August 22, 2024

Via Electronic Mail

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RE: EA Comments, Scotts Valley Casino and Tribal Housing Project

Dear Regional Director Dutschke and Mr. Broussard:

On behalf of the Federated Indians of Graton Rancheria (FIGR or the Tribe), I submit these comments on the Environmental Assessment (EA) for the Casino and Tribal Housing Fee-to-Trust Project (Project) proposed by the Scotts Valley Band of Pomo Indians in the City of Vallejo, Solano County, California. The U.S. Bureau of Indian Affairs (BIA) published notice of the EA on July 8, 2024, and availability for public comment ending August 7, 2024. On July 17, 2024, the Tribe requested a 60-day extension to the public comment period due to the long, technical, and complex nature of the EA and supporting appendices.[1] At a virtual public hearing on July 30, 2024, the BIA announced that the public comment period was extended to August 22, 2024.

[1] Letter from FIGR Chairman Greg Sarris to BIA Pacific Regional Director Amy Dutschke and BIA Environmental Protection Specialist Chad Broussard (July 17, 2024). This and other FIGR correspondence referred to in this letter are incorporated by reference.

The Tribe is composed of Southern Pomo and Coast Miwok people. Our aboriginal territory includes Sonoma County and Marin County and our reservation is located adjacent to the City of Rohnert Park in Sonoma County. FIGR, like other California tribes, maintains a close connection to our ancestors and cultural resources throughout our ancestral territory. This Project will have significant effects on the sovereignty, rights, and cultural resources of local tribes in whose ancestral territory this Project is located. Under the National Environmental Policy Act (NEPA), the BIA is required to prepare an environmental impact statement (EIS) to assess these significant impacts. Additionally, the BIA must consider an alternative site for the Project within Lake County, the location of the Scotts Valley Band's ancestral territory.

I. Guiding Authority on the Need for the BIA To Complete an EIS for the Project

The goal of NEPA is to ensure that agencies engage in informed decision making before approving federal actions that may have significant environmental impacts.[2] A critical aspect of informed decision making is notifying the public of the proposed action, sharing the relevant data and studies, and providing a meaningful opportunity for public comment.[3] Public comment allows the agency to better understand the nature and severity of impacts, that is, the significance of impacts, which in turn informs the agency's decision whether to prepare a full EIS.

NEPA is clear that the BIA must issue an EIS for any proposed action that has a "reasonably foreseeable significant effect on the quality of the human environment."[4] The significance of impacts need not be determined with absolute certainty. As the Ninth Circuit has explained, an "EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'"[5] The volume and nature of negative public comment may be indicative of the degree to which "substantial questions" have been raised regarding the effects of the proposed action and whether serious

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[2] *See* 42 U.S.C. § 4332(c); *see also South Fork Band Council of Western Shoshone v. Dep't of Interior,* 588 F.3d 718, 725 (9th Cir. 2009) ("An adequate EIS is essential to informed agency decision-making and informed public participation, without which the environmental objectives of NEPA cannot be achieved."); *Am. Rivers v. Fed. Energy Regul. Comm'n*, 895 F.3d 32, 49 (D.C. Cir. 2018) ("NEPA's primary function is information-forcing, compelling federal agencies to take a hard and honest look at the environmental consequences of their decisions.") (internal citations and quotations omitted).

[3] *See, e.g., Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (explaining the "informational role" that NEPA plays in assuring the public that the agency "has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, provide a springboard for public comment in the agency decisionmaking process itself.") (internal citations and quotations omitted); *see also* 40 C.F.R. § 1501.5(f) (requiring agencies to involve the public, state, tribal, and local governments to the extent practicable when preparing EAs).

[4] 42 U.S.C. § 4336(b)(1).

[5] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal citation omitted). Similarly, the D.C. Circuit has long held that if "*any* 'significant' environmental impacts might result from the proposed agency action, then an EIS must be prepared *before* the action is taken." *Am. Bird Conserv., Inc. v. F.C.C.*, 516 F.3d 1027, 1034 (D.C. Cir. 2008) (per curiam) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1412-13 (D.C. Cir. 1983)).

doubts have been cast upon the reasonableness of the agency's conclusions.[6] To the extent that public commenters have "urged that the EA's analysis was incomplete, and the mitigation uncertain, they cast substantial doubt on the adequacy of the [agency's] methodology and data."[7] Here, major questions exist regarding the many environmental and human impacts of the Project, particularly regarding impacts to tribal rights and cultural resources, as well as the adequacy of the EA's analysis of those impacts.

