Tribal Letters

From: Andy Mejia <andymejia@lyttonrancheria.com>
Sent: Monday, December 2, 2024 4:45 PM
To: Dutschke, Amy <Amy.Dutschke@bia.gov>; Garriott, Wizipan <Wizi_Garriott@ios.doi.gov>
Subject: [EXTERNAL] Lytton Rancheria - Koi Nation FEIS - Comment Period - Time Extension Request

Good Afternoon,

Attached to this email you will find a letter requesting an extension of time for the Koi Nation's FEIS Comment Period.

Andy Mejia
Chairperson
Lytton Rancheria of California
1500 Falling Oak Way
Windsor, CA 95492
Ph: 707-575-5917 Fax: 707-575-6974
andymejia@lyttonrancheria.com

LYTTON RANCHERIA • Lytton Band of Pomo Indians

1500 Falling Oak Way • Windsor, California 95492

(707) 575-5917 • Fax (707) 575-6974

12/1/2024

Wizipan Garriott
Principal Deputy Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Amy Dutschke, Regional Director
Pacific Region Regional Office
Bureau of Indian Affairs
2800 Cottage Way, Suite W-2820
Sacramento, CA 95825

Re: Lytton Rancheria Request for Extension of Koi Nation Final EIS Public Review Period

Dear Principal Deputy Assistant Secretary Garriott, and Director Dutschke:

On behalf of the Lytton Rancheria of California ("Lytton"), I am writing to request a 45-day extension of the Koi Nation Final EIS Public Review Period.

The Final EIS and included appendices ultimately consist of approximately 10,000 pages of environmental review documents. Lytton is being forced to expend considerable resources to hire experts and prepare informed comments on these documents, with only 30 days to do so. The public was provided 45 days and then a 15-day extension to comment on the substantially smaller Environmental Assessment for this project, and then 45 days were allotted for comment on the Draft EIS, which we were left scrambling to complete. It is illogical that we would be given progressively less time to review an ever-increasing number of complicated environmental documents. To make matters worse, the BIA has chosen to begin the public review period on November 22nd, which is the Friday before Thanksgiving and to end it on December 23rd, the day before Christmas Eve. The intention here seems to be to rush this application forward as quickly as possible and to limit the opportunities for scrutiny.

We call on the BIA to extend the public comment period for 45-days, in order to give Lytton and others time to properly review the final documents. If we are having difficulty pouring through them, we can only imagine the burdens imposed on average citizens who do not have our resources. In addition, Sonoma County has proclaimed a State of Emergency in the wake of severe flooding. This further limits the ability to properly respond to the Final EIS for Lytton, Sonoma County Tribes and Sonoma County residents. The ongoing disaster should be cause enough for an extension of the comment period. Finally, we urge the BIA to engage in meaningful consultation with the local tribes who will be severely harmed by this project, and to hold a public hearing on the Final EIS as had been done for each of the previous drafts.

We continue to be disturbed by the way Interior is operating with this proposed project and others, as well as the favoritism being shown to Tribes like Koi Nation, in contrast to the hoops and obstacles regularly thrown at the Lytton Rancheria. Please contact me should you have any questions.

Sincerely,

Andy Mejia
Chairperson, Lytton Rancheria of California

T2

Pomo of Upper Lake
Habematolel

9470 Main St.
Upper Lake, CA 95485

Correspondence
P.O. Box 516
Upper Lake, CA 95485

P 707.275.0737 | F 707.275.0757
www.hpultribe-NSN.gov

December 4, 2024

Amy Dutschke, Regional Director
Bureau of Indian Affairs, Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Subject: Support for the Koi Nation of Northern California's Shiloh Project

Dear Ms. Dutschke:

The Habematolel Pomo of Upper Lake is pleased to provide our support for the Koi Nation of Northern California's Shiloh Project and offer these comments on the BIA's publication of the Final Environmental Impact Statement ("FEIS"). We first note that the FEIS contains several revisions from the Draft Environmental Impact Statement ("DEIS"), which reflects a careful reading of the public comments of the DEIS. The result is a strong, well-reasoned FEIS, which addresses in-depth water resources, traffic, fire evacuation and other environmental issues of concern to the community.

