

October 15, 2018

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**VIA MESSENGER AND EMAIL**

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**Re: Adoption and Recirculation of the Final Environmental Impact Statement for the Wilton Rancheria Fee-to-Trust and Casino Project, 83 Fed. Reg. 46754 (Sept. 14, 2018).**

Dear Mr. Badger:

The following comments are being submitted on behalf of Stand Up for California!, Elk Grove GRASP, the Committee to Uphold Elk Grove Values, and concerned citizens of Elk Grove, regarding the National Indian Gaming Commission's (NIGC) adoption of the Bureau of Indian Affairs' (BIA) 2016 Final Environmental Impact Statement (EIS) for the Wilton Rancheria Fee-to-Trust and Casino Project in Elk Grove, California. The NIGC is adopting the EIS for purposes of its review of the Tribe's request for the NIGC Chairman's approval of a gaming management agreement between the Tribe and BGM Co., Inc. For the reasons explained in these comments, adoption of the EIS does not comply with the National Environmental Policy Act (NEPA), and the NIGC must prepare a Supplemental EIS. We also request that the NIGC expand its review of this management contract to include related agreements.

These comments incorporate by reference our full January 13, 2017 comments to the BIA regarding the inadequacy of the Final EIS.<sup>1</sup> Among other things,<sup>2</sup> those comments describe the

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<sup>1</sup> These comments are found in the Record of Decision (ROD) available at [www.wiltoneis.com](http://www.wiltoneis.com). We also incorporate by reference our comments submitted to BIA on February 9, 2016; February 12, 2016; and September 27, 2016. These comments are found in the FEIS available at [www.wiltoneis.com](http://www.wiltoneis.com).

<sup>2</sup> Deficiencies in the EIS include a failure to prepare a Supplemental EIS based on the change in the proposed site and changes to the proposed project; failure to provide adequate public participation to Elk Grove residents; failure to consider that the Elk Grove site is subject to the encumbrances of an existing Development Agreement; failure to consider new information regarding the public safety risks associated with nearby Suburban Propane facility; failure to consider the unenforceability of mitigation; failure to fully address comments regarding compliance of the Final Conformity Determination with the Clean Air Act; and failure to adequately consider socioeconomic impacts of the Casino Project.

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BIA's last minute bait-and-switch and sham review in this matter. After initially proposing in 2013 to acquire a site in Galt, California, the proposed acquisition was switched to Elk Grove at the eleventh hour. 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 to Elk Grove was the December 14, 2016 Federal Register notice of the availability of the Final EIS, barely *one month* before BIA's final decision.<sup>3</sup>

As noted in NIGC's Notice of Adoption, the BIA EIS is currently the subject of a judicial action which is not final, *Stand Up For California!, et al., v. United States Department of Interior, et al.*, Civil Action No. 1:17-cv-00058 (D.D.C. filed Jan. 11, 2017). The Court in that action has already determined that plaintiffs have made a preliminary showing of bad faith and a predetermined decision on the part of BIA, which among other things, "shifted into warp speed" to approve the Tribe's application after the 2016 Presidential election made clear that a different political party would control the Executive Branch. *Id.* ECF 62 at 10-14. Adoption of the EIS under these circumstances is inappropriate. The NIGC must prepare a Supplemental EIS to avoid relying on an EIS that was prepared to support a predetermined and politically motivated decision of the Obama Administration, to avoid the appearance of impropriety, and to address the deficiencies identified in these comments, as well as our January 13, 2017 comments to BIA.<sup>4</sup>

The NIGC has prepared a Supplemental Information Report (SIR) for the 2016 Casino Project EIS to evaluate new information, including changes to the project consisting of, among other things, the construction of a new parking garage structure and changes to the square footage for the casino and convention hall floor spaces. The SIR concluded that the mitigation in the EIS was still sufficient and that a Supplemental EIS was not required. NIGC agreed with this conclusion and adopted the Final EIS. We submit these comments to the Commission related to impacts that were not considered related to the availability of water supplies and significant increases in traffic, which should be analyzed in a Supplemental EIS.