The EA relies heavily on cursory references to mitigation measures in concluding that significant impacts can be avoided. While mitigation measures can be utilized to reduce a particular impact to less-than-significant levels, federal courts have emphasized that such measures must be detailed and evaluated for efficacy. An agency's "perfunctory description of mitigating measures is inconsistent with the 'hard look' it is required to render under NEPA."[8] Rather, an "essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective."[9] Indeed, the Ninth Circuit has expressly warned that a "mitigation discussion without at least *some* evaluation of effectiveness is useless" in making the determination of whether anticipated environmental impacts can be avoided.[10] Furthermore, an agency may not take a wait-and-see approach with mitigation, even if certain data is unknown at the time of conducting the EA, because "NEPA requires that a hard look be taken, if possible, *before* the environmentally harmful actions are put into effect."[11]

Ultimately, if the BIA were to issue a Finding of No Significant Impact rather than proceed with an EIS, it must demonstrate that it "has taken a hard look at the consequences of its actions, 'based its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant."[12] In other words, a decision *not* to prepare an EIS "will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant."[13] It is important to

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[6] *Nat'l Parks Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (internal quotations and citations omitted).
[7] *Id*.
[8] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F. 3d 1372, 1380 (9th Cir. 1998).
[9] *South Fork Band,* 588 F.3d at 727; *see also Neighbors of Cuddy Mountain*, 137 F. 3d at 1381-82 (rejecting an EIS as incomplete because, among other flaws, the Forest Service had not "provided an estimate of how effective the mitigation measures would be if adopted."); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 930-31 (D.C. Cir. 2017) (explaining that courts must ensure that the agency, in deciding not to prepare an EIS, "has shown that even if there is an impact of true significance, an [EIS] is unnecessary because changes and safeguards in the project sufficiently reduce the impact to a minimum.") (internal quotations omitted).
[10] *South Fork Band,* 588 F.3d at 727 (emphasis in original).
[11] *Id.* (holding that the agency's limited understanding of the site's hydrologic features did not relieve the agency of its responsibility to assess whether mitigation measures could be effective in avoiding impacts to groundwater).
[12] *Nat'l Parks*, 241 F.3d at 730 (internal quotations and citations omitted).
[13] *Blue Mountains*, 161 F.3d at 1211 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)) (internal quotation omitted); *see also Am. Wild Horse*, 873 F.3d at 931 (holding that an agency's decision not to prepare an EIS was improper because it "failed to make a convincing case for its finding of no significant impact.") (internal quotation omitted).

always keep in mind both the underlying policy and the real-life stakes. As the Ninth Circuit declared, while quoting the U.S. Supreme Court, "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'"[14]

As detailed below, there are substantial questions regarding the impacts to tribal rights and cultural resources. A substantial dispute exists as to whether the evidence, or lack thereof, actually supports the EA's findings of no significant impact. Furthermore, the mitigation measures offered by the EA are inadequate. They provide no reasonable assurances that significant impacts will be addressed in a realistic and proportionate matter. Nor are there critical enforcement mechanisms in place to ensure that the Project proponent will keep its mitigation commitments once the Project is approved. For these reasons, the contemplated mitigation measures do not meaningfully reduce the significance of the likely impacts and are not an adequate replacement for a comprehensive EIS. We urge the BIA to prepare an EIS for the Project.

II. A Decision Not To Prepare an EIS is Wholly Inconsistent with BIA Practice

For all the reasons described in this letter, the BIA should proceed with preparing an EIS. Furthermore, failing to prepare an EIS would be arbitrary, capricious, and inconsistent with BIA practice. The EA describes Alternative A (the project proponent's preferred alternative) as the transfer of 160 acres in trust to construct a 108-foot tall casino with 3,500 gaming devices, 130 table games, 51,603 square feet of restaurants and kitchens and bars seating 600 patrons—comprising 614,959 square feet.[15] There will also be a 1,595,001 square foot parking garage and 12,555 square foot tribal administration building.[16] Further, the Project site would host 24 homes for tribal housing.[17] The Project also contemplates the need for a 1.5-million-gallon steel storage tank or at least two wells for water supply, a wastewater treatment plant, and recycled water reuse facilities that could include a 100,000-gallon recycle water storage tank and up to 64.5 acre-feet of seasonal storage.[18] It will require specialized grading and stabilization techniques due to geotechnical conditions, including slow-moving landslides, requiring 767,000 cubic yards of fill.[19] It is clear that a project of this scale will have a significant impact on the quality of the human environment. In fact, BIA's practice has long been to conduct the more comprehensive review demanded by an EIS for tribal gaming projects of this nature.

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[14] *Blue Mountains*, 161 F.3d at 1216 (quoting *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 371 (1989).
[15] EA at 2-1, 2-6.
[16] EA at 2-6.
[17] EA at 2-6.
[18] EA at 2-7, 2-8.
[19] EA at 2-9.

For example, on July 8, 2024, the BIA issued a draft EIS for the Koi Nation Shiloh Resort and Casino, a project involving a similar scope of development as the Scotts Valley Band's Project. The Koi Nation project proposes the acquisition of 68.6 acres in trust to construct a three-story casino with 2,750 gaming devices, 105 table games, a food court, five restaurants, and four service bars—comprising 538,137 square feet.[20] The Koi Nation proposes a five-story, 400-room hotel with spa, ballrooms/meeting space, and event center—comprising 268,930 square feet.[21] Additionally, the site would contain a four-story parking garage and paved surface parking lot providing 5,119 parking spaces—comprising 1,689,380 square feet.[22] Lastly, the project anticipates an on-site potable water treatment plant and storage tank, on-site wastewater treatment facilities (including a wastewater treatment plant, 4-acre seasonal storage pond, storage tank, and pump station), as well as "up to" two new water supply wells and potentially a fire station.[23] The BIA issued a draft EIS for the Koi Nation project even though it has a smaller footprint than the present Project (68 acres compared to 160 acres) and is located on a relatively flat parcel that does not have the significant grading and stabilization challenges of the Vallejo parcel.