While the DEIS addressed community concerns related to existing water resources and the potential for groundwater depletion, the FEIS contains additional analysis as well as responsive mitigations pertaining to water resources following the construction and operation of the Shiloh Project. This additional work demonstrates that the BIA genuinely considered and incorporated into its analyses the comments submitted pursuant to the publication of the DEIS.

Likewise, the FEIS considered a more expansive list of measures intended to mitigate traffic concerns raised by the local community, including alternative modifications to local roadways and modified fair share contributions. These modifications strengthened the FEIS and confirmed that local community input was an effective component in the environmental review process for this project.

It is evident from the FEIS that the BIA has taken a hard look at all the environmental issues that were raised during the DEIS comment period, including water resources, traffic, fire evacuation, and tribal consultations, and has addressed these concerns and others in the FEIS. Each stage of the Shiloh Project environmental analysis has been thoughtful in its consideration of environmental risks associated with any project of this nature, but this Final Environmental Impact Statement represents a review and analysis of highest quality. In sum, we wholeheartedly support the final approval of the Shiloh Project and believe that it will create jobs and have a favorable overall economic impact for the long term.

Pomo of Upper Lake
Habematolel

9470 Main St.
Upper Lake, CA 95485

Correspondence
P.O. Box 516
Upper Lake, CA 95485

P 707.275.0737 | F 707.275.0757
www.hpultribe-NSN.gov

Please contact Danielle Cirelli, Chairperson for the Habematolel Pomo of Upper Lake with any questions you may have regarding our support.

Sincerely,

Executive Council

Executive Council
Habematolel Pomo of Upper Lake

Cc: Koi Nation

T3

Cloverdale Rancheria
555 S. Cloverdale Blvd. ~ Cloverdale, CA 95425
(707) 894-5775 ~ Fax (707) 894-5727

11/12/2024

Paula Hart, Director
Office of Indian Gaming
Office of the Assistant Secretary – Indian Affairs
1849 C St., NW
MS 3543 MIB
Washington, DC 20240

Amy Dutschke, Regional Director
Pacific Region Regional Office
Bureau of Indian Affairs
2800 Cottage Way, Suite W-2820
Sacramento, CA 95825

Re: Opposition to Koi Nation Restored Lands Request

Dear Director Hart and Director Dutschke:

On behalf of the Cloverdale Rancheria of Pomo Indians of California ("Cloverdale"), I am writing to express our opposition to the current request of the Koi Nation of Northern California for a restored lands determination under 25 C.F.R. Part 292.

I. Koi Nation Cannot Demonstrate a Significant Historical Connection to the Windsor Site and the Request for Indian Lands Opinion Should be Denied.

On September 15, 2021, the Koi Nation ("Koi" or "Tribe") submitted an application to the Department of the Interior to have approximately 68 acres of land in unincorporated Sonoma County, California ("Windsor Site") taken into trust for gaming purposes. The proposed gaming facility would reportedly include 2,500 class III gaming machines, a 200-room hotel, six restaurants and food service areas, a meeting center, and a spa ("Koi Project" or "Project").

In pursuit of its efforts, Koi intends to utilize the "restored lands" exception to the Indian Gaming Regulatory Act's ("IGRA") general prohibition on gaming on Indian lands. On Sept 13, 2021, Koi submitted its most recent request for a restored lands decision from the Office of Indian Gaming ("Restored Land Request"). In 2019, the Koi Nation received a favorable judgment from

the United States District Court for the District of Columbia which found that the Tribe satisfied one requirement of "restored lands" exception – that the federal government had "restored" the Tribe's federal recognition in 2000. *Koi Nation of Northern Californian v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14,46 (D.D.C. 2019). However, the Court's determination did not mean that Koi can now conduct gaming on *any* site it chooses – the Tribe must still demonstrate that it has a "significant historical connection" to any proposed gaming site. 25 C.F.R. § 292.12(b). The Koi Nation cannot establish such a connection to the Windsor Site.