NIGC has an obligation to reconsider both the traffic analysis and water supply analysis initially included in the EIS. As discussed in these comments, the proposed action will affect the quality of the human environment in a significant manner or to a significant extent not already considered. In such a case a supplemental EIS must be prepared. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). "The key to whether a Supplemental Environmental Impact Statement is necessary is . . . whether the proposed [work]

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<sup>3</sup> 81 Fed. Reg. 90379 (Dec. 14, 2016).

<sup>4</sup> We also adopt and incorporate by reference the comments on the FEIS submitted by the City of Galt and other parties, which identify additional deficiencies in the Final EIS. These comments are found in the ROD available at [www.wiltoneis.com](http://www.wiltoneis.com).

will have a significant impact on the environment in a manner not previously evaluated and considered." *South Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663 (3d Cir. 1999). New information is significant when it "provides a seriously different picture of the environmental landscape." *City of Olmsted Falls, Ohio v. Fed. Aviation Admin.*, 292 F.3d 261, 274 (D.C. Cir. 2002); *see also Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000) (changes "that cause effects which are significantly different from those already studied require supplementary consideration.").

#### 1. Availability of water supply

Here, there is new information that the water supply impacts of the Casino Project will be much greater than analyzed in the EIS. Simply put, based on the Zone 40 Water Supply Plan (discussed below) and recent state determinations of available water supply, there is insufficient water available from Sacramento County Water Agency (SCWA) to provide for the Casino Project. The final EIS states that water supply service needs would result in a significant impact to local water supply infrastructure, but simply asserts that an adequate supply will be ensured by a mitigation measure that says the Tribe will enter into an agreement with SCWA to pay for new facilities, and that SCWA has sufficient capacity. The EIS does not analyze the SCWA distribution system to determine whether sufficient capacity is indeed available, and to evaluate the feasibility of infrastructure upgrades. In fact, such an analysis shows that no feasible present capacity exists.

The Final EIS admits that SCWA is the water provider for the area that includes Elk Grove and other communities commonly known as "Zone 40", and SCWA is the designated municipal water provider for the casino site. Final EIS, p. 3.10-3. NEPA requires evaluation of the water supply impacts that will result from a project. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 2011 U.S. Dist. LEXIS 47661, at \*30-31 (E.D. Cal. May 4, 2011). And in the case of the Casino Project, to date, the "hard look" required by NEPA as to available water supply for the project has not been taken.

The Final EIS also acknowledges that, in 2005, SCWA prepared a Water Supply Master Plan to meet the water demands of Zone 40. Final EIS, p. 3.10-3. Inexplicably, though, the Final EIS does not refer to or analyze any of the water supply data included in the Zone 40 Water Supply Master Plan; the Final EIS simply failed to evaluate or consider this impact of the project. The FEIS asserts that "SCWA has available capacity to meet anticipated demand for domestic water." Final EIS at 2-30 (citing Appendix I). The water supply study (EIS Appendix I), however, apparently assumed, without any analysis or inquiry, that a sufficient water supply was available based simply on the presence of unfinished water supply infrastructure that had been intended to serve the previously proposed development of the site as a retail shopping mall. *See* ROD response to comments 7-18; DEIS, Appx. I (Water & Wastewater Feasibility Study) at 6,

24-26, 39. That infrastructure was never been placed into use, and was intended to supply a much less water-intensive use. Indeed, the EIS acknowledges that critical components of the existing infrastructure would need to be upgraded to meet the increase in anticipated water demands. *Compare id.* at 24 (existing pipes estimated to range between 1.5 and 3 inches in size) to *id.* at 25 (4-inch connections to SCWA distribution pipes will be needed). Under these circumstances, the Commission's decision not to prepare an SEIS is faulty.

The Zone 40 Water Supply Master Plan indicates that the site of the proposed Wilton Rancheria casino was planned for "mixed use" at a water demand of no more than 2.51 af/acre/yr. (SCWA Zone 40 Water Supply Master Plan, pp. 2-5, 2-7.) As revised, the project site includes a total project area of 35.9 acres. (Wilton Rancheria Fee-to-Trust and Casino Project FEIS, p. 2-26, n. 1.) Thus, the amount of water that the water provider (SCWA) budgeted for this project site to use was no more than 90.36 acre-feet per year, which is about 80,668 gallons per day (gpd). The EIS for the casino project indicates that "the estimated average daily water consumption for [the casino at Lent Ranch Mall site] (including landscaping and irrigation) would be approximately 260,000 gpd (Appendix I)." (Wilton Rancheria Fee-to-Trust and Casino Project FEIS, Vol. II, p. 2-30.) Citing no data, the EIS conclusorily states, "SCWA has capacity to meet anticipated demand for domestic water use . . . ." (Wilton Rancheria Fee-to-Trust and Casino Project FEIS, Vol. II, p. 2-30.)