Similarly, in 2020 the BIA issued a final EIS for the Tejon Indian Tribe's acquisition of land for a casino project similar in scope to the Project. The Tejon Indian Tribe proposed the trust acquisition of 306 acres of land in order to construct a 715,800 square foot Class III gaming facility with casino, restaurants, entertainment and retail space, a fire and police station, RV park, water treatment facilities, and 400-room hotel.[24] Prior to trust transfer, the site consisted primarily of agricultural land with rural residential housing and commercial development.[25] Further, in 2019 the BIA issued a final EIS for the Tule River Indian Tribe's relocation of its casino—a project involving less acreage and less casino square footage than the Project. Specifically, the Tule River Indian Tribe's project involved the trust acquisition of 40 acres of land for a 104,637 square foot gaming facility with a casino, food and beverage facilities, events center, conference center, parking, and 250-room hotel.[26] The 40-acre site was located next to the municipal airport and consisted of mixed-use, dominated by agricultural uses, prior to the approval of the project.[27]

Two other recent examples include the BIA's preparation of an EIS for the Wilton Rancheria casino project and also for the Soboba Band of Luiseño Indians Horseshoe Grande

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[20] BIA, Draft Environmental Impact Statement, Koi Nation of Northern California Shiloh Resort and Casino Project (May 2024) (hereinafter Koi Nation DEIS) at 2-1, 2-2.
[21] Koi Nation DEIS at 2-1, 2-2.
[22] Koi Nation DEIS at 2-1, 2-2, 2-4.
[23] Koi Nation DEIS at 2-7 – 2-11.
[24] BIA, Final Environmental Impact Statement, Tejon Indian Tribe Trust Acquisition and Casino Project (Oct. 2020) (hereinafter 2020 Tejon FEIS) at 2-1 – 2-2.
[25] *Id.* at 2-1.
[26] BIA, Final Environmental Impact Statement, Tule River Indian Tribe Fee-to-Trust and Eagle Mountain Casino Relocation Project (Apr. 2019).
[27] *Id.* at 2-1.

casino project—both of which involved parcels that had already been partially developed. In 2016, BIA finalized its EIS evaluating the trust acquisition of 36 acres of land for the Wilton Rancheria that had already been partially developed as a shopping mall. The Wilton Rancheria project involved the construction of a 608,756 square foot gaming facility (similar in size to the Scotts Valley Band's 614,959 square foot facility).[28] In 2013, the BIA issued a final EIS for the trust acquisition of 535 acres of land for the Soboba Band of Luiseño Indians. A portion of the large site was already being used for a tribal golf course, but 55 undeveloped acres were evaluated by the BIA for construction of a 729,500 square foot gaming facility (again, similar in size to the Scotts Valley Band's 614,959 square foot facility), as well as two fire stations and a gas station.[29] Importantly, there is no reasonable basis for concluding that these recent tribal casino-resort projects required an EIS but the current Project somehow does not.

Of course, an EA may be appropriate for certain tribal casino projects. For example, the BIA prepared an EA for the Agua Caliente Cathedral City Casino. That project, however, was a fraction of the size of the Project, with only 13 acres of land being acquired in trust for purposes of constructing a small casino (500 gaming devices), parking lot, tribal office space, and other ancillary facilities, totaling 125,000 square feet of development.[30] Importantly, the site had already been developed, including utility connections, and the proposed use was consistent with local land use zoning and in furtherance of the Agua Caliente's shared goal with the local municipal entities to redevelop the parcel as part of a larger downtown revitalization project.[31] The parcel was adjacent to the Agua Caliente's existing reservation, greatly minimizing any potential impacts on the sovereign rights of other tribes.[32]

Here, on the other hand, the Project site is largely undeveloped, bordered on the west by I-80 with commercial development to the south and undeveloped land to the north and east,[33] and the site is 70 miles from the Scotts Valley Band's historic rancheria (and within the aboriginal and cultural territory of Patwin-speaking people).[34] The Project is much more like the

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[28] BIA, Final Environmental Impact Statement / Tribal Project Environmental Document, Wilton Rancheria Fee-to-Trust and Casino Project (Dec. 2016) (hereinafter 2016 Wilton Rancheria FEIS) at ES-4–ES-5.
[29] BIA, Final Environmental Impact Statement, Horseshoe Grande Fee-to-Trust Project (Sept. 2013) at ES-1.
[30] BIA, Draft Environmental Assessment / Tribal Environmental Impact Report, Agua Caliente Band of Cahuilla Indians Cathedral City Fee-to-Trust Casino Project (Oct. 2018) (hereinafter 2018 Agua Caliente Draft EA) at 6–7; *see also* BIA, Final Environmental Assessment / Tribal Environmental Impact Report, Agua Caliente Band of Cahuilla Indians Cathedral City Fee-to-Trust Casino Project (July 2019).
[31] 2018 Agua Caliente Draft EA at 2, 4, 8, 10, 39–40; *see also* Tara Sweeny, Assistant Secretary – Indian Affairs, Finding of No Significant Impact for the Agua Caliente Band of Cahuilla Indians Cathedral City Fee-to-Trust Casino Project at 3 (Oct. 7, 2019).
[32] 2018 Agua Caliente Draft EA at 2.
[33] EA at 1-7.
[34] Letter from Yocha Dehe Wintun Nation Chairman Anthony Roberts to Secretary of the Interior Deb Haaland (Nov. 28, 2023) at 1-2; Letter from FIGR Chairman Greg Sarris to U.S. Department of the Interior Principal Deputy Assistant Secretary – Indian Affairs John Tahsuda (Feb. 27, 2019) at 2; Letter from FIGR Chairman Greg Sarris to U.S. Department of the Interior Acting Assistant Secretary – Indian Affairs Larry Roberts (Nov. 10, 2016) at 1-2; Letter from FIGR Chairman Greg Sarris to BIA Pacific Regional Director Amy Dutschke (Aug. 9, 2024) at 1-2.

