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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
ASSISTANT SECRETARY – INDIAN AFFAIRS

BRIAN KRAMER AND SUZANNE KRAMER; COUNTY OF SANTA BARBARA, CALIFORNIA; NO MORE SLOTS; LEWIS P. GEYSER AND ROBERT B. CORLETT; PRESERVATION OF LOS OLIVOS; SANTA YNEZ VALLEY CONCERNED CITIZENS; ANNE (NANCY) CRAWFORD-HALL and SANTA YNEZ VALLEY ALLIANCE,
APPELLANTS,

v.

PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,
APPELLEE.

OPENING BRIEF OF APPELLANT ANNE CRAWFORD-HALL

Table of Contents

INTRODUCTION

This is an appeal by Appellant Anne (Nancy) Crawford-Hall from the December 24, 2014 Notice of Decision ("Decision") issued by the Pacific Regional Director of the Bureau of Indian Affairs ("BIA"), approving the Application of the Santa Ynez Band of Chumash Mission Indians ("Applicant") to Have the Land commonly Known as "Camp 4" Accepted by the United States in Trust, and the underlying Finding of No Significant Impact ("FONSI") and Final Environmental Assessment, Volumes I and II (May 2014) ("EA"), on which the Decision is based.

Camp 4 is comprised of over 1,400 acres in the Santa Ynez Valley of Santa Barbara County, California. It is zoned for agricultural use, governed by the County General Plan and the Santa Ynez Valley Community Plan. It is surrounded by other agricultural ranching, farming, and low density property uses, and it is accessed by narrow rural roads. Applicant owns Camp 4 in fee simple, and seeks to develop Camp 4 free from State and local land use restrictions. Applicant anticipates constructing 143 one-acre residential units (for an uncertain number of residents), access roads, meeting facilities (with a 250-car parking lot), on-site wastewater treatment facilities, and drilling an additional two new wells (the "Proposed Action"). The meeting facility will host 100 events per year, each of which will draw 400 visitors plus vendors, with corresponding water usage, traffic, noise, and waste. The development will remove protected mature oak trees (six inches or greater in diameter at breast height) and build on wetland areas that are important to wildlife habitat. The Proposed Action would drain scarce groundwater resources in a time of historical drought, harm neighboring livestock and crop operations, and place untold (and unpaid-for) increased demands on the infrastructure and on the community's fire, police, and medical first responders. The Proposed Action is so significant that the FONSI had to rely on over 100 separate mitigation measures to reduce its impacts on the land and environment. There is no evidence in the record that any of these mitigation measures could actually be implemented or enforced.

Appellant Ms. Crawford-Hall[1] owns and works on agricultural land directly south and southwest of Camp 4. She has appealed because the Decision is invalid for at least four major

[1] Ms. Crawford-Hall appeals in her personal capacity and as representative of various entities, which hold, manage, and operate real property and businesses, including the San Lucas Ranch LLC and Holy Cow Performance Horses LLC

reasons.[2] First, BIA lacks authority to transfer Camp 4 into trust. The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461, *et seq*., gives BIA discretion to transfer land into trust only to members of recognized Indian tribes who were under Federal jurisdiction when the IRA was enacted on June 18, 1934. 25 U.S.C. § 479; *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). BIA had no evidence that Applicant was a "recognized tribe" or "under Federal jurisdiction" in 1934.

Second, the Decision violates the National Environmental Policy Act's ("NEPA's") requirement to issue an environmental impact statement ("EIS") for a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Here, BIA's FONSI and Decision relied on a fundamentally flawed EA despite significant impacts, and therefore cannot stand.

Third, BIA failed to satisfy regulatory requirements to transfer land into trust. 25 C.F.R. §§ 151.10(b), (c), (e), (f), (g). In evaluating these requirements, BIA must "give greater scrutiny to the tribe's justification of anticipated benefits" than it would to an on-reservation property transfer, since Camp 4 is off-reservation. 25 C.F.R. § 151.11(b). Here, however, BIA improperly dismissed valid concerns as insignificant or non-existent. This failure to meet regulatory requirements invalidates the Decision.

Fourth, BIA erred in approving an Application which includes land which is not owned by the Applicant, including public rights of way and private easements. The Decision cannot stand as it ignores, and overrides, public and private rights to use Camp 4.

STANDING TO APPEAL

Ms. Crawford-Hall is an interested party because the Decision inflicts concrete environmental, aesthetic, and economic injuries on her. *See* Declaration of Anne (Nancy) Crawford-Hall dated December 23, 2014 ("Crawford-Hall Declaration", attached hereto as **Exhibit A**).[3]

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properties and facilities.

[2] Appellant understands that the Assistant Secretary will not address constitutional challenges. (*Capay Valley Coalition v. Pacific Regional Director*, Opn. of Asst. Secretary – Indian Affairs, August 14, 2015, fn. 52, citing *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 69 (2011). Appellant expressly reserves her rights to assert such challenges in an appropriate venue, including a challenge to the Constitutionality of the governing statutory and regulatory scheme.

[3] The Crawford-Hall Declaration was previously attached as Exhibit 2 to Appellant's Notice of Errata for Notice of Appeal and Statement of Reasons, served on the IBIA on January 30, 2015.

Camp 4 was previously part of Ms. Crawford-Hall's family's ranch, on which cattle, horses, and crops were raised sustainably since 1924. Ms. Crawford-Hall's present properties are located directly south and southwest of Camp 4. They include a horse breeding facility, cattle ranching operations, and crops and range which form a critical part of the grazing rotation her family has practiced for generations. Ms. Crawford-Hall regularly stays on the property, enjoying the natural beauty of the land, its open spaces and wildlife and its surroundings. *Id*. at ¶ 20-24; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992). She relies on water from the local wells for personal use, to water her cattle and horses, and to grow her crops. The Proposed Action would adversely affect Ms. Crawford-Hall (and the Valley's) scarce water resources. *See*, Crawford-Hall Declaration ¶ 21, 23-26; *see, Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003).

The Proposed Action inflicts injury with its development of dense residential units across the narrow rural street. *See, e.g., Tyler v. Cuomo*, 236 F.3d 1124, 1132 (9th Cir. 2000) (effects on neighboring land by number and size of buildings establish standing). The significant increase in traffic and noise caused by the additional residents and visitors will disturb the peaceful and quiet environment of San Lucas Ranch. *See* Crawford-Hall Declaration ¶ 28. The increased traffic, building and development, destruction of wetland, removal of local vegetation, increased water runoff, pollution and waste, nighttime lighting, paved roads and buildings will interfere with Appellant's cattle and horses and will affect the local habitat, including the wildlife that resides on and around Appellant's property. *Id*. at ¶¶ 5, 30, 35. Further, while the new residents' use of water will deplete the wells relied upon by Appellant, the development's irrigation and landscaping will generate gray water runoff which will pollute Ms. Crawford-Hall's crops and grazing fields to the south and southwest. *Id*. at ¶¶ 26, 35. These environmental impacts also will interfere with Appellant's management of and her environmental and economic interests in the San Lucas Ranch LCC and Holy Cow Performance Horses LLC. *Id*. at ¶¶ 31-43.