The applicable regulations governing a restored lands acquisition provide that a "significant historical connection" means the "land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land."[1] The Windsor Site is not within the boundaries of the Koi Nation's last reservation, nor can the Tribe demonstrate by historical documentation the existence of the tribe's villages, burial grounds occupancy or subsistence use in the vicinity of the Windsor Site. Cloverdale is confident in these assertions because the Windsor Site is in the aboriginal territory of the existing Sonoma County Tribes, and there is no more knowledgeable expert on the occupancy and use of the Windsor Site lands than those Tribes – 1) the Cloverdale Rancheria of Pomo Indians of California 2) the Lytton Rancheria of California 3) the Federated Indians of Graton Rancheria, California 4) the Dry Creek Rancheria Band of Pomo Indians, California 5) the Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California.

II. How Restored Lands are Defined Under the Indian Gaming Regulatory Act and Regulations.

IGRA prohibits gaming on lands acquired after 1988 except under certain circumstances. Specifically, Section 20(a) of IGRA provides that if lands are acquired in trust after October 17, 1988, the lands may not be used for gaming, unless one of the following statutory exceptions applies:

) The lands are located within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988;
) The tribe has no reservation on October 17, 1988 and "the lands are located...within the Indian tribe's last recognized reservation within the state or states where the tribe is presently located;"
) The "lands are taken in to trust as part of (i) the settlement of a land claim; (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process; or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition...:

Under the "restored lands exception," found in IGRA Section 20(b)(1)(B)(iii) (25 U.S.C. § 2719(b)(1)(B)(iii)), a tribe must first document that it has been "restored" – meaning that it had federal recognition, lost it, and then regained recognition. It then must document that the land it wants to use for gaming is on a site that constitutes a restoration of land to the tribe. The notion of "restoration of lands" means that the land has been returned to tribal ownership and control and that it lies within the historic trial occupancy area. The "restored land" provision is poorly understood and has frequently compelled tribes to file briefs and reports with the National Indian Gaming Commission ("NIGC") or to litigate to get the facts confirming its eligibility under the restored lands exception into a forum to prove

[1] 25 C.F.R. § 292 was amended on March 22, 2024.

its case and secure trust status of lands for gaming. In analyzing whether lands have been "restored," the NIGC examines whether the "land acquisition in some way restores to the Tribe what it previously had."[2]

When the Bureau of Indian Affairs ("BIA") evaluated this issue in the past, it has analyzed historical tribal ties to the lands to determine if the proposed gaming site is within a tribe's aboriginal territory. In testimony regarding off-reservation gaming and newly restored lands, then-Principal Deputy Secretary Aurene Martin stated:

> For instance, to qualify under the "initial reservation" exception, the Department requires that the tribe have strong geographical, historical and traditional ties to the land. To qualify under the "restoration of lands" exception, the Department requires that either the land is either made available to a restored tribe as part of its restoration legislation or that there exist strong historical, geographical, and temporal indica between the land and the restoration of the tribe. The Department's definition of restored land has been guided by fairly recent federal court decisions in Michigan, California, and Oregon.[3]

Because the Windsor Site is neither within the boundaries of the Koi's former Rancheria in Lake County, or within the Koi aboriginal territory,[4] the Tribe cannot satisfy the traditionally applied "significant historical connection: requirement of the "restored lands exception" unless it has historical documentation of Koi's occupancy or use of the lands as a Tribe. There is no historical documentation that would support such a claim. The Windsor Site is within the boundaries of the Dry Creek Rancheria Band of Pomo Indians (Dry Creek) aboriginal territory and has been historically occupied by Dry Creek not the Koi Tribe. Any claims otherwise by Koi are false and are not supported by the evidence it has presented in support of its application.