Koi Nation, Tejon Indian Tribe, Tule River Indian Tribe, Soboba Band of Luiseño Indians, and Wilton Rancheria projects, all of which were subject to an EIS. Further, the Project is akin to the Nottawaseppi Huron Band of Potawatomi Indians' proposed casino project, for which the D.C. District Court held in an unreported case that the BIA's preparation of an EA was insufficient.[35] That project concerned the acquisition in trust of 79 acres to construct a 200,000 square foot facility, 1,200 to 1,400 slot machines, 60 gaming tables, and a 3,100-space parking lot.[36] The District Court stated that it appeared such a project would entail "a multitude of significant direct impacts," and remanded the EA's findings to the contrary back to the BIA.[37] Similarly, relying solely on an EA to evaluate the current Project is inappropriate because, as detailed in our comments, this Project will have significant direct, indirect, and cumulative impacts on tribal rights and cultural resources. It would be arbitrary and capricious for the BIA to conclude otherwise and forego its standard practice of preparing a full EIS for this type of casino project.

III. The BIA Must Consider an Alternative Project Location Within Lake County

The Scotts Valley Band's ancestral territory is located in Lake County.[38] The EA, however, does not include an alternative for the Project at a site within Lake County.

NEPA requires the BIA to consider reasonable alternatives that are "technically and economically feasible, and meet the purpose and need for the proposed action."[39] The EA Appendix F states that five screening criteria were applied to the selection of development alternatives: 1) the extent to which they meet the Project's purpose and need; 2) technical and economic feasibility; 3) regulatory feasibility, including establishing the requisite connection for a restored lands determination; 4) ability to avoid or minimize environmental impacts; and 5) ability to contribute to a reasonable range of alternatives.[40] An alternative location within Lake County would satisfy all of these criteria.

The BIA provides a cursory explanation for why it eliminated alternative project sites in Lake County. The BIA dismisses an existing 33.5-acre parcel in Lake County because the Scotts Valley Band intends to expand residential use on the site and states that the land was acquired with funding from the Department of Housing and Urban Development.[41] The BIA does not explain whether that funding source would prohibit the use of the parcel as proposed for the

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[35] *Citizens Exposing Truth About Casinos v. Norton*, No. CIV A 02-1754 TPJ, 2004 WL 5238116 (D.D.C. Apr. 23, 2004), aff'd sub nom. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007).
[36] *Id*. at *1, *7.
[37] *Id.* at *6, *10.
[38] *See* Decision Letter from Principal Deputy Assistant Secretary – Indian Affairs to the Scotts Valley Band Chairman Shawn Davis (Feb. 7, 2019) at 4 (explaining that the Scotts Valley Band traces genealogical descent from the Mo-al-kai, who were located in Scotts Valley, west of Lakeport, on the western shore of Clear Lake.)
[39] 40 C.F.R. § 1508.1(hh); *see also* 40 C.F.R. § 1502.14.
[40] EA Appendix F at 1.
[41] EA Appendix F at 3.

Project, nor does it explain why residential use on that parcel would prevent this Project, which proposes its own residential housing development, from moving forward on that parcel. The BIA dismisses consideration of any other parcel in Lake County as highly speculative.[42]

The stated purpose and need for the Project is to facilitate tribal self-sufficiency, self-determination, and economic development.[43] There are currently four tribal casinos operating in Lake County.[44] Other tribal commercial development enterprises, too, have helped to advance the self-sufficiency, self-determination, and economic development of several tribes in Lake County.[45] Different locations result in different opportunities for economic development, but the ability to satisfy the stated purpose and need and economic feasibility of this Project in Lake County has been demonstrated by other tribes in Lake County.

Dismissing alternative sites due to technical or economic feasibility is not supported by the record. It is not "highly speculative" to claim that Lake County is a viable location for a casino capable of funding tribal government, as four tribal casinos are currently in operation there. While competition from the other casinos may affect the amount of revenue a project could expect, the same assumption can be made for the proposed Project as there are other nearby tribal casinos in Sacramento, Sonoma, and Yolo Counties that the Project would be competing against.[46] Further, a brief internet search reveals that the median property value in Lake County is substantially lower than in Solano County, making investment in Lake County more affordable.[47] Moreover, there are currently available sites in Lake County that are well situated for tourism and large-scale development.[48] Without providing any market data, it is not