This unsupported statement directly contradicts the data in the SCWA Zone 40 Water Supply Master Plan – which the Final EIS utterly ignored. The casino project will use approximately 180,000 to 200,000 gpd more than SCWA had earmarked to serve this property. 260,000 gpd equates to about 291 acre-feet per year (see Wilton Rancheria Fee-to-Trust and Casino Project FEIS, Vol. I, p. 3-29, confirming this calculation), which is about 200 to 221 acre-feet per year more than the level of demand planned for in the Zone 40 Water Supply Master Plan.

The projected 291 acre-feet per acre per year divided by the 36 acres encompassing the project site equates to a water demand rate of 8.08 af/acre/year, more than three times higher than the demand rate planned for the entire site in SCWA's Zone 40 Water Supply Master Plan. (See also Lent Ranch EIR, p. 6.10 ("[I]f [land] uses change from those proposed (i.e., restaurants, theaters, and retail shops) then these demand estimates should be reevaluated" to assure adequate water supplies.) The Final EIS assumed this water would be available to serve the casino project, but it never analyzed this issue. Since the EIS never adequately analyzed this potentially significant environmental impact, the Commission must prepare a Supplemental EIS to evaluate this issue. Indeed, the attached March 6, 2017 memorandum from the Sacramento County Water Agency to the County of Sacramento addresses the availability of water supplies in the local service area. The memorandum states that the water agency's "water supply portfolio is fully allocated" in the project area. In addition, the memorandum states that, should SCWA serve the area, additional infrastructure will be required, including a groundwater treatment and storage facilities, water

wells, and transmission and distribution mains, and that additional surface water and groundwater supplies will need to be procured. None of these activities and their environmental impacts have been evaluated in the EIS. Moreover, given these constraints, the only conceivable alternative available any time within the next several years is a well system utilizing groundwater and providing for wastewater using a packaged plant—an alternative not evaluated in the EIS. On-site groundwater pumping and wastewater treatment and disposal raise a host of issue that have not been considered, including impacts to nearby water supply wells from a local lowering of the water table; and the reliability of the wastewater treatment method, especially given that bioreactors fail fairly frequently, the Elk Grove Site is located in a floodplain, and the footprint of the site is relatively small, with extensive commercial and residential development and water supply wells nearby.

The Final EIS also concedes that the water supplies SCWA uses to serve Zone 40 include surface water from the American and Sacramento Rivers diverted by the City of Sacramento (and delivered via the Franklin Intertie with SCWA) or by SCWA at the Freeport Regional Water Project intake. Final EIS, p. 3.10-3. The regulatory body with jurisdiction over surface water rights in California, the State Water Resources Control Board, has announced plans to require surface water rights holders to leave 40% of the unimpaired runoff of the stream as instream flows for fish. On July 6, 2018, the State Water Board released a final proposal to amend the Bay-Delta Plan.<sup>5</sup> The State Water Board completed its public meetings on the first phase of these draft amendments to the Bay-Delta Water Quality Control Plan on August 22 and is expected to adopt the amendments at its November 7 meeting.<sup>6</sup> This phase of the proceedings applies to the San Joaquin River and its tributaries. The second phase of the State Water Board's amendments to the Bay-Delta Water Quality Control Plan will be focused on the Sacramento River and its tributaries, Delta outflows, and interior Delta flows.<sup>7</sup>

On July 6, 2018, the State Water Board released a framework for the Sacramento/Delta phase, which states the background, purpose, and need for the proposed amendments; the proposed amendments seek to impose the unimpaired flow regime on the Sacramento River and designated tributaries. See *id.* SCWA's Freeport diversion is located on the Sacramento River

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<sup>5</sup> See

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/bay\\_delta\\_plan/water\\_quality\\_control\\_planning/](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/).