III. The Evidence Provided by the Koi Nation does not Establish a "significant historical connection" Pursuant to Applicable Regulations.

As previously noted, because the Windsor Site is not within or even near the boundaries of the Koi's former rancheria in Lake County, Koi cannot satisfy the "significant historical connection" requirement of the "restored lands" exception unless it has historical documentation of Koi's occupancy or use of the lands as a Tribe. There is no historical documentation that would support such a claim. It is not disputed that the Windsor Site is within the boundaries of Dry Creek's aboriginal territory and Koi has not historically occupied or used it. Any tribal cultural material found during an archaeological investigation or construction of a casino is evidence of Dry Creek's use and occupancy of the Site. Under

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[2] U.S. Dep't of the Interior, Office of the Solicitor, Memorandum: Elk Valley Indian Lands Determination, at 7 (July 13, 2007).

[3] Testimony of Aurene M. Martin Principal deputy Assistant Secretary – Indian Affairs, Department of the Interior, at the Oversight Hearing Before the Committee on Resources, U.S. House of Representatives Concerning Gaming on Off-Reservation, Restored and Newly-Acquired Land, July 13, 2004

[4] See, *Koi Nation v. City of Clearlake*, Lake County Superior Court, Case No. CV 423786. California Attorney General Rob Bonta announced on October 20, 2023, that the Lake County Superior Court has granted the Department of Justice's application to file an amicus brief in support of the Koin Nation o Norther California's lawsuit against the City of Clearlake. The Koi Nation contends that the site of a proposed 75-room hotel – known as the Airport Hotel and 18th avenue Extension in Clear Lake, California – contains Koi tribal cultural resources and that the city did not adequately conduct consultation with the Koi Nation or consider the project's impacts on Koi trial cultural resources in violation of the California Environmental Quality Act's (CEQA) tribal consultation requirements added by Assembly Bill 5 (AB52). The California Department of Justice's amicus brief supports the Koi Nation's position, providing information on the legislative history and intent of AB 52's requirements.

State law, if tribal cultural resources were discovered, the Dry Creek Rancheria would be considered the Most Likely Descendant – not Koi, to determine how best to protect the tribal cultural resources.

Recognizing that it cannot show historical documentation of its occupancy or use of the Windsor Site as a Tribe, the Koi attempt to establish a modern tie to Sonoma County due to individual tribal members moving to the town of Sebastopol in the 1950's. Sebastopol is nearly twenty miles from the Windsor Site and is within the aboriginal territory of Graton Rancheria. Only Graton can claim a significant historical connection to the Sebastopol area. The fact that Koi tribal members moved to the Sebastopol Area in the 1950's cannot create a historical connection to the Windsor Site as a Tribe.

The Department has already determined that 'relocation of some of [a tribe's] members to various locales throughout the Bay Area does not equate to the [tribe] itself establishing subsistence use or occupancy in the region apart from its Rancheria"[5] and that "evidence of the [tribe's] citizens' movements as late as the 1960s is more of a modern era activity, as opposed to *historic*, as those two terms are used in the part 292 regulations."[6] Further, the Department has held, in the context of denying a different Lake County tribe's restored lands request, that it "cannot establish its subsistence 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;" rather, the Department found that "[s]ubsistence use and occupancy requires something more than a transient presence in an area."[7]

Koi also attempts to claim a tribal historical connection to the Windsor Site as a result of establishing a tribal office in Santa Rosa, California, a few miles from the Windsor Site for over a period of two years. Such a claim is absurd. If the Department of the Interior proceeds to approve restored lands for Koi in Sonoma County based on a relocated tribal office, it is likely that a number of yet restored tribes in Northern California would be emboldened to establish a tribal office in urban locations far from their aboriginal territory and seek to be administratively restored and acquire land for gaming in those new areas disenfranchising tribes already in that area.