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[42] EA Appendix F at 3.
[43] EA at 1-2.
[44] *See* California Gambling Control Commission, Tribal Casino Locations Alphabetical by Tribe as of August 31, 2023 (available at https://www.cgcc.ca.gov/documents/Tribal/2023/List_of-Casinos_alpha_by_tribe_name.pdf) (last visited August 12, 2024). The casinos are operated by the Habematolel Pomo of Upper Lake, Middletown Rancheria of Pomo Indians, Robinson Rancheria, and Big Valley Band of Pomo Indians of the Big Valley Rancheria.
[45] *See, e.g.,* R Pomo Pumps operated by the Robinson Rancheria, Habemco operated by the Habematolel Pomo of Upper Lake, and Uncle Buddy's Pumps operated by the Middletown Rancheria of Pomo Indians. *See also* page 1-4 of the EA for a fee-to-trust application approved by the BIA for a travel center operated by the Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria with the stated purpose and need of achieving economic self-sufficiency, providing employment opportunities for tribal members, and providing funding for tribal services.
[46] *See* California Gambling Control Commission, Tribal Casino Locations Alphabetical by Tribe as of August 31, 2023 (available at https://www.cgcc.ca.gov/documents/Tribal/2023/List_of-Casinos_alpha_by_tribe_name.pdf) (last visited August 15, 2024). *See also* EA Appendix A at 27 (summarizing regional competition for the Project).
[47] *See, e.g.*, National Association of Realtors, County Median Home Prices Q1 2024 (providing that the median home price in Solano County is $668,950, whereas the median home price in Lake County is $349,880), https://www.nar.realtor/research-and-statistics/housing-statistics/county-median-home-prices-and-monthly-mortgage-payment (last visited Aug. 12, 2024).
[48] *See, e.g.*, https://www.sothebysrealty.com/eng/sales/detail/180-l-518-4pnknt/5115-east-highway-20-nice-ca-95464 (57-acre property on the northeastern shores of Clear Lake, with existing buildings, infrastructure, and winery) (last visited August 15, 2024);
https://www.loopnet.com/Listing/5700-Roland-dr-Lucerne-CA/31159731/ (19.26 acres zoned for planned development commercial in Lucerne on the shore of Clear Lake with additional parcels potentially available) (last visited August 15, 2024);

reasonable for the EA to eliminate consideration of a project site in Lake County due to economic or technical feasibility.

Neither is elimination of a project site in Lake County reasonable due to regulatory feasibility. If anything, considerations of regulatory feasibility weigh in favor of locating the Project in Lake County and *against* locating it in Solano County. As discussed in more detail below, the Indian Gaming Regulatory Act (IGRA) requires the Scotts Valley Band to demonstrate a "significant historical connection" to the Project site for it to be eligible for gaming.[49] But the Scotts Valley Band cannot demonstrate a "significant historical connection" to the Project site, specifically, or Solano County more generally.[50] The Scotts Valley Band is an Eastern Pomo tribe aboriginally from Lake County, whereas the Project site in Solano County is the aboriginal territory of Patwin-speaking tribes. The Project parcel is known to contain Patwin cultural resources.[51] Nonetheless, the Scotts Valley Band claims it has a significant historical connection to Solano County.[52] Certainly, a project site in the Scotts Valley Band's aboriginal territory is regulatorily feasible, even more so than the proposed Project site in the City of Vallejo.

Further, the U.S. Department of the Interior (Interior) has held, in the context of denying a different California tribe's restored lands request, that it "cannot establish its subsistence use or occupancy based on the fact that its ancestors traveled to various locations to trade and interact with other peoples and then returned to the Clear Lake region."[53] Rather, Interior found that "[s]ubsistence use and occupancy requires something more than a transient presence in an area."[54] Accordingly, the BIA should have considered a project site that is actually within the Scotts Valley Band's aboriginal territory, as the BIA has done for similar projects.[55]

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https://www.loopnet.com/Listing/7590-CA-29-Hwy-Kelseyville-CA/32264455/ (337 acres with existing vineyards and view of Clear Lake near Kelseyville) (last visited August 15, 2024).

[49] 25 C.F.R. § 292.11(b).

[50] Decision Letter from Principal Deputy Assistant Secretary – Indian Affairs to the Scotts Valley Band Chairman Shawn Davis (Feb. 7, 2019) at 15-19.

[51] Letter from Yocha Dehe Wintun Nation Chairman Anthony Roberts to Secretary of the Interior Deb Haaland (Nov. 28, 2023) at 2; Letter from Yocha Dehe Wintun Nation Chairman Anthony Roberts to BIA Pacific Regional Director Amy Dutschke (July 22, 2024).

[52] Complaint at 8, *Scotts Valley Band of Pomo Indians v. Dep't of the Interior*, No. 19-CV-01544 (D.D.C.).

[53] Decision Letter Assistant Secretary Larry Echo Hawk to the Honorable Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians (Sept. 1, 2011) at 14.

[54] *Id* at 14, 15.

