in the EIS, nor made available to the public for review and comment. More importantly, it correspondingly calls

[10] Under Alternative F, the casino is projected to serve 8,100-9,000 patrons each day per weekday, and 12,900-14,200 on weekends. FEIS at 2-30. Given the resulting weekday-to-weekend ratio of 1:1.6 and the Weekend PM rate of 18.4 chosen for the Traffic Impact Study, the corresponding Weekday PM rate should be approximately 11.6.

into question the evaluation of traffic impacts under Alternative F and their costs. The basis for the Tribe's about-face should be disclosed to the public and analyzed in a supplemental EIS.[11]

In addition, the Galt alternative includes 3,500 parking spaces and a transit facility. The Elk Grove alternative has only 1,690 on-site surface parking spaces, with additional parking provided by the adjacent mall, and site access would be provided at existing intersections along Promenade Parkway. The EIS does not take into account the impacts to the proposed outlet mall of a reduction of almost 2,000 parking spaces available to mall patrons, nor the impacts of mixing casino traffic with families and children visiting the mall and theaters.

C. The public services analysis is inadequate.

The FEIS continues to have insufficient analysis with regard to Public Services. In particular, Section 4.10.6 of the EIS analyzes water supply for Alternative F. It concludes that "[a] significant effect would occur to water supply distribution facilities as a result of the need to provide service to Alternative F." Despite identifying this significant effect, the FEIS discussion is brief and conclusory, stating that "mitigation measures" in Section 5.10.1 will "ensure that an adequate water supply is available for the operation of Alternative F." In fact, Section 5.10.1 contains just one mitigation measure (not multiple), which states only that the Tribe will enter into a service agreement to reimburse the applicable service provider for necessary new or upgraded facilities. This general mitigation measure is recommended for several of the alternatives and is not specific to Alternative F. It is unclear how this alone will ensure adequate water supply distribution facilities and mitigate the significant effect identified in the FEIS.

The FEIS estimates daily water consumption for Alternative F to be approximately 260,000 gpd; however, it is unclear whether this estimate should be revised in light of the new project. FEIS at 4.10.6. The FEIS states that the Sacramento County Water Agency (SCWA) "has the capacity to meet anticipated demand for domestic water use under Alternative F." *Id.* But the FEIS does not analyze SCWA's distribution system in relation to the service area. Moreover, the FEIS does not address any increased capacity required by new proposed project for the acquisition of nearly 36 acres instead of 28. This is especially important considering the severe drought conditions in California.[12] For these reasons, the FEIS discussion relating to water supply for Alternative F is insufficient and warrants further detail and analysis.

D. The cumulative effects analysis is incomplete.

Cumulative effects are effects "on the environment which result from the incremental effect 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. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. The cumulative setting includes past, present, and

[11] If such information is not available, it must be evaluated under 40 C.F.R. § 1502.22.

[12] The FEIS asserts that "[h]istoric drought conditions are taken into account in Appendix K (groundwater supply report) of the Draft EIS." Response to comment O8-11. Appendix K, however, only addresses *average* drought duration, and therefore does not in any way address the historic drought California is currently experiencing. Whether recent heavy precipitation has alleviated the current drought remains to be seen, and is not evaluated in the FEIS.

reasonably foreseeable future actions not part of the Proposed Action, but related to cumulative effects.

The FEIS continues to omit the Kammerer Road Project in the list development projects in the cumulative setting in the City of Elk Grove. Table 4.15-2. In addition, the FEIS fails to consider numerous amendments to Elk Grove's General Plan, nor does it consider that the process to update the General Plan has been underway since 2015, and is now in its final stages.[13] Changes to the General Plan are thus specifically foreseeable, and changes in the cumulative setting resulting from those changes are therefore reasonably foreseeable, yet the FEIS contains no analysis of these effects.

As noted above, traffic impacts have been severely underestimated, and "[a] significant effect would occur to water supply distribution facilities as a result of the need to provide service to Alternative F." FEIS at 4.10-25. Unidentified projects that should have been included in the cumulative setting, which are currently under development and reasonably foreseeable, will further impact traffic, water supply, and other factors in Elk Grove. Accordingly, the FEIS's cumulative impact analysis is woefully inadequate and must incorporate a more complete range of current and foreseeable projects within the City of Elk Grove and must include future projects based on the City's current efforts to expand its sphere of influence.

E. The FEIS ignores new information regarding the public safety risks associated with the nearby Suburban Propane Storage facility.