PROCEDURAL BACKGROUND

Applicant submitted its original application for the Camp 4 transfer from fee to trust in June, 2013 (AR0030). It supplemented its original application in July, 2013 (AR0032). The application was largely based on an approved Tribal Consolidation and Acquisition Plan ("TCAP"). In August,

2013, Applicant published an Environmental Assessment, also based on the approved TCAP ("2013 EA," AR0127). Applicant withdrew its TCAP "without prejudice" in October, 2013 (AR0061.00003). In November, 2013, Applicant submitted a revised application (the "Application," AR0080). A revised, final EA was published in May 2104 (the "EA," AR0194). Ms. Crawford-Hall submitted comments to BIA on these applications and EAs.[4] In those comments, she also adopted comments filed by others, including the County of Santa Barbara, all of which are re-adopted and incorporated herein.

Public comment on the EA closed on July 14, 2014. By early August, BIA had already decided *not* to prepare an EIS and was drafting a FONSI (AR0218), and was allowing Applicant to review BIA's draft document (AR0223). On October 17, 2014, BIA issued its FONSI (AR0237). Ms. Crawford-Hall submitted a comment letter on the FONSI (AR0247) and filed an appeal to the Interior Board of Indian Appeals ("IBIA") on the FONSI on November 21, 2014. On December 24, 2014, BIA issued the instant Decision. Appellant's appeal on the FONSI was dismissed as moot upon Appellant's statement of intent to appeal the Decision, and all issues set forth in her prior FONSI appeal are incorporated herein.

On January 29, 2015, Ms. Crawford-Hall timely filed a Notice of Appeal and Statement of Reasons challenging BIA's Decision. On February 9, 2015, the Assistant Secretary of Indian Affairs assumed jurisdiction over Ms. Crawford-Hall's appeal and consolidated it with other appeals of the BIA's Decision.

LEGAL DISCUSSION

A. BIA Lacks Authority To Grant The Application Because the Applicant Does Not Meet the Statutory Requirements To Invoke Fee-To-Trust Transfer.

Before approving an application to transfer land into trust, BIA must consider "the existence of statutory authority for the acquisition and any limitations contained in such authority." 25 C.F.R.

[4] Appellant's comment letters on the applications include AR0063 (10/16/2013) and AR0109 (12/28/2013). Appellant's comment letters on the EAs include Comment Letter P311 (10/4/2013) (AR0194.01441-1451) and Comment Letter P9 (7/11/2014) (AR0237.00323-00336)

§ 151.10(a). The IRA, 25 U.S.C. § 461, *et seq*., authorizes the Secretary to acquire land "for the purpose of providing land for Indians." 25 U.S.C. § 465. Title to such land is taken "in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* The term "Indian" means "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.

The Supreme Court has explained that "the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). Because the statute is unambiguous, the *Carcieri* Court refused to defer to a contrary agency interpretation. *Id.* at 390-391. In this case, Applicant was neither a "recognized Indian tribe" nor "under federal jurisdiction" when the IRA was enacted on June 18, 1934, and the Secretary therefore lacks authority to transfer land into trust.[5]

1. The Applicant was not a "recognized Indian tribe" on June 18, 1934.

The IRA was intended to benefit those Indian *tribes* federally recognized at the time of the IRA's passage. 25 U.S.C. § 479; s*ee Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975) ("the IRA was primarily designed for tribal Indians, and neither [the plaintiff] nor his relatives had any tribal designation, organization, or reservation at that time," when the IRA was enacted). The Supreme Court in *Carcieri* explained that "Congress' use of the word 'now' in this provision, without the accompanying phrase 'or hereafter,' . . . provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment." *Carcieri*, 555 U.S. at 389; see also, *United States v. John*, 437 U.S. 634, 650 (1978) (the IRA "defined 'Indians' . . . as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation [modification in original]").[6] Section 479 of the IRA thus requires that the "*Indian tribe*" must have been recognized on June 18, 1934.[7]

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[5] The Decision also cites the Indian Land Consolidation Act, 25 U.S.C. § 2202. However, that Act does not expand BIA's authority to take land into trust beyond that provided in the IRA. *See, Carcieri*, 555 U.S. at 394.

[6] *See also United States v. State Tax Comm'n of Miss.*, 505 F.2d 633, 642 (5th Cir. 1974) ("The language of Section 19

The term "recognized" denotes a political act that confirms the tribe's existence as a distinct political entity: "The most important condition [to the receipt of federal benefits under the IRA] is federal recognition, which is 'a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.'" *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting *Cohen's Handbook of Federal Indian Law* § 3.02[3]m at 138 (2005)). "The federal government has historically recognized tribes through treaties, statutes, and executive orders." *Id*.; see also, *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 214, 216 (D.C. Cir. 2013) (federal government interactions with *individuals* who descended from a tribe are not government-to-government interactions with the *tribal entity*, for purposes of recognition).

In 1933, the Supreme Court held that only Congress had the power to determine "'to what extent, and for what time [Indian tribes] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States.'" *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting *United States v. Sandoval*, 231 U.S. 28, 46 (1913). The Supreme Court subsequently also construed the term "federally recognized" in the IRA as designating a political status. *See Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). Indeed, the IBIA also has held: "Congressional authority over Indian affairs under the Constitution is based on tribes' political status, and if the Department has determined that a group is not a political entity with whom the Federal Government has a government-to-government relationship, *that group cannot be considered a 'tribe' within the meaning of the IRA*." *Estate of Elmer Wilson, Jr.*, 2008 I.D. LEXIS 37, *24 [47 IBIA 1, 11] (2008) (emphasis added).

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positively dictates that tribal status is to be determined as of June, 1934"); *State v. Salazar*, No. 08-cv-644, 2012 U.S. Dist. LEXIS 136086, *28 (N.D.N.Y. Sept. 24, 2012) ("[T]he operative question for a court or the Agency in determining whether trust authority may properly be exercised is whether the tribe in question was federally recognized and under federal jurisdiction in 1934 as opposed to whether the tribe was federally recognized and under federal jurisdiction at the time of the trust decision."); *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 160 n.6 (D.D.C. 1980).

[7] The legislative history confirms this reading of the IRA. The Senate and House sponsors of the IRA stated that Indians would not be "recognized" unless "they are enrolled at the present time," Hearing on S. 2755 before the S. Comm. on Indian Affairs, 73rd Cong. 264 (1934), and that the IRA only "recognizes the status quo of the present reservation Indians" and prohibits those "who are not already enrolled members of a tribe" from claiming benefits, 78 Cong. Rec. 12,056 (1934) (Congressional debate on Wheeler-Howard Bill).