<sup>6</sup> See

[https://www.waterboards.ca.gov/press\\_room/press\\_releases/2018/pr082218\\_bay\\_delta\\_update\\_hearings\\_news\\_advisory.pdf](https://www.waterboards.ca.gov/press_room/press_releases/2018/pr082218_bay_delta_update_hearings_news_advisory.pdf).

<sup>7</sup> See [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/docs/bay\\_delta\\_faq.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/bay_delta_faq.pdf); *see generally*, [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/bay\\_delta\\_plan/water\\_quality\\_control\\_planning/2018\\_sed/](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2018_sed/) and materials contained therein.

and will be subject to the new flow regulations when they are finalized. These pending updates to the flow regulations make it reasonably foreseeable that SCWA will not have access to as much surface water in the future as it has anticipated in evaluating supplies for Zone 40 in the past. Consequently, the Commission must prepare a Supplemental EIS to evaluate the water supply impacts of this project, with its unanticipated water demand, under the reasonably foreseeable scenario that SCWA has less surface water supply available to serve its customers in the future.

## 2. Traffic impacts

The BIA's responses to comments on the FEIS explained (for the first time) that the addition of a parking garage structure to the originally proposed project was necessitated by the fact that the neighboring Lent Ranch/Promenade Mall site owner no longer agrees to share any of its parking spaces with the Casino. ROD response to comment 7-4. Why the Mall owner now anticipates a greater need for parking spaces is not known, but the FEIS failed to consider the effect of the approximately 2,000 additional parking spaces that would be created on the Casino site (presumably making an equivalent number of parking spaces available on the Mall site) and the additional casino and/or mall traffic that can be anticipated.<sup>8</sup> As explained below, the EIS calculations of traffic impacts assumed the Tribe's use of all of the parcels of Promenade, including the spaces located on the balance of the Lent Ranch Mall site [The Elk Grove Promenade is the trade name for the Lent Ranch Mall site]. On December 21, 2016 the Wilton Rancheria [Tribe]'s predecessor in title executed an agreement which allowed for shared parking on all parcels within the Elk Grove Promenade [See Document Book 20170109 at page 1364], which has not been cancelled and therefore total parking spaces from both sites must be considered. The SIR does not even mention this parking agreement. This apparent discrepancy between total traffic (Mall and Casino) vs. Casino related traffic will affect Kammerer Road and should be evaluated and explained as part of a Supplemental EIS.

As part of the 2016 Casino project EIS, a Traffic Impact Analysis (TIA) was conducted by Kimley-Horn to address the traffic and transportation effects of the proposed casino and hotel development. (FEIS, at p. 3.8-5; DEIS Appendix O.) A new or re-evaluated TIA must be prepared based on the following: (1) the analysis of total traffic entering onto Kammerer, by reason of the either Mall and Tribe's right to expand parking over the entire Promenade site pursuant to the existing parking agreement, if that agreement is still effective or, if that agreement has in fact been terminated, the approximately 2,000 additional parking spaces that will result from the new proposed parking garage on the Casino site, presumably making an

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<sup>8</sup> DEIS App. O (Traffic Impact Study) at 35 states that "Baseline traffic volumes at the Promenade Parkway intersections accessing the proposed outlet project site were refined to provide consistency with the anticipated traffic levels associated with the current development plans for the site." The Mall owner has stated that the casino will bring more patrons to the Mall.

equivalent number of additional spaces available for Mall patrons; (2) the unmitigated impacts of that additional traffic, given that the EIS planned to mitigate for Casino-related traffic impacts to area roads as agreed to between the Tribe and the City of Elk Grove in a Memorandum of Understanding based on limited impacts of 3,533 parking spaces; and therefore the mitigation identified in the EIS is no longer sufficient and should be increased or new mitigation added to meet the Tribe's obligation to mitigate traffic impacts, especially to Kammerer Road on an urgency basis.