We previously commented that, in an April 2, 2016 letter to the Sacramento Local Agency Formation Commission (LAFCo) opposing the City of Elk Grove's application for amendments to expand its sphere of influence for the Kammerer/Highway 99 Project and the new proposed sports complex, Suburban Propane outlined serious concerns related to the projects' proximity to its propane storage tanks, which hold 24 million gallons of refrigerated propane. While Suburban Propane noted its superb safety history, it also informed LAFCo of a past, unsophisticated and foiled, terrorist plot. At trial, the director of the Chemical-Biological National Security Program at Lawrence Livermore Laboratory, one of the world's foremost experts on explosions, testified that if the plot had been successful, a "gigantic fireball" would have caused injuries and damage up to 1.2 miles away, including fatal injuries to roughly 50 percent of the people in the blast radius, and fatalities and injuries up to 0.8 miles from the explosion. In addition, the initial blast would likely have caused two smaller on-site pressurized propane loading tanks to explode, rupturing the formaldehyde storage tank at another nearby industrial facility, creating in turn a toxic cloud that would be potentially deadly to anyone encountering it, and which would travel for almost a mile with the prevailing wind.[14] Terrorism concerns have only increased since that time, and Suburban points out that increased development near the storage tanks potentially puts many people at risk. Terrorism risks are not easily quantified, but this is precisely the type of incomplete or unavailable information that must be evaluated pursuant to 40 C.F.R. § 1502.22 (Incomplete or unavailable information).

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[13] *See* http://www.elkgrovecity.org/city_hall/departments_divisions/planning/a_brighter_future/.
[14] *See* Sacramento Business Journal, *Elk Grove project ignores nearby propane risk* (Dec. 9, 2001), available at: http://www.bizjournals.com/sacramento/stories/2001/12/10/editorial4.html.

As described in its letter, numerous studies have evaluated the accident potential at the Suburban Propane, Elk Grove Propane Storage Facility. The most reliable and unbiased studies agree that the hazards associated with an unconfined vapor cloud explosion and boiling liquid expanding vapor explosions present serious safety risks to any potential off-site population within one mile of the facility. Among the locations Suburban notes as in the danger zone is the Lent Ranch area. The draft EIS noted, "Lent Ranch and the Marketplace at Elk Grove are located in the immediate vicinity of the Mall site," yet the draft EIS did not mention or address Alternative F's location in relation to Suburban Propane's storage tanks or the past demonstrated and future dangers that proximity to the site may represent. In fact, the Mall site is located approximately half a mile from the Elk Grove Storage Facility. Accordingly, we requested in our September 27, 2016 comment letter that the propane storage facility and any associated or potential environmental or public safety concerns should be addressed and analyzed in a supplemental EIS.

The FEIS, in section 3.12.3, acknowledges this issue, but declines to analyze this risk on the basis of a February 2001 Environmental Impact Report (EIR) by the City of Elk Grove that concluded that the risk levels posed by the Suburban Propane facilities "are viewed as acceptable and impacts are considered to be less-than-significant," and a 2004 state appellate court decision that the EIR's findings were adequately supported by the evidence. The FEIS, however, fails to consider new information available after February 2001, including the reevaluation of terrorism risks after the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon; information in Suburban Propane's April 2, 2016 letter, and the 2003 risk evaluation report identified in that letter; and the February 2015 report prepared by Northwest Citizen Science Initiative regarding the Portland Propane Terminal,[15] which discusses the risks posed by large propane storage facilities in urban areas, including specifically the Suburban Propane facility. To comply with NEPA, BIA must evaluate this significant new information in a supplemental EIS because it is relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c).

F. Air quality impacts are inadequately addressed.

The Updated Draft General Conformity Determination ("Updated Draft CD") fails to meet the regulatory requirements for a Clean Air Act conformity determination under 40 C.F.R. Part 93. Additionally, the Updated Draft CD does not address the comments submitted by Stand Up for California! ("Stand Up") on the Draft General Conformity Determination on September 27, 2016. As Stand Up commented on the Draft CD, "it is impossible to assess the air quality impacts of the project prior to the completion of the conformity determination." For the following reasons, BIA must prepare and make available for public comment a supplemental EIS after completing a final conformity determination.

BIA improperly released the Updated Draft CD simultaneously with the Final EIS for public comment. In its September 27, 2016 comments, Stand Up reminded BIA that they must finalize the conformity determination, including an opportunity for public comment, before releasing the

[15] *See* Exhibit 2; available at: http://sustainable-economy.org/wp-content/uploads/2015/02/Portland-Propane-Terminal-NWCSI-3rd-rev-ed-Feb-27-2015.pdf. The report concludes that the risks posed by a terrorist attack targeting smaller pressurized propane tanks near the main storage tanks is much greater than the risks of an attack targeting the main storage tanks directly; the pressurized tanks are more easily exploded, and could in turn explode the main tanks more effectively, in a domino-style effect. *Id.* at 17.