The administrative record here does not contain any treaty, statute or executive order demonstrating that Applicant was a "recognized" political entity with whom the federal government had a government-to-government relationship in June, 1934. Instead, the Application and Decision rely on an April 24, 2013 Notice from the Federal Register that states BIA has recognized the "Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California"[8] (AR0080.00034). This notice, dated 2013, cannot establish that Applicant was recognized in 1934.

In fact, in an earlier application from 2005, Applicant stated that its recognition as a political entity occurred *as of 1963*, when the Secretary of the Interior approved the Santa Ynez Band of Mission Indians' initial Articles of Organization. *See* Applicant's April 2005 fee-to-trust application ("2005 Application"), at AR0062.00436 [**Exhibit B** hereto]. In both 2005 and now, Applicant failed to provide any evidence of federal recognition before 1963. Because Applicant has not shown that it was a "recognized Indian tribe" at the time of the IRA's enactment, it is ineligible for fee to trust transfer under Section 465.

2. Applicant was not "under Federal jurisdiction" on June 18, 1934.

Applicant also was not "under Federal jurisdiction" in June 1934. 25 U.S.C. § 479; *Carcieri*, 555 U.S. at 395. The Decision's analysis of this issue relies on two primary assertions: (1) the Secretary of the Interior held an election six months *after* the IRA was enacted; and (2) the Santa Ynez Reservation was purportedly established before the IRA was enacted. Decision at 3, 13. Upon examination, neither assertion supports BIA's conclusion.

First, evidence that the Secretary called an election in December, 1934, to see whether the Native American families living near the Santa Ynez Mission (who did not comprise a tribal political entity) wanted to accept the IRA and organize themselves politically, does not satisfy the "under federal jurisdiction" requirement. That is, evidence of such a vote being held *after* the

[8] The Applicant has recently added the word "Chumash" to its name, a change from the originally recognized name of "Santa Ynez Band of Mission Indians," under which it filed the2005 Application (*see* AR0062.00433 [Exhibit B]), and under which it took title to Camp 4 (AR0080.0078). There are no data in the administrative record to support the Applicant's bare assertion that its members are descendents of the *Chumash*, as opposed to a mixed group of Native Americans previously living near missions, or that they have a historical connection to Camp 4. Evidence in the record is to the contrary. *See, e.g.,* AR 0062.00402-410 (Siggins letter).

passage of the IRA in *December*, 1934 (with the majority not voting), cannot establish that the parties voting in December 1934 were under federal jurisdiction in *June*, 1934. Indeed, the Fifth Circuit has rejected a similar argument, holding that the vote of a tribe "in 1935 to accept the benefits of the Act was not authorized by" the IRA because Indian tribes "could not confer upon themselves the benefit of a law in which, by its very terms, they had not been included." *United States v. State Tax Comm'n of Miss.*, 505 F.2d 633, 642 (5th Cir. 1974).[9]

While the IBIA and the Interior have argued that the mere calling of an election, standing alone, establishes federal jurisdiction,[10] this analysis cannot be squared either with the statutory language or with *Carcieri*, *supra*, which focus on events prior to June, 1934. In addition, this rule is particularly inapt here, where the record demonstrates the Applicant could *not* have been a recognized *tribe* in 1934 because it had no governing body until 1963, and was not engaged in any government-to-government relations as a recognized tribe at the time the IRA was enacted.[11] Under *Carcieri*, calling and holding an election in *December* 1934, cannot establish that an *unrecognized tribe* was "under Federal jurisdiction" when the IRA was enacted *on June 18, 1934*. *Carcieri*, 555 U.S. at 388-389.

Second, Applicant's reservation was *not* established before 1934. While the Decision states that the "Santa Ynez Reservation was originally established pursuant to Departmental Order under the authority of the Act of January 12, 1891 (26 Stat. 712)" (Decision 3), the Decision does not cite the date of that Departmental Order, and the record does not contain any such order. In fact, the administrative record *does* contain Applicant's confirmation that its reservation was *not* established

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[9] The Supreme Court in *United States v. John* disagreed with the Fifth Circuit's ultimate conclusion that the Choctaw Indians were not "Indians" under the IRA based on its analysis of separate language in § 479. 437 U.S. 634, 650 (1978) (holding instead that the Choctaw were of one-half or more Indian blood). In doing so, the *John* Court did not question the Fifth Circuit's rejection of the 1935 election; to the contrary, the *John* Court affirmatively analyzed whether the Choctaw "were recognized as such by Congress and by the Department of Interior, *at the time the Act was passed.*" *Id*. (emphasis added).

[10] *See, e.g., Shawano Cnty. v. Acting Midwest Reg'l Dir., BIA*, 2011 I.D. LEXIS 16, *24, 30 [53 IBIA 62, 71-72] (2011); *Village of Hobart* v. *Acting Midwest Reg'l Dir., BIA*, 2013 I.D. LEXIS 51, * 41, 47, [57 IBIA 4, 23-24] (2013); *cf.* Memorandum from Michael Berrigan, Assoc. Solicitor, Div. Indian Affairs, to Amy Dutschke, Pac. Reg'l Dir., Bureau of Indian Affairs 6 (May 23, 2012).

[11] That the federal government conducted an annual census of all Indians in the United States does not establish that those Indians were members of a then-recognized tribe, particularly with respect to the historically mixed groups of Indians who lived in or around the California missions.

until well after 1934: "[i]t was not until *December 18, 1941* that the area, . . . was officially acquired by the U.S. Government to be held in trust for use as the Santa Ynez Reservation." 2005 Application at 7 (emphasis added) (Exhibit B at AR0062.00434; AR0109.00018; see also, AR0062.00435, AR0109.00019 ("In 1941, the Santa Ynez Reservation was formally established . .").[12] Thus, until 1941, the land on which Native Americans resided in the Santa Ynez Valley was under the exclusive control of its non-Native American owner and the State of California, not the federal government.

The Decision's conclusion that the Santa Ynez Reservation was established before the IRA was enacted is also belied by further evidence of record, including the following:

(a) An agreement regarding the land dated July 30, 1898, between the Bishop of Monterey and Lucius A. Wright – U.S. Agent, expressly states that the Secretary did not accept the reservation. (AR0015.00003 ("*No acceptance by Secretary of the Interior*."), emphasis added).

(b) A deed dated April 10, 1906, which purports to transfer land to the United States of America (AR0008.00001-.0005) *does not show that it was accepted by the United States*, as required by 25 U.S.C. § 151.3. Moreover, the deed contains a reversion arising when the original descendents cease to occupy the parcel. (*Id*. at .0005) That reversion presumably was triggered, since the record also contains an admission by Applicant's counsel that no lineal descendents of the original families exist (AR0062.001134). Thus, this unaccepted deed does not and cannot establish the existence of a reservation or federal jurisdiction over the land.