Changes to the estimated use of portions of the casino for support uses, and the square footage of the casino and convention hall floor spaces also affect the original analysis because some of the TIA's trip calculations were generated based on square footage. (FEIS, at pp. 4.8-1, 2, 3, 4; Casino DEIS Appendix O, at p. 221, Table 82). The project assumptions used in the TIA analysis were as follows:

- Casino building area- 381,000 s.f.
- Gaming floor area- 110,260 s.f.
- Gaming positions- 2,104 positions
- Convention area- 47,000 s.f.
- Hotel rooms- 307 rooms

(Casino DEIS Appendix O, at p. 219).

Changes to these assumptions would naturally affect the trip calculations based on such assumptions in the TIA. Moreover, since the data reflected in the TIA was collected in 2014, the recent anticipated changes to the project must be reexamined in relation to evaluations to recently approved projects in the immediate vicinity of the Casino project.

According to the TIA, the Casino project is expected to generate 11,093 new weekday trips, 16,003 new Saturday trips, 1,198 new trips in the weekday PM peak hour and 2,056 new trips in the Saturday PM peak hour. (FEIS, at p. 4.8-39; Casino DEIS Appendix O, at p. 221, Table 82.). Since there are proposed changes to the casino and convention hall square footage and the Lent Ranch/Promenade Mall is no longer sharing approximately 2000 parking spaces with the Casino, the trips are now at least 3,533 plus the 2000 parking spaces that have now become available to patrons of the shopping center. The vehicle trips and impacts associated with the 2000 parking spaces at the Mall and re-calculated Casino square footage trips should be included in a new or re-evaluated analysis.

The TIA evaluated operational conditions of 19 study intersections, 10 roadway segments, 8 freeway mainline segments and 13 ramps, which included, but were not limited to, the following locations in close proximity to the proposed Casino:

- Hwy 99 NB Ramps/Grant Line Road
- Hwy 99 SB Ramps/Grant Line Road/Kammerer Road
- Promenade Parkway/Kammerer Road
- Promenade Parkway/Bilby Road
- Grant Line Road/East Stockton Boulevard
- Promenade Parkway (between Whitelock Parkway and Kammerer Road)
- Kammerer Road (between Bruceville Road and Hwy 99)
- NB/SB ramps at Hwy 99/Grant Line Road.

The TIA states that the evaluated locations represent key locations and facilities where project trips are anticipated to be added and were selected based on input from, and confirmed by, the City of Elk Grove and other agencies. (Casino FEIS, at p. 3.8-7, 8; DEIS Appendix O, at p. 10). For existing conditions, traffic volumes were collected by Kimley-Horn during April 2014 and a weighted amount of growth was applied to determine a baseline condition for the year 2018 (when the casino was expected to open). (Casino DEIS Appendix O, at pp. 19-20). Baseline traffic volumes at the Promenade Parkway intersections included anticipated traffic levels associated with the Lent Ranch/Promenade mall development which were refined to be consistent with the current mall development plans for the site. (Casino DEIS Appendix O, at p. 35). Since the baseline conditions for these intersections included the Lent Ranch/Promenade mall development traffic volumes, changes in the form of an additional 2000 mall parking spaces expand the mall's capacity, thereby affecting the baseline and should be included in the new or re-evaluated TIA.

The EIS and TIA show that Casino project vehicle trips will cause significant near-term and long-term impacts where locations operating at acceptable levels of service are rendered unacceptable and/or unacceptable LOS locations are worsened, requiring mitigation. (FEIS, at pp. 4.8-40, 41, 42, 43, 50; Casino DEIS Appendix O, Tables 83, 85, 88, 91, at pp. 233, 236, 239, 240, 241, 242). Because of the severity of the impacts, any increase in vehicle trips associated with the proposed project changes should be included in the new or re-evaluated TIA. Without a new or re-evaluated TIA, it is unknown whether the proposed mitigation is sufficient to address the significant impacts.

Although the intersection of Promenade Parkway/Bilby Road -- the primary Casino Project access driveway -- was designed to accommodate future traffic demand associated with significant planned growth in the area, including traffic associated with the previously approved Lent Ranch/Promenade development, this location is projected to operate at unacceptable levels of service with the addition of the Casino project. (Casino FEIS, at p. 4.8-43; DEIS Appendix O, at pp. 26, 244). Any study locations such as this which included traffic associated with the Lent Ranch/Promenade development have now been affected by the increased vehicle trips due to the



Casino project changes identified above, i.e. 2000 now-available parking spaces induce additional mall trips. Conditions determined to be unacceptable in the original TIA will be exacerbated by these changes and should be re-analyzed.