[55] *See, e.g.*, 2020 Tejon FEIS at ES-2, 1-2 (considering an alternative at a location within the reservation area identified for the tribe under an un-ratified 1851 treaty); 2016 Wilton Rancheria FEIS at 1-2, 1-3 (considering, among the alternatives, the tribe's historic rancheria site, which was no longer held in trust); Dep't of Interior, Record of Decision for Trust Acquisition of the 40-acre Yuba County Site in Yuba County, California, for the Enterprise Rancheria of Maidu Indians of California (Nov. 2023) (incorporating the Final EIS and considering, among the alternatives, the tribe's historic rancheria site which was held in trust for the tribe); BIA, Final Environmental Impact Statement, North Fork Rancheria of Mono Indians (Feb. 2009) (considering, among the alternatives, the tribe's historic rancheria site which was held in trust for individual North Fork members).

IV. The Project Will Have Significant Impacts to Tribal Rights and Cultural Resources

NEPA requires federal agencies to provide a full and fair discussion of significant effects to the environment in an EIS.[56] A significant effect can take many forms depending on a project's context, including impacts to sensitive resources and tribal communities and enduring effects.[57] Within this context, an agency must consider the extent to which the proposed action may adversely affect cultural resources or sacred sites, violate or be inconsistent with federal, state, or tribal law, or adversely affect the rights of tribes.[58] This includes reasonably foreseeable indirect effects and cumulative effects resulting from other past, present, and reasonably foreseeable actions.[59]

The Scotts Valley Band's ancestral territory does not include the Project site. As a result, the approval of this Project will have significant direct, indirect, and cumulative effects on the sovereignty, rights, and cultural resources of tribes in Solano County who are culturally affiliated with this location.

State law currently applies to the Project site, which is owned in fee. If any Native American human remains and associated cultural resources are found at a site subject to state law, the county coroner notifies the Native American Heritage Commission (NAHC), which will immediately notify those most likely descended from the Native American decedent.[60] The landowner must then work with the most likely descendants to determine appropriate treatment of the remains.[61] A landowner may also develop agreements with appropriate Native American groups for the handling of Native American human remains.[62] The NAHC interprets these provisions to mean that the most likely descendant and the appropriate Native American group will be culturally affiliated with the remains discovered.[63] The NAHC only designates a most likely descendant from the tribal ancestral territory where the remains were discovered.[64] Thus, under state cultural resources law, if Native American human remains are located on the Project site, only a tribe whose ancestral territory includes the parcel could be recognized as culturally affiliated with the land and eligible to be a most likely descendant or reach agreement with the

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[56] 40 C.F.R. § 1502.1(b).
[57] 40 C.F.R. § 1501.3(d).
[58] 40 C.F.R. § 1501.3(d)(2).
[59] 40 C.F.R. §§ 1508.1(i); 1508.1(i)(2) (defining indirect effects as those caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable), 1508.1(i)(3) (describing cumulative effects as resulting from "the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions").
[60] Cal. Public Resources Code § 5097.8; Cal. Health and Safety Code § 7050.5. State law refers to associated cultural items as "associated grave goods." Cal. Public Resources Code § 5097.98(a).
[61] Cal. Public Resources Code § 5097.98(b).
[62] Cal. Public Resources Code § 5097.94(l).
[63] NAHC, Most Likely Descendant Procedures (MLD Procedures) at 3,4 (available at https://nahc.ca.gov/wp-content/uploads/2023/01/NAHCMLDProceedures.pdf) (last visited August 12, 2024).
[64] MLD Procedures at 6.

landowner on appropriate treatment and disposition of the remains. The Scotts Valley Band, which is an Eastern Pomo tribe whose ancestral territory is located in Lake County, would not be considered a most likely descendant or culturally affiliated with the Project site under state law. The Scotts Valley Band currently has no say in the disposition of Native American human remains at the Project location.

This changes significantly if the Project site is taken into trust, at which point federal law, including NAGPRA, would apply to any human remains or sensitive cultural items found at the Project site. NAGPRA recognizes that tribes maintain rights in Native American human remains and cultural items, such as funerary and sacred objects.[65] It provides a process for the protection of these items that are found on federal or tribal lands.[66] If human remains or cultural items are discovered, NAGPRA establishes a priority order for their disposition, beginning with:

1) A known lineal descendant,
2) The tribe whose tribal lands the items were discovered on or removed from,
3) The tribe with the closest cultural affiliation.[67]

Cultural affiliation requires a reasonable connection that may be clearly demonstrated by available information or reasonably identified based on the location the item was discovered.[68]

NAGPRA essentially recognizes that a known lineal descendant would have the closest connection to the human remains or cultural items, and thus should have the highest priority. The tribe on whose land the cultural resources are discovered has the next highest priority because typically that tribe would have the closest cultural connection to the site. Indeed, most tribes in California have reservation lands within their ancestral territory. Therefore, similar to state law, the clear intent of NAGPRA is to ensure that human remains found on federal lands go to either a known lineal descendant or the tribe with the most direct cultural connection to the land where the remains were found.