Final EIS. *See* EPA, General Conformity Training Manual at 1.3.4.2 ("At a minimum, at the point in the NEPA process when the specific action is determined, the air quality analyses for conformity should be done."). Without a finalized conformity determination before the public comment period on the final EIS, the public and agency decision makers cannot sufficiently analyze the environmental consequences of the Project.

The Updated Draft CD fails to comply with 40 C.F.R. § 93.160(a) because it does not describe all air quality mitigation measures for the Project and it does not outline the process for implementation and enforcement of those air quality mitigation measures. The Updated Draft CD only describes two mitigation measures: purchasing emissions reduction credits for nitrogen oxides ("NOx") and preferential parking for vanpools and carpools. Updated Draft CD, § 4.2. For other mitigation measures, it merely references their inclusion in Section 5.4 of the draft EIS and does not provide a description as required under 40 C.F.R. § 93.160(a). *Id*.

As Stand Up commented on the Draft CD, the only semblance of an implementation timeline provided for a mitigation measure in the Updated Draft CD is that ERCs will be purchased prior to operation of the Project. This still does not constitute an "explicit timeline" and there are no other timelines or deadlines for the other mitigation measures in the Updated Draft CD. *See* 40 C.F.R. § 93.160(a).

Like the Draft CD, the Updated Draft CD does not contain any information on the process for enforcing mitigation measures, including the purchase of ERCs. A description of enforcement measures is required under 40 C.F.R. § 93.160(a). The Updated Draft CD merely recommends that the Tribe commits to purchasing the required ERCs. Even though the Updated Draft CD states that the Tribe will provide the "documentation necessary to support the emissions reductions through offset purchase," it does not establish any specific procedures or requirements for doing so, nor it explain how the purchase will be enforceable. Additionally, the Updated Draft CD is incomplete because BIA has not obtained written commitment from the Tribe that it will purchase ERCs under 40 C.F.R. § 93.160(b). As such, the final EIS and the public are unable to consider how effective the enforcement measures will be, or even if there will be any at all.

BIA must ensure compliance with the Clean Air Act's conformity determination requirement prior to making a decision to take land into trust for a gaming acquisition. Because the conformity determination is not finalized before the final EIS and does not fully comply with 40 C.F.R. Part 93, BIA must prepare a supplemental EIS after considering public comments and issuing a final conformity determination.

G. Socioeconomic impacts are inadequately analyzed.

Finally, the FEIS also fails to give any estimate of the possible range of increases in societal problems that may result from the proposed casino, including problem gambling, divorce, suicide, prostitution, bankruptcy, and demand for social services. An estimate is provided (for Alternative A only) of the anticipated increase in calls for law enforcement service and

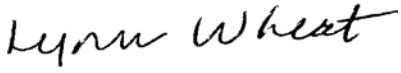
percentage that would result in arrests,[16] but there is no quantification of the different types of additional crimes that would result, including DUIs, a particular concern given that the Project is within walking distance of three schools. The FEIS should therefore evaluate the possible range of social costs of different types that would be borne by the local community as a whole, as well as by more vulnerable segments of our community. We note in particular that the target market for the Project is disproportionately senior citizens and the Asian community. In addition, we note that the Rancheria's contractual arrangement with Boyd Gaming of Las Vegas, Nevada typically provides for compensation of 30% of gross revenues—given projected revenues of $449 million annually, that would mean over $130 million leaving the local economy annually, an impact completely ignored in the FEIS's economic impact statement.

CONCLUSION

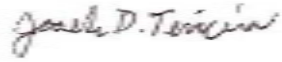
For the foregoing reasons, the FEIS is deficient and cannot support a decision to take the Elk Grove site into trust. The BIA must prepare a supplemental EIS for additional public review and comment before any final decision.

Sincerely,

Cheryl Schmit
Director, Stand Up for California!



Lynn Wheat
Elk Grove GRASP



Joe Teixeira
Committee to Protect Elk Grove Values

[16] *See* DEIS App. N (Socioeconomic Analysis) at 40. The report speculates that the other alternatives "may experience similar impacts relative to their proposed size and gaming positions." The City of Galt, however, estimated more than twice as many service calls and arrests based on data for comparable casinos in California. BIA declined to consider this information, however, on the grounds that because Galt "did not cite the published source of its information, the figures described by the Commenter could not be verified." Response to Comment A16-234. BIA admits, however, that often that information is available only by direct inquiry to the relevant law enforcement agencies, a relatively easy task. BIA's failure to verify the information and consider it is therefore a violation of 40 C.F.R. § 1502.22 (Incomplete or unavailable information).

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