According to the TIA, the Casino is anticipated to add up to 1,500 vehicle trips per day specifically on Kammerer Road. Kammerer Road from Hwy 99 to Bruceville Road currently has no shoulders. The TIA states that, in its current condition, this roadway segment would not support traffic generated by the Casino. As part of the Capital Southeast Connector Project, future widening is planned for Kammerer Road and mitigation is included in Section 5.8 of the EIS for the Tribe to pay its fair-share contribution towards those improvements. The TIA states that the 2016 Memorandum of Understanding between the Tribe and the City of Elk Grove includes a regional roadway contribution that is intended to address this impact. (Casino FEIS, at p. 4.8-44). However, according to a power point presentation shown at the September 12, 2018 Elk Grove City Council meeting, the Kammerer Road extension project has still not completed NEPA review and approval by the JPA, and is not expected to be constructed until at least 2020. Thus if NIGC provides final approval without requiring additional mitigation, direct impacts of casino/hotel operations flowing directly onto Kammerer Road cannot be supported for an indefinite period of time.

The TIA acknowledges the grave existing condition of Kammerer Road and delay in constructing the Kammerer Road improvements. Because of this, and with the addition of three large annexation projects along Kammerer and Grant Line Roads in the near vicinity of the Casino project that have come into play since the TIA was prepared (discussed below), a new or re-evaluated TIA should be prepared to include these annexation projects.

The TIA collected and utilized data and Elk Grove policies from 2014-2015 (Casino DEIS Appendix O, at pp. 19-20). NIGC should look at changes in forecasted area traffic from 2014 to the present, such as the Bilby, Kammerer and Sports Complex annexations, located along Kammerer and Grant Line Roads just West, South and Southeast of the Casino project area. These traffic studies identify substantial impacts to these roadways resulting from combined casino and development traffic, but propose only long-term ephemeral mitigation plans. According to the Bilby Annexation Draft EIR dated December 2017, under cumulative conditions -- which include the Casino project, Lent Ranch/Promenade mall development, and all three annexations -- multiple locations along Kammerer and Grant Line Roads operate at unacceptable LOS (Es and Fs). (Bilby Annexation DEIR, at p. 3.13-36.) The Bilby, Kammerer and Sports Complex annexation projects should be included in the new or re-evaluated TIA for the Casino project together with an analysis of cumulative impacts to Kammerer Road and other developing locations. All of these additional development activities must also be evaluated in the cumulative impacts analysis of a Supplemental EIS.

### 3. Additional review of collateral agreements

The NIGC appropriately views as important its obligation to protect the financial interests of a Tribe from the unjust enrichment of consultants/investors in development contracts. This is equally important to the citizens and local governments of the host community of a proposed off-reservation tribal casino. We request that NIGC consider expanding the definition of management agreements to include any collateral agreements that advance the development of off-reservation casinos. The NIGC's current discussion draft of proposed 25 C.F.R. § 502.25 includes a non-exhaustive list of examples of management activities which include planning, organizing, directing, coordinating, controlling and pertaining to the development of a casino. This is a necessary list and includes all collateral agreements.

Gaming on after-acquired lands, giving rise to "reservation shopping", as it has been termed, is visibly driven by gaming investors making "development agreements" intentionally outside of management agreements that are reviewed by the NIGC. Development agreements often obscure the terms of the agreement, the source of the money, and the payout of the investors. These agreements skirt the criteria of management contracts laid out in IGRA that are intended to promote transparency in the tribal gaming industry. In California, many of these agreements have been with newly recognized or restored Rancheria Tribes acquiring lands at a considerable distance from a Tribe's former Rancheria, and reaching into the urban and metropolitan areas of California.

Reviewing management contracts in isolation from these obscure "development agreements" presents a potential violation of IGRA. By law, tribal casinos are to be owned and operated by the Tribe. IGRA requires a minimum of 60% sole "proprietary interest". Additionally, lobbying or consultant agreements that provide a percentage of the net win of the casino over a period of years should also be reviewed. A lobbyist at the federal level may be paid on the outcome of their lobbying efforts; however, that activity is inconsistent with the State of California lobbying laws. Thus, agreements approved by the NIGC that provide a share of casino revenue over a period of time to lobbyists must be reviewed to ensure they do not violate California state law.