(c) An opinion of the Solicitor dated *October 14, 1940* (M.29739), which analyzes the '[s]ufficiency of deeds and acceptability of title to certain lands and certain water rights with the *proposed* Santa Ynez Indian Reservation" (AR0013.00001-3, emphasis added), notes the issues presented by numerous deeds and a judgment of March 31, 1906, and concludes by stating, "*When all the requirements of this opinion [to clear title] have been met, the title may be approved and the deeds accepted formally*." (AR0013.00008, emphasis added). This document conclusively

[12] The Mission Relief Act of 1891 authorized a commission to, with the approval of the President and the Secretary of the Interior, set aside lands for bands and villages in California to be used as reservations. 26 Stat. 712. However, that commission never set aside land for Applicant.

demonstrates that the Santa Ynez Reservation was *not* in existence as of October 14, 1940, but was merely a "proposed" reservation.

Thus, to the extent the Decision relies on Applicant's unsupported narrative of its *tribal* recognition, or federal jurisdiction having existed before 1934, that reliance is contrary to the record. That evidence shows that the initial reservation land was *not* accepted by the United States until *after* 1940. Moreover, if the land were accepted in trust, the record is devoid of evidence establishing the beneficiary; it could *not* have been Applicant, since Applicant did not then exist as a tribe. If the trust were for the benefit of the five families who occupied the land at the time of the 1906 Santa Barbara Superior Court judgment (the judgment is not in the record), then the Applicant's admission that there are no remaining lineal descendents of those families makes it clear that the Decision must be set aside (AR0062.00113-4).

Finally, "reservation" is defined in 25 CFR § 151.2(f), which states in relevant part: "'Indian reservation' means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." *Id*. In this case, the "reservation" which purportedly was established in 1941 could not have been an area of land over which *Applicant* was recognized by the United States as having governmental jurisdiction. Rather, Applicant was only recognized as a political entity in 1963, and, even then, was not recognized as an entity related to the Chumash. The Decision's conclusion that Applicant was "under Federal jurisdiction" on June 18, 1934, is unsupported by evidence, and the Decision should be vacated.[13]

B. BIA's Decision Violates NEPA By Failing to Comply with NEPA Review Requirements.

Before granting an application, BIA is obligated to take a "hard look at the environmental consequences of [its] actions." *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002); 42 U.S.C. § 4332(2)(C). "If the action is expected to have significant impacts, or if the analysis in the EA identifies significant impacts, then an EIS will be prepared." Div. of Envtl. & Cultural Res. Mgmt., Dep't of the Interior, 59 IAM 3-H, *Indian Affairs National Environmental Policy Act (NEPA) Guidebook* § 8.1 (Aug. 2012). Indeed, "only in those obvious circumstances

[13] Appellant also incorporates by reference all arguments made by other appellants on these issues.

where no effect on the environment is possible, will an EA be sufficient for environmental review required under NEPA." *Natural Res. Defense Council v. Duvall*, 777 F. Supp. 1533, 1538 (E.D. Cal. 1991); *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004).

Here, BIA did not conduct an EIS, and relied only on the EA. Indeed, the Decision does not discuss *any* NEPA issues; rather, it defers reflexively to the *Applicant's* responses to EA comments:

> While 25 C.F.R. §151.10(h) addresses 'the extent to which the applicant has provided information that allows the Secretary to comply with . . . NEPA,' that is a separate process in which *the Tribe has responded to comments on its* EA (Final EA Appendix O). *Whether an EIS is necessary, or any other specific environmental issues which have already been thoroughly addressed in the Tribe's Final EA and the responses to comments therein* (Final EA Appendix O). Thus, the Final EA and its appendices are incorporated by reference herein as though fully set forth. Decision at 18 (AR0123.00018, emphasis added).

The above language patently misconstrues BIA's role in this process, and reflects that BIA has not fulfilled its obligation to undertake a "hard look" at the hundreds of significant impacts noted by the public and by local agencies. [14] As explained below, the underlying EA and FONSI are defective, and the Decision therefore violates NEPA.

1. BIA improperly used a present-day baseline to assess the environmental impacts of a development that will not occur until 2023.

An agency must select an appropriate baseline to conduct an environmental assessment. *See Half Moon Bay Fishermans' Marketing Asso. v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). BIA approved a present-day baseline in the EA. However, Applicant has stated that it intends to comply with its Williamson Act contract, under which the land could not be developed until 2022. EA, Vol. I, 2-9 (AR0194.00025); Uniform Rules for Agricultural Preserves and Farmland Security Zones 1 (AR0237.00278-81). Both the EA and the FONSI confirm that the development would not occur for close to another ten years (AR0194.00025-9; AR0237.00428-9)

Applying the above time line, the Decision would transfer the land into trust now but development on the land would not commence until 2023. The EA and FONSI are therefore

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[14] See, Waples, Kelsey J. "*Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*." Pepperdine Law Review, vol. 40, Issue 1 (2013).

inherently and impermissibly speculative. One cannot evaluate whether the Proposed Action would "significantly affect[]" the environment [42 U.S.C. § 4332(2)(C)], or what impacts are "reasonably foreseeable" [see, e.g., 40 C.F.R. § 1508.7 (assessing the "cumulative impact" of proposed actions)], when those impacts will occur ten years or more in the future. Nor can the EA be deemed to have supported its conclusions with the requisite "quantified or detailed information." *Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005).

The Council on Environmental Quality ("CEQ"), NEPA's implementing agency, requires reexamination of NEPA documents that extend beyond five years, because their conclusions are inherently suspect. *Cf.* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981) (EIS documents that are "more than 5 years old" must be carefully reexamined and evaluated to determine if they are still accurate and satisfy NEPA's criteria). Here, BIA has approved NEPA documents looking ten years and more into the future.

BIA acknowledges that "there is inadequate information available to accurately determine the environmental setting in 2022, and use of an inaccurate existing setting would result in an inaccurate or, at best, a limited assessment of impacts to resources." (AR0237.00429). In other words, BIA admits the proposed actions are all "highly uncertain or involve unique or unknown risks," which precludes it from finding there is no significant impact. 40 C.F.R. § 1508.27(b)(5). Given the inherent speculation in the EA, and BIA's acknowledgement of inadequate information available, the Decision should be vacated and an EIS prepared at a proper time.[15]

2. BIA failed to require a thorough EIS despite the existence of significant impacts.

BIA must: (1) "take a 'hard look' at the problem, as opposed to [offer] bald conclusions;" (2) "identify the relevant areas of environmental concern;" and (3) "make a convincing case that the impact is insignificant." *Maryland-National Capital Park & Planning Com. v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973). Here, the Decision does not satisfy these requirements. The

[15] Further, if BIA proceeds with an EIS, as it must in this case, BIA's statement that "there is inadequate information available to accurately determine" the environmental impact of the Proposed Action would trigger the requirement to investigate the "incomplete or unavailable" information. 40 C.F.R. § 1502.22. If this information cannot be obtained, the regulation requires BIA to at least identify the information that is incomplete or unavailable, state its relevance to any findings of adverse impacts, summarize the existing credible evidence that is available, and evaluate impacts based on theoretical approaches or research methods. 40 C.F.R. § 1502.22(b).