Taking the Project parcel into trust on behalf of the Scotts Valley Band would turn this approach on its head. The tribes with the greatest cultural affiliation would be dispossessed of these profoundly sensitive cultural resources. Under state law, the Yocha Dehe Wintun Nation is the most likely descendant for the Project site.[69] It would control the disposition of any Native American human remains or cultural items found on site. Once the Project parcel is taken into trust, this will no longer be the case. Under NAGPRA, the Scotts Valley Band would receive priority for ownership and control of Native American remains and cultural objects. The most

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[65] 43 C.F.R. §§ 10.1(a); 10.2 (defining cultural items as a funerary object, sacred object, or object of cultural patrimony according to the traditional knowledge of a lineal descendant or tribe).
[66] 43 C.F.R. §§ 10.1, 10.5.
[67] 43 C.F.R. § 10.7(a).
[68] 43 C.F.R. §§ 10.2; 10.3(e)(1).
[69] Letter from Yocha Dehe Wintun Nation Chairman Anthony Roberts to Secretary of the Interior Deb Haaland (Nov. 28, 2023) at 1-2.

closely affiliated tribe will lose its rights to its cultural resources and be prevented under federal law from controlling those resources.

The unique characteristics of cultural resources and the inconsistency in treatment under state law versus NAGPRA results in a significant impact to tribal cultural resources.[70] BIA cannot allow one tribe to dispossess another tribe from its ancestors. Project approval would cause significant impacts to tribal sovereignty and tribal rights and cultural resources. There is no way to mitigate the complete loss of one tribe's connection to its ancestors. These impacts must be avoided and support the need for the BIA to consider an alternative location in Lake County as discussed above.

In addition, as discussed in FIGR's letter in response to the BIA's Part 151 Notice of Gaming Land Acquisition Application, converting the Project site into the Scotts Valley Band's tribal lands will inject confusion into the application of several other state laws implicating cultural resources and tribal sovereignty. [71] These state laws include:

- Senate Bill 18 (Cal. 2003) (Cal. Gov't Code § 65352.3) - requiring local governments to consult with tribes within their jurisdiction on the protection of tribal cultural resources prior to adopting or amending a general or specific plan for that area);
- Assembly Bill 52 § 1 (Cal. 2014) (Cal. Public Resources Code § 21080.3.1) - providing tribes a statutory right to consult on impacts to tribal cultural resources resulting from development projects, including determining appropriate mitigation measures such as the removal and repatriation of cultural resources; and
- California Native American Graves Protection & Repatriation Act of 2001 (Cal. Health and Safety Code §§ 8010 *et seq.*) - covering gaps in the federal NAGPRA and similarly imposing a duty on all state agencies and museums receiving state funding to identify and repatriate human remains and cultural items to culturally affiliated tribes.

Local jurisdictions like the City of Vallejo and Solano County will not know which tribes to consult with or defer to when implementing legal obligations under these state laws concerning tribal cultural resources and ancestor protection on nearby lands. This delay, confusion, and potential failure to consult with the culturally affiliated tribes will result in real, irreparable harm to the cultural resources and ancestors of local tribes with an aboriginal connection to the region. The EA makes no attempt to address, let alone mitigate, these serious concerns.

[70] *See* 40 C.F.R. § 1501.3(d) (significance requires analysis of adverse effects to unique characteristics of cultural resources and tribal sacred sites and inconsistencies with state and federal policies).
[71] Letter from FIGR Chairman Greg Sarris to BIA Pacific Regional Director Amy Dutschke (Aug. 9, 2024).

V. The Cultural Resource Mitigation Measures Are Inadequate

The EA summarily concludes that while there is a potentially significant impact to cultural and paleontological resources, such impact would be reduced to less-than-significant if mitigation measures are employed.[72] The mitigation measures, however, are poorly designed, fail to incorporate applicable law, and provide no guarantee that mitigation will be implemented properly or with the participation of culturally affiliated tribes.

To start, Cultural Resource Mitigation Measure A provides, in part:

> Ground-disturbing activities shall be monitored by a qualified archaeologist and Native American Tribal Monitor, particularly any activities that occur within 150 feet of the prehistoric chert quarry component of CA-SOL-275 (refer to Appendix I-1 for location). An archaeological monitoring program shall be established that includes consultation between the consulting archaeologist, BIA, and the project proponent.[73]

This mitigation measure is flawed in several respects. It does not specify who may properly serve as a Native American Tribal Monitor and there is no guarantee that the monitor will come from a culturally affiliated tribe. Further, the archaeological monitoring program is to include consultation between the consulting archaeologist, lead agency, and the project proponent, but there is no mention of consultation with any of the local culturally affiliated tribes. The measure should be revised to require the presence of a monitor from culturally affiliated tribes and consultation with such tribes when establishing the archaeological monitoring program.

Next, Cultural Resource Mitigation Measure B provides that:

> In the event of any inadvertent discovery of prehistoric or historic archaeological resources during construction-related earthmoving activities, all such finds shall be subject to Section 106 of the NHPA as amended (36 CFR Part 800). Specifically, procedures for post-review discoveries without prior planning pursuant to 36 CFR § 800.13 shall be followed. All work within 50 feet of the find shall be halted until a professional archaeologist meeting the Secretary of the Interior's qualifications (36 CFR Part 61), or paleontologist if the find is of a paleontological nature, can assess the significance of the find in consultation with the BIA and other appropriate agencies. If any find is determined to be significant by the archaeologist or paleontologist and project proponent, a BIA representative shall meet with the archaeologist or paleontologist and project proponent to

[72] EA at 3-40.
[73] EA at 4-5.