This matter provides several examples of the need for the draft language for proposed § 502.25 which includes planning, organizing, directing, coordinating, controlling and pertaining to the development of a casino:

In July of 2012, Boyd Gaming of Las Vegas announced in their Securities and Exchange Commission report the purchase of a "development agreement" with the Wilton Tribe. The Wilton Tribe's web site reports the purchase price of the development agreement as \$24.5 million

dollars.<sup>9</sup> Boyd Gaming is due to receive 5% of the gross gaming revenues for a period of 7 years after the casino opens. The report does not say who the development agreement was purchased from nor does it outline the repayment of the \$24.5 million dollars. Boyd further states it is prepared to spend \$1 to \$2 million dollars annually to establish the casino.<sup>10</sup> In January of 2017 Boyd Gaming announced the joint purchase of the 35.9 acres Elk Grove site with the Wilton Tribe for the development of the proposed \$400 million dollar casino resort. Boyd and the Wilton Tribe paid Howard Hughes Corporation \$36 million dollars for the Elk Grove site.

Boyd Gaming and the Wilton Tribe's questionably inflated purchase price of the property is a gamble on future success, but if the development doesn't work out, the property will potentially lose half or more of its value. The purpose of this is not known, but it may be for Boyd Gaming to hedge its bet. The inflated price could potentially include a settlement to other developers in the area discontent over the casino resort location, or a property deal elsewhere between Boyd Gaming and Howard Hughes Corporation. The Wilton Tribe paid \$1 million dollars with Boyd Gaming paying the additional \$35 million dollars. Boyd Gaming at its press conference stated it would be financing the casino project "off the books" through the sale of bonds. Boyd Gaming is a \$2.3 billion dollar company with a \$3.3 billion dollar debt. Selling bonds for the construction of the casino allows Boyd Gaming to clean up its balance sheet on this controversial and contentious project.

Based on this limited information, and not considering the hundreds of thousands of dollars spent on lobbying in Washington, D. C. and Sacramento, it appears that Boyd Gaming has well over a \$65 million dollar investment compared to the Wilton Tribe's \$1 million dollar investment. This hardly seems to meet the federal sole-proprietary requirement of a Tribe owning 60% of the casino operation. Additionally, Boyd Gaming has a management agreement waiting for approval. It is unknown what the percentage of casino revenue payment will be on the management contract or for how many years.

In addition, the need for review is demonstrated by a recent ruling in the San Francisco Superior Court (June 4, 2018) regarding a gaming consultant/development agreement in which the consultant and developers were seeking unjust enrichment from the Tribe's casino. *Federated Indians of the Graton Rancheria v Kenwood Investments No.2, LLC* Case No CPF-18-516178,<sup>11</sup> awarded the Federated Miwoks of the Graton Rancheria almost \$800,000, including attorney fees.

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<sup>9</sup> See <http://wiltonrancheria-nsn.gov/resortproject/News/tabid/521/ArtMID/2806/ArticleID/12/language/br-FR/Default.aspx>.

<sup>10</sup> See <http://wiltonrancheria-nsn.gov/resortproject/News/tabid/521/ArtMID/2806/ArticleID/12/language/br-FR/Default.aspx>.

<sup>11</sup> See <https://webapps.sftc.org/ci/CaseInfo.dll?CaseNum=CPF18516178&SessionID=D24E75D7E1A610EC1E40E3CD205B0DB04D24BB55>.

Other issues of the legality of the lobbying efforts both in Washington, DC and California were raised in this ruling.<sup>12</sup>

The issue of development agreements is not new nor is it unique to California. For example, the development agreement between the Mashpee Tribe and the Malaysian Genting Group raised eyebrows in Washington D.C. and Cape Cod. Development agreement abuse first surfaced in 2006, motivating then Chairman Hogan of the NIGC to work with U.S. Senator John McCain to develop federal legislation that would have emphasized the sole proprietary requirements of IGRA. The improper use of development agreements abuses the integrity of the IGRA regulatory framework.