Decision defers entirely to the Applicant's conclusory responses in the EA, and thereby fails objectively to assess the potential impacts of such a massive project. Under any proper evaluation, the Proposed Action significantly affects the environment, and thus an EIS is required.

a. The Proposed Action would significantly affect groundwater resources.

California is in the midst of one of the worst droughts in its recorded history, and has recently implemented regulations to foster sustainability and require mandatory water use reductions of up to 25% throughout the State.[16] Camp 4 sits above the Santa Ynez Uplands Groundwater Basin, which the 2013 EA *acknowledged* was in overdraft status (AR0127.00043). The Proposed Action includes drilling two new water wells. The EA[17] and FONSI, both of which find no significant groundwater impacts, are rife with clear error.

First, despite the 2013 EA's acknowledgement of basin overdraft, the EA concludes that the basin is in a state of *surplus*. It reaches this mistaken conclusion by relying on a 2002 study which concluded *that increases in imported water* resulted in a basin that was balanced or in a slight surplus; and by noting that a 2009 Final EIR for the Santa Ynez Valley Community Plan ("SYVCP") identified a surplus of approximately 513 acre-feet per year ("AFY"), and stated that several hundred acre feet of new long-term demand could be accommodated (AR0194.00046). However, the EA ignores that the SYVCP EIR *qualifies* the conclusion of surplus, by explaining that "*without those imported water supplies the demands on the groundwater basin would exceed supply*," and that "the County's 2001 water budget for the basin exceeds recharge by approximately 2000 AFY, as corroborated in a study by Hopkins (2002)." See**, Exhibit C** [Santa Ynez Valley Community EIR 4.9-2, emphasis added].

Although the only support for a finding of surplus was the existence of an external imported supply, the EA and FONSI improperly dismissed comments from the County and other knowledgeable agencies that detailed the lowering of neighboring well levels from 2009 to 2013,

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[16] State Water Resources Control Board Resolution No. 2015-0032 *available at* http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2015/rs2015_0013.pdf.

[17] The EA states: "[i]ncreased well production above existing conditions at the site may adversely impact neighboring wells depending on where the onsite wells are located and the amount of pumping that occurs" (AR0194.00753).

and the fact that imported water was no longer available (AR0194.01162;[18] AR0194.01164 (citing the 2013 Annual Engineering and Survey Report, which the Applicant ignored); AR0237.00075-76). Applicant failed to model the basin or to perform any evaluation of long-term water supply, despite existing long-term drought conditions and comments that such a modeling was essential (see, e.g., AR0194.01447). The Applicant instead portrayed the basin in a state of surplus, based on the existence of imported water sources, which it knew or should have known were no longer available. This misleading presentation of surplus, standing alone, should require that a proper EIS be prepared.

Second, the EA misstates the amount of groundwater the Proposed Action will withdraw. Neighboring agencies with data on residential use noted that the EA and FONSI relied on grossly understated figures, and that the withdrawal of water would be a significant impact (AR0194.01163-64; AR0194.01504-7; AR0194.01523-01526; AR0194.01645-646; AR0237.00326-328; AR0237.00360-361). The EA and FONSI nevertheless dismiss all alternative figures and rely on their own figures. But these figures include arbitrary changes, such as a reduction in domestic indoor water demand from 90 gallons (AR0127.00338) to 65 gallons per capita per day (AR0194.00735), a 28% reduction unsupported by any explanation. They also include the contradictory justifications of reducing the vineyard acreage by an arbitrary 50 acres in Alternatives A and B "in response to current economic conditions" (AR0194.01699), yet under those same economic conditions, the "No Action" Alternative C proposes an *increase* of 50 acres of vineyard acreage to "increase vineyard production to maximize the use of the prime farmland on the project site" (AR0194.01713). In other words, Applicant simply manipulated water usage numbers to justify its position. These and other such arbitrary and unsupported figures compel rejection of Applicant's analysis upon which the Decision depends.

Third, the EA relies on proposed mitigation measures, without providing supporting evidence. Perhaps the most important of the mitigation recommendations is to site the new wells "as far as possible" from existing offsite wells and to site "at least one of the new wells south of the

[18] The Applicant even acknowledged that the hydrographs indicated declining water levels (AR0194.01745), at the same time as it concluded there would be no significant impacts.

Baseline fault." (AR0194.00754-55). However, there is no evidence that this proposal is feasible; indeed, the EA concedes that the "capacity of the proposed wells to meet the project demand and water quality cannot be properly assessed without actually constructing and testing each well." (AR0194.00754). Thus, there is no certainty that the two new wells would suffice for the Proposed Action. If there is insufficient draw from these wells, the Applicant's only other proposed well locations are sites that Applicant *admits* would result in a significant impact on neighboring wells (AR0194.00750).

Finally, while the EA explains that Applicant has federal water rights (AR0194.00047) it does not evaluate how invoking those rights to draw whatever amounts Applicant deems necessary from the basin could affect the environment or the community's groundwater source. This issue is particularly significant, since BIA admits it cannot require conformity with a stated project after a trust transfer: i.e., that the relevant regulations "do not authorize the Department to impose restrictions on a Tribe's future use of land which has been taken into trust" (AR0062.00108).

b. The Proposed Action would significantly affect the environment and neighboring property.

The Proposed Action would also harm water resources, agriculture, wildlife habitat, air quality, public resources and services, and public safety (AR0237.00429-37). Building 143 homes (of 3,000 – 5,000 square feet, each with unspecified ancillary buildings), paving roads and parking lots, removing protected oak trees and disturbing habitat for protected species would affect wildlife, as would the increased human activity on the proposed sites. The Proposed Action would jeopardize the endangered Vernal Pool Fairy Shrimp, by affecting 330 acres of designated critical habitat. (AR0237.00249-50). The development also would affect wetland areas that are critical for wildlife and central to migratory patterns (AR0237.00245-6).[19]

Moreover, neither the FONSI nor the EA adequately evaluates the impact of dense residential development, plus a meeting facility hosting 100 events per year, placed on property that

[19] Appellant adopts and incorporates all arguments made previously by herself and by all other appellants on the EA's, FONSI's and Decision's inadequate NEPA analysis of biological and other resources, including under the Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

was restricted previously to agricultural uses, on neighboring agricultural or very low density properties. The Proposed Action would create increased noise, traffic, lights, and pollution. It would increase the potential for trespassing, vandalism, and littering (AR0244.00016). It would result in an additional at least 223 tons of solid waste per year, targeted to be placed in a landfill closing in 2026 (AR0237.00443-4; AR0244.00025-6). Yet the EA and FONSI fail to evaluate the impact of light, noise, pollution, and lack of buffers on neighboring grazing and crop operations, and there is no evaluation of the likely impacts on agricultural neighbors of trespassing or vandalism.