> determine the appropriate course of action, including the development of a Treatment Plan and implementation of appropriate avoidance measures or other mitigation.[74]

This mitigation measure again excludes culturally affiliated tribes from the process, providing no role for them in assessing the significance of a find or in developing a Treatment Plan or other appropriate course of action. Ironically, and inappropriately, the project proponent—the Scotts Valley Band, which has no aboriginal connection to Solano County— is guaranteed a voice in this process, while local tribes from the area are excluded.

Moreover, this mitigation measure fails to identify and incorporate applicable federal law from NAGPRA and the Archaeological Resources Preservation Act (ARPA). NAGPRA provides a process for determining the ownership and control of Native American cultural items discovered on tribal lands.[75] ARPA also imposes a number of relevant requirements, including prohibiting the unauthorized evacuation, removal, or damage of archaeological resources on Indian lands.[76] Last, this mitigation measure fails to provide a clear explanation or description of how archaeological materials will be treated. While it refers generically to a Treatment Plan, it should specifically require that an Archaeological Research Design and Treatment Plan (ARDTP) be authored to guide archaeological evaluation and mitigation measures. The ARDTP should follow *Guidelines for Archaeological Research Designs* published by the California State Office of Historic Preservation and be reviewed by the BIA and all culturally affiliated tribes that requested to be a consulting party. Moreover, the ARDTP should be in place prior to commencing any ground-disturbing construction activities, rather than waiting until a discovery occurs.

Cultural Resource Mitigation Measure C provides that:

> If human remains are discovered during ground-disturbing activities the designated BIA representative for the project shall be contacted immediately. No further disturbance shall occur until the BIA representative has made the necessary findings as to the origin and disposition of the discovery. If the remains are determined to be of Native American origin, the appropriate provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) shall apply. Construction shall not resume in the vicinity until a plan for avoidance, removal or other disposition of the remains has been developed and implemented.[77]

[74] EA at 4-6.
[75] 25 U.S.C. § 3002(a); 43 C.F.R. § 10.4, 10.5.
[76] 16 U.S.C. §§ 470aa–470hh; *see also* 43 C.F.R. § 7.4.
[77] EA at 4-6.

This mitigation appropriately specifies the application of NAGPRA, but similar to the issues with the prior two mitigation measures, culturally affiliated tribes are not consulted for the disposition of the human remains.

The incorporation of federal law in the second and third mitigation measures drives home the most concerning, indeed significant, impact of all: the Scotts Valley Band will be afforded superior rights to culturally affiliated tribes if any cultural resources or human remains are inadvertently discovered during or after the construction of the Project. Why? Because the federal action here will result in the property being transferred into trust for the Scotts Valley Band, thereby becoming the Scotts Valley Band's tribal lands. And under these various federal legal schemes, the Indian tribe on whose tribal lands such remains or objects are found has a custodial priority over Indian tribes with the closest cultural affiliation. We cannot imagine it was Congress' intent to create such an unjust scenario, but Congress likely was not envisioning a scenario where a tribe would acquire trust lands far outside of its aboriginal territory and in the aboriginal territory of another federally recognized tribe.

Finally, the EA provides for the following Cultural Resource Mitigation Measure D:

> If human remains are encountered during off-site improvements construction, work within 100 feet of the find shall halt immediately and the stipulations of the California Health and Safety Code Section 7050.5 shall be implemented. The California Health and Safety Code Section 7050.5 requires that the County Coroner be notified if human remains are discovered. . [sic] In addition, the designated BIA representative for the project should be immediately contacted regarding the discovery. If the County Corner determines that the remains are of Native American origin, the Coroner must, in accordance with PRC Section 5097, notify the Native American Heritage Commission (NAHC) within 24 hours of the identification. In turn, the NAHC will identify a Most Likely Descendent [sic], who will work with the Tribe, BIA, and the construction contractor to develop a plan for avoidance, removal or other disposition of the remains.[78]

This measure applies to off-site improvements on fee land, which would be subject to state law. Under state law as discussed above, the NAHC would notify the most likely descendants, who will have a close cultural affiliation. As a result, a culturally affiliated tribe would remain connected to its cultural resources on off-site locations, but not on the Project parcel, which would be subject to NAGPRA. However, the measure also injects the Scotts Valley Band into this equation by specifying that the most likely descendant "will work with the Tribe, BIA, and the construction contractor" to develop a plan for appropriate disposition. This is in conflict with

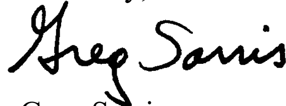
[78] EA at 4-6.

state law, which requires the landowner to work with the most likely descendant.[79] There is no role for the Scotts Valley Band in these discussions. The measure should be revised to follow the required state law process.

IV. Conclusion

The proposed Project, if approved by BIA, will have significant, unmitigated impacts to the rights and cultural resources of tribes culturally affiliated with the Project location. The BIA must complete an EIS for the Project consistent with its approach to other tribal gaming projects of this scale and to ensure the hard look required by NEPA for an informed decision. An alternative location within Lake County would meet the purpose and need for this Project and avoid the significant effects of this Project on tribal sovereignty, rights, and cultural resources. The Tribe urges the BIA to conduct a comprehensive EIS for the Project and properly consider this decision in its role as trustee for *all tribes*.

Sincerely,



Greg Sarris
Chairman

[79] Cal. Public Resources Code §§ 5097.94(l), 5097.98(b).