Development agreements, consultants, investors and manufacturer's agreements, in particular for off-reservation gaming proposals, must be reviewed to ensure the sole proprietary interest requirements of IGRA are met. Otherwise the NIGC burdens tribes with insurmountable debt and places them at risk of fines and closure of their casinos. Development agreements promoting off-reservation casinos cause the target non-tribal communities significant man-hours and scarce general fund dollars to participate in unfamiliar multiple federal processes.

These obscure development agreements for off-reservation casino development can be sophisticated financial schemes enriching investors at the expense of Tribes, non-tribal communities and local governments. In some instances, local governments have acquiesced to these schemes in exchange for a percentage of casino revenue sharing into perpetuity, effectively corrupting the political will of elected officials to protect the welfare of the public. The development agreements shield the investors with tribal immunity, permitting exemption from a state's environmental and civil laws, zoning, general plans, taxation and ground water statutes for auxiliary developments that enhance the casino and investor profits.

We fully support the draft language of 502.25. All collateral agreements must be reviewed to prevent fraud, money laundering and self-enrichment of investors to the detriment of a Tribe and the surrounding host community.

## Conclusion

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<sup>12</sup> The Federated Miwoks of the Graton Rancheria were recognized by an Act of Congress (2000) carried by U. S. Senator Barbara Boxer. Citizens at the time raised significant concerns over conflicts of interest regarding the legislation as Senator Boxer's son Doug Boxer was involved with Kenwood Investments No. 2. The Federated Coast Miwoks (Petitioner group #154) had petitioned under the Part 83 process for federal recognition but investor attorneys expedited this tribal group's recognition by joining it with the two Indians residing on the Graton Rancheria and then declaring the new group a restored Tribe. The restored Tribe was defined as landless. Station Casinos and Kenwood Investments No. 2 were then able to shop for a lucrative casino location on Highway 101 within the San Francisco market area.

Mr. Austin Badger  
October 15, 2018  
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For all of the foregoing reasons, we request that NIGC prepare a supplemental EIS, including a revised traffic impact and water supply analyses, for the Casino Project to address the issues raised in this letter. We also request that the NIGC expand its review of the management contract to include all related agreements.

Very truly yours,



Odin A. Smith

Attachment

Department of Water Resources  
Michael L. Peterson, Director



Including service to the Cities of  
Elk Grove and Rancho Cordova

SACRAMENTO COUNTY  
WATER AGENCY

**Date:** March 6, 2017

**To:** Jeff King – CEO Analyst  
County of Sacramento

**From:** Mike Huot – Principal Civil Engineer *MH*  
Sacramento County Water Agency

**Subject:** SCWA Comments on the Draft Municipal Service Review for the Proposed  
Kammerer/99 Sphere of Influence Amendment (LAFC #07-15) Draft Environment  
Impact Report

Sacramento County Water Agency (SCWA) reviewed the subject document and has the following comments:

1. SCWA is a potential water purveyor for the area and will consider supplying water to the area. Please contact SCWA to begin preparing for this scenario.
2. Should SCWA serve the area with water, there will be additional requirements. A list of potential requirements is listed below and more requirements may be added in the future.
  - a. Adding the area to Zone 40 and Zone 41.
  - b. Updating or amending the existing Zone 40 Water Supply Master Plan.
  - c. Updating or amending the existing Water System Infrastructure Plan.
  - d. Adding demand to the Urban Water Management Plan.
  - e. Performing a Water Supply Assessment for the project as determined by the land use planning agency.
3. Should SCWA serve the area, additional infrastructure will be required. At a minimum this will include a ground water treatment plant and storage facilities, water wells, and transmission and distribution mains. The size and number of facilities will be determined by the water demand. The new water system will be required to connect to the existing Zone 40 system.
4. Additional surface water and groundwater supplies need to be procured to serve the area with water and continue the conjunctive use program. Recycled water supplies may serve some of this demand if they are available. At this time SCWA's water supply portfolio is fully allocated in the current Zone 40 service area. One additional potential source of supply could be groundwater banked through the South County Agriculture & Habitat Lands Recycled Water Program that is planned for the future.

Electronic Copy: P:\Shared Folders\Wsplandev\County CEQA Comments-Protests\Sacramento County