Two examples of the EA's deficiencies, taken from many, are light pollution and traffic. As to light pollution, the EA and FONSI refer to lighting including "emergency and nighttime security lighting at public facilities including parking lots, street intersections, and residential areas" which would be "downcast and shielded," in accordance with "dark sky" principles. In addition, the EA and FONSI refer to the implementation of street lighting consisting of "pole-mounted lights, limited to 18 feet tall, with cut-off lenses and down cast illumination *to the extent feasible*" (AR0194.00027; AR0237.00010 [emphasis added]).

However, the EA and FONSI do not explain what other measures would be necessary to adhere to "dark sky" principles, or what "to the extent feasible" means. The Santa Ynez Valley Community Plan, at Appendix H, provides design recommendations and prohibitions designed to "preserve and protect the nighttime environment of the Santa Ynez Valley" **(Exhibit D**). In response to the County's comments regarding Visual Resources (AR0194.01142), however, the Applicant dismisses comments, guidance, and those regulations, stating that "if the project site is taken into trust, the County's Outdoor Lighting Regulations for the SYVCP area would no longer be applicable" (AR0194.01736). The EA, FONSI and Decision are thus based on a cavalier dismissal of relevant regulations, and constitute a refusal to analyze significant impacts. In essence, BIA concludes that there are no significant impacts by improperly presupposing approval of the project and the elimination of regulatory restrictions, an approach contrary to its NEPA obligations. See, *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084-85 (9th Cir. 2011).

As to traffic, the EA states: "The Transportation Concept Reports show LOS D [Level of Service D] as the minimum operating standard for both SR 154 and SR 246" (AR0194.00796).

However, in comments submitted to the Applicant, the California Department of Transportation ("Caltrans") specifically advised Applicant that utilization of LOS D as a minimum operating standard was "a misapplication of the Caltrans Transportation Concept Report" (AR0194.01085-7). Caltrans informed the firm which prepared the study of this misapplication on multiple prior studies, and stated its "regret to see this misapplication here again" (AR0194.01085).

One result of this deliberate misapplication is that the junction intersection of SR 246/Alisal Rd, classified as LOS D for P.M. peak traffic at Table 18, has neither analysis nor mitigation measures. A major intersection, like others, predicted to be significantly affected by cumulative development, has been ignored entirely. Caltrans' comments on repeated misapplications and under-calculations in the traffic analysis which "yield results that show a better scenario than what would actually be experienced in the field" (AR0194.01086-7) and "makes traffic concentration appear lower than it may be" (AR0248.00001) are likewise dismissed (AR0194.01713-5).

The Proposed Action would add at least 415 residents (and 800 visitors every weekend), clogging traffic on the narrow rural access roads and straining law enforcement, fire and emergency services. BIA did not consider how this increased traffic would have a negative impact and cause harm to the surrounding area and the Santa Ynez Valley, by making it more difficult for commuters, by increasing pollution, by slowing emergency response times, and by affecting the safety of drivers using roads not designed for heavy traffic. (AR0244.00026-7). An EIS is necessary to evaluate the context and intensity of the environmental impact of the sweeping changes articulated by Applicant in proposing to transfer more than 1,400 acres, and to develop over a hundred housing units and meeting facilities, on land that is presently zoned for very low density agricultural uses. As a result, an EIS is required.

c. The Proposed Action is incompatible with existing land use and requires more thorough evaluation.

The FONSI and EA do not address adequately the incompatibility of the Proposed Action with the surrounding property and the conflict posed with the County's General Plan, the SYVCP, and the County's zoning and land use regulations. *See, e.g.*, AR0237.0329-330. Indeed, the EA asserts that the Proposed Action "would not contribute to the conversion of surrounding agricultural

land" (AR0194.00188), when the very purpose of the Proposed Action is to convert zoned agricultural land to other, denser land uses. The level of scrutiny on these issues is extremely high: where "the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny." *Maryland-National Capital Park & Planning Com.*, 487 F.2d at 1037.[20] Yet neither the FONSI nor the EA addresses the lack of agricultural buffers, the increase in pests, or the risk that weeds and diseases would spread to neighboring agricultural properties (AR0194.00140-3; AR0194.00165-8; AR0194.01125; AR0237.00068-69). BIA's failure to require thorough analysis of the impacts on neighboring properties of converting this significant amount of agricultural property to denser uses, in the context of the County's land use restrictions and commitment to protect the agricultural environment, renders the EA defective.

In addition, the impacts of the Proposed Action are highly controversial. 40 C.F.R. § 1508.27(b)(4). Under NEPA, controversy exists when knowledgeable individuals are critical of the EA and dispute its conclusions. *Foundation for North American Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982). Here, BIA received substantial comments in opposition from the County of Santa Barbara, the Environmental Defense Center, California Coastal Protection Network, Caltrans, and other expert agencies, organizations, and individuals who were critical of multiple aspects of the 2013 EA and the EA's statements and analyses that BIA relied upon to conclude there was no significant impact to agricultural resources, waste, water, public services, traffic, and the environment (AR0194.01050-1685; AR0237.00025-00422). As a result of this controversy, coupled with the manifest deficiencies identified, an EIS is required.

3. BIA failed to properly evaluate the mitigation measures.

The FONSI acknowledges that mitigation measures are required to "reduce significant impacts to a less-than-significant level." (AR0237.00011). The FONSI therefore relies on more than 100 "best management practices"/"mitigation measures," listed over 12 pages, to reduce the

[20] This is because federal regulations purport to exempt land taken into trust from state and local laws. 25 C.F.R. § 1.4(a). The FONSI and EA also must be evaluated under a more stringent standard because the Application is an off-reservation proposal. See, e.g., AR0128.01356-60.

undisputed significant impacts. AR0237.00007-19. However, *none* of these mitigation measures is properly evaluated by BIA or is even likely enforceable. *See, e.g.*, AR0194.00194-0204; AR0237.0331-333; AR0237.00429-37.

CEQ guidance states that the ability to monitor compliance with mitigation measures is "essential" to a finding of no significant impact. Mitigation measures should be "carefully specified in terms of measureable performance standards or expected results, so as to establish clear performance expectations." Memorandum for Heads of Fed. Departments and Agencies from Nancy H. Sutley, Chair, Council of Envtl. Quality 8 (Jan. 14, 2011).[21] CEQ further states that "*[m]onitoring is essential in those important cases where the mitigation is necessary to support a FONSI and thus is part of the justification for the agency's determination not to prepare an EIS*." *Id*. at 10 (emphasis added).

Here, however, BIA may not be able to conduct *any* monitoring of the hundred-plus mitigation measures after the land is transferred into trust. Notwithstanding BIA's "continuing duty," *id*., BIA outsources its monitoring to Applicant and an unspecified "General Contractor." (AR0237.00500-514). Additionally, BIA apparently has no authority to monitor or restrict Applicant's land use to ensure that the mitigation measures are actually implemented: "[n]othing in . . .25 U.S.C. § 465, or 25 C.F.R. Part 151 authorizes the Department to impose restrictions on the [Applicant's] future use of land which is taken into trust." *City of Lincoln v. Portland Area Dir.*, 33 IBIA 102, 107 (1999); see also, AR0062.00108. The EA, FONSI, and Decision thus fail to address whether Applicant would be obligated to implement these mitigation measures, or if BIA could engage in the requisite monitoring practices.

Finally, the FONSI and EA fail to demonstrate how or if the mitigation measures would be effective even if implemented. Courts have repeatedly rejected what BIA has done here: provide a "'perfunctory description' []or a 'mere listing' of measures, in the absence of 'supporting analytical data.'" *W. Land Exch. Project v. United States BLM*, 315 F. Supp. 2d 1068, 1091 (D. Nev. 2004)

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[21] As one example of insufficient specification, the oak tree mitigation program acknowledges the proposed removal of 70 oak trees, but fails to require the minimum 10:1 replacement ratio under County or State standards, instead referring generally to a "no net loss" goal and a Tribal Oak Tree Ordinance which is not included in the administrative record for review. See, EA at AR0237.00222, .00504 **check cites**

(quoting *Nat'l Parks & Conservation Assn'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001)). Without such supporting documentation and evidence, the mitigation measures here fail to remedy the significant impacts that BIA acknowledges.

4. BIA did not sufficiently evaluate the cumulative impact.

Cumulative impact is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions*." 40 C.F.R. § 1508.7 (emphasis added). These cumulative impacts "must be fully analyzed in any EA." *Kern v. United States BLM*, 284 F.3d 1062, 1078 (9th Cir. 2002).

The Applicant states that its casino renovation will include: "addition of up to 215 hotel guest rooms; addition of up to 584 parking spaces; expansion of the casino to ease overcrowding; and renovation of the existing casino and hotel to address overcrowding and circulation issues."[22] This expansion alone will bring an additional 1,200 visitors per day to the area surrounding Camp 4 and its neighboring property.[23] The EA recognizes that the casino expansion is a "cumulative impact," but does not address in any detail the environmental impact that these additional 1,200 patrons per day, in combination with the *additional* expected visitors to the cultural center, museum, park, gift shop, and offices on its 6.9 acre project, and the additional residents in the proposed facilities, would have on the environment, scarce water resources, agriculture, wildlife habitat, air quality, traffic, public resources and services, and public safety (AR0194.00176-191). However, these cumulative impacts, added to the significant impacts identified in connection with the Camp 4 trust transfer, would have a profound impact on neighboring properties and the community. Because the EA and the FONSI fail adequately to consider the other development projects of Applicant, they are "inadequate under NEPA" and the Decision must be vacated. *See Kern*, 284 F.3d at 1075-76. *See, e.g.*, AR0195.0325, .0329; AR0237.00434-7.

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[22] Notice of Adoption and Approval from Santa Ynez Band of Chumash Indians to Office of Planning & Research and Bd. of Supervisors of Cnty. of Santa Barbara (Sept. 22, 2014), *available at* http://www.chumashee.com/wp-content/uploads/2014/09/Notice-of-EE-Adoption- Approval-Signed.pdf.

[23] *See* Final Environmental Evaluation Santa Ynez Band of Chumash Indians Hotel Expansion Project 3-42 (Sept. 2014), *available* at http://www.chumashee.com/wp-content/uploads/2014/09/Hotel-Expansion-Final-EE-September-2014.pdf.

5. The FONSI and EA fail to address reasonable alternatives such as postponement or a smaller land transfer.

BIA must evaluate and describe all reasonable alternatives to the proposed federal action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b). Failure to do so renders the EA inadequate. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) ("The existence of a viable but unexamined alternative renders an [EA] inadequate."). Further, BIA must not simply "blindly adopt[] the applicant's goals," but must "allow for the full consideration of alternatives required by NEPA." *Envtl. Law & Policy Ctr. v. United States NRC*, 470 F.3d 676, 683 (7th Cir. 2006).

Here, the FONSI and EA do not evaluate whether Applicant can meet its objectives without transferring the land into trust, particularly since the development is not proposed to start until 2023 and Applicant already owns the land in fee. Nor do they assess whether a far smaller amount of land could be transferred, since the total acreage to be developed is purportedly a small portion of the 1400 acres. BIA is under an obligation to consider whether it can "accomplish[] the same results by entirely different means." *Environmental Defense Fund, Inc. v. Corps of Engineers of United States Army*, 492 F.2d 1123, 1135 (5th Cir. 1974); *see also, W. Land Exch. Project*, 315 F. Supp. 2d at 1096 (EA was invalid where it failed to consider "why [the agency] did not consider less intensive development"). By failing to evaluate these alternatives, BIA violated NEPA.

6. BIA failed to provide an opportunity for public comment.

NEPA requires BIA to "involve environmental agencies, applicants, and the public, to the extent practicable." 40 C.F.R. § 1501.4(b). The addition of new information and new mitigation measures that were not subject to public comment violates NEPA. *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1204-05 (N.D. Cal. 2004); *Sierra Nev. Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 991 (E.D. Cal. 2005) ("the public [should] be given as much environmental information as is practicable"). The FONSI, however, includes mitigation measures that were not analyzed or referenced previously. They include: (1) new information and analysis of water recycling and usage, solid waste, biological resources; (2) mitigation measures for the Vernal Pool Fairy Shrimp and California red-legged frog; (3) the provision of a police department to be operated by Applicant; and (4) other information and mitigation measures that had not been

publicly disclosed or available for public comment. (AR0237.00006-21). The FONSI also cites and relies upon new information and analysis from the U.S. Fish and Wildlife Service and State Historic Preservation Office that had not been subject to public review and comment (AR0237.00001). This violation, standing alone, requires that the Decision be vacated.

C. Applicant failed to satisfy additional regulatory requirements governing fee-to-trust.

BIA must evaluate whether Applicant met additional regulatory requirements. These include establishing Applicant's "need . . . for additional land," the "impact on the State and its political subdivisions,""[t]he purposes for which the land will be used,""[j]urisdictional problems and potential conflicts of land use which may arise," whether BIA is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," and "a plan which specifies the anticipated economic benefits associated with the proposed use,". 25 C.F.R. §§ 151.10(b), (e), (c), (f) (g) and § 151.11(c). The Decision fails properly to evaluate these requirements. Moreover, because this land is off-reservation, BIA was required to give "greater scrutiny" to Applicant's asserted justification and purpose. 25 C.F.R. § 151.11(b). Based on these failings, BIA improperly exercised its discretion, and the Decision should be vacated.

1. Applicant has not shown a "need" or "purpose" for Fee-To-Trust transfer.

The Decision states that Applicant's 1,400 acres are needed to: provide housing; bring land within Applicant's jurisdictional control; meet Applicant's "long range needs;" meet Applicant's needs for "future generations, land banking;" increase Applicant's "ability to exercise self-determination;" and preserve cultural resources (AR0123.00020). But the Decision fails to demonstrate why trust acquisition is necessary for any of these purposes. Nor has Applicant demonstrated that all of its existing members would relocate from existing housing to Camp 4.

Further, the Decision asserts that the land is required for Applicant's "long range needs" and that "invaluable cultural resources" must be preserved, without specifying what these plans are or what cultural resources will be preserved (AR0123.00020-1). Moreover, BIA fails to explain why ownership of property does not fulfill Applicant's needs for self-determination and land-banking. The Decision only points to the fact that Applicant will be exempt from State and local regulations – regulations that are in place to protect the environment and the public. BIA had insufficient

information on which to assess Applicant's alleged justification at all, let alone under the required heightened standard for lands located separate and apart from a reservation. Applicant failed to meet its burden to establish a "need" to transfer the land into trust.

2. The Decision fails adequately to consider the impacts on political subdivisions.

The loss to the County in taxes would be from *at least* $35 million (if there is no development) to in excess of $275 million under the Proposed Action over the next 50 years. *See* AR0180.00039-40. BIA looked instead to the historically low taxes that Applicant paid previously by virtue of Camp 4's enrollment under the Williamson Act, and dismissed the tax loss as "de minimis" and "insignificant." (AR0123.00022). But, as part of its Application, Applicant withdrew from the Williamson Act (AR0080.00198-200). As a result, even with no development, Camp 4's assessed value would result in tax liability of $340,000 annually, not the $81,000 Applicant previously paid. With development, the tax liability would approximate nearly $5.5 million per year (taking the County's estimate of nearly $275 million over 50 years). The enhanced tax rate should have been considered: it would properly reflect the increased demand imposed on public resources from the additional at least 415 residents and the additional visitors to Camp 4, which would have a detrimental impact on the rural roads, the community schools, and Santa Barbara County Sheriff's and Fire Departments' ability to respond to the community needs.

3. BIA failed to consider jurisdictional problems and land use conflicts.

BIA must consider the "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10(f). Camp 4 is presently zoned for agricultural use: AG-II-100 (AR0123.00022). The development of residential units and supporting infrastructure is inconsistent with this designation and the surrounding land, and would contravene the County's General Plan, the SYVCP, and County regulations. BIA fails to consider this conflict and the Proposed Action's impact on surrounding properties and the health, safety, and regulatory problems that will arise (AR0109.00008-9; AR0244.00017-18).

4. BIA failed to consider whether it can discharge additional responsibilities.

BIA must consider whether it is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(g). BIA concluded

that emergency services would be provided by the County Fire and Police Departments through agreements with Applicant (AR0123.00023). But these agreements are for services on the current reservation and do not extend to Camp 4 (AR0237.0071-3; AR0244.00019-20). BIA therefore failed to address how BIA would discharge these additional duties with regard to the Camp 4 property as a trust acquisition.

5. The Decision fails for lack of the required business plan.

Where off-reservation land is acquired for "business purposes," the fee-to-trust applicant must "provide a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R. § 151.11(c). Although Applicant proposes to utilize the land for economic pursuits (vineyard and a horse boarding stable) (AR0080.00011; AR0123.00022), no business plan was included. The Decision dismisses the business plan as unnecessary because these businesses are "on-going." (AR0123.00024). But the regulations do not exempt on-going business from the requirement of a business plan. Rather, this requirement applies whenever "land is being acquired for business purposes." 25 C.F.R. § 151.11(c). For this reason, the Application is deficient, and BIA's Decision invalid.

6. BIA failed to exercise "greater scrutiny" required for off-reservation transfers.

BIA is required to "give greater scrutiny to the tribe's justification of anticipated benefits" when the land being transferred into trust is off-reservation. 25 C.F.R. § 151.11(b). The Decision fails to reflect the greater scrutiny mandated under the applicable regulations (AR0109.00006-8). BIA's reasoning and balance of factors suffers a fundamental flaw that invalidates the Decision.

D. The Decision approves taking land into trust that is not owned by Applicant.

The EA and FONSI refer to taking 21.9 acres of right of ways into trust (AR0194.0008). However, these rights of ways include dedicated public roadways that are owned by the County and the public (AR0194.01702-.01704; AR0080.00183-.00197). The relevant Certificates of Compliance identify these public roadways and describe the land as bounded by but not including these roadways. *Id.*[24] The title commitment describes the property by reference to the Certificates

[24] See also, the Exhibits attached to the Application, all describing the property by reference to the foregoing Certificates of Compliance and the 1887-88 survey and excluding the Public Roads: The Grant Deed by which Applicant acquired

of Compliance, which exclude fee title to the Public Roads, but also refers to the Public Roads as "easements" (AR0080.00093), thereby suggesting that the legal description of what Applicant owns includes the Public Roads. The description cannot both exclude public roads from fee simple ownership as the Certificates of Compliance do, and at the same time include them within fee simple ownership and show the public roads as easements. Despite the lack of clarity as to the legal description, Applicant seeks to have all of this property transferred into trust (AR0080.00005). It further states that it has determined that all rights of way are easements, not dedicated roads, and that it will decide whether or not to "honor" alleged rights of way "on a case by case basis." (AR0194.01704).

The Applicant's assertion that it owns the rights of way is belied by the Certificates of Compliance as well as other exhibits to the Application. The question of ownership of the property being taken into trust must be determined prior to transfer, or appellants could be divested of an opportunity to challenge the Applicant's claim to this property.[25]

CONCLUSION

For the above-stated reasons, BIA's FONSI and Decision should be reversed and vacated.

DATED: February 9, 2016

CAPPELLO & NOËL LLP

By: _____
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title to the property (Exhibit M) (AR0080.00077-83); the Title Insurance Policy insuring title to Applicant (Exhibit G) (AR0080.00036-44); the proposed deed to the United States (Exhibit L) (AR0080.00073-76); and the Title Commitment (Exhibit N) (AR0080.00084-197). See also, AR0063.00005

[25] The Federal Quiet Title Act, 28 U.S.C. § 2409a (the "QTA"), which waives sovereign immunity and allows the United States to be named as a defendant in a civil action to adjudicate disputed title claims, does not apply to trust or restricted Indian lands. *Id*. at subd. (a); see, e.g., *Robinson v. United States*, 2007 U.S. Dist. LEXIS 68726, *11 (E.D. Cal. Sept. 4, 2007), vacated on other grounds by 586 F.3d 683 (2009); see also, *Alaska v. Babbitt* (*Albert*), 38 F.3d 1068, 1073 (9th Cir. 1994), finding that the QTA is the "exclusive means by which adverse claimants [can] challenge the United States' title to real property" and that one could not "avoid the limitations of the QTA by bringing an action under the APA (the Administrative Procedures Act)."

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2015, I caused to be served the **APPELLANT CRAWFORD-HALL'S OPENING BRIEF** either by electronic service, U.S. Mail, or both, to each of the below listed persons or parties known or believed to be interested in this matter, as follows:

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