Lastly, it appears that the Koi Tribe is also attempting to show some sort of connection to the Sebastopol and Santa Rosa Area via an unratified treaty. The Tribe's Request for Restored Land Opinion, dated September 15, 2021 includes an attachment titled "The Koi Nation of Northern California: An Overview of Traditional Culture and History and It's Documented Historical Connection to Sonoma County, California" ("Report").

In that report, an unratified treaty is cited as one specific to Koi (or Cho-tan-o-man-as) with some sort of connection to Sonoma County. Cloverdale would simply note that the unratified treaty documents in California are full of errors and omissions that leave them fraught with discrepancy and subject to conflicting interpretations. As noted in "The Eighteen Unratified Treaties of 1851-1852" by Robert F. Heizer. "Taken all together, one cannot imagine a more poorly conceived, more inaccurate, less informed,

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[5] Decision letter from Assistant Secretary – Indian Affairs Larry Echo Hawk to the Honorable Merlene Sanchez, Chairperson Guidiville Band of Pomo Indians at 19 (Sept. 1, 2011)("Guidiville Letter").

[6] Decision Letter from Acting Assistant Secretary – Indian Affairs Doanld E. Laverdure to the Honorable Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians at 18 (May 25, 2012)(discussing the relation of individual Band members during the 1920's and 1960s)(emphasis in original).

[7] See, Guidiville Letter at 14.

and less democratic process than the making of the 18 treaties in 1851-1852 with the California Indians." No credibility should be given to any claim by the Koi Tribe based on one of these unratified treaties.

IV. Misuse of the Restored Lands Process is Reservation Shopping and Should be Rejected by the BIA.

Koi has a well-documented history of attempted reservation shopping, and this iteration is strikingly similar to past efforts by Koi. They have again partnered with and out-of-state developer, the Chickasaw Nation,[8] except that instead of seeking to enter the Bay Area market, they seek to select a site in the middle of the aboriginal territory of five other recognized tribes.

A. Koi's Original 2005 Plan to build a Casino, Resort and Spa in Oakland.

This proposed gaming acquisition is not the first for Koi Nation, which is evidence of its blatant effort to "reservation shop." In 2005, Koi officially announced its plans to build a "world-class" tribal government building, gaming facility, resort and spa, near the Oakland International Airport.[9] The Tribe's Crystal Bay Casino, Resort & Spa project was said to create an estimated 4,440 new jobs, 2,200 directly, with annual payroll approaching $80 million and $1 billion in overall annual economic activity for the local area. The BIA issued a Notice of Intent to prepare an Environmental Impact Statement for the Lower Lake Rancheria (Koi's previous name which reflects their ties to Lake County) Casino-Hotel project on November 26, 2004.

The Tribe also began talks with the City of Oakland to explore potential benefits the project could bring to the local economy. Discussions included a proposal for annual payments from the Tribe to mitigate impacts to city services, including funding for additional police and fire protection, reimbursement for lost property taxes and parking tax revenue, as well as funds for road and traffic improvements. The proposal was funded by Florida real estate developer Alan Ginsburg. Facing incredible community opposition, and citizen outrage over the blatant reservation shopping, Koi dropped its plans.

B. Koi's Plan in 2006 to Build a Casino in Los Banos.

After being rejected by the City of Oakland for an off-reservation casino, the Lower Lake Rancheria Koi Nation submitted a request to Secretary of Interior Gale Norton requesting that the Secretary deem a specific parcel in Los Banos, California to be eligible for gaming. This was done prior to the tribe being determined to be a "restored tribe" as required by 25 C.F.R. Part 292. Chairman Daniel Beltran wrote:

The Lower Lake Rancheria Koi Nation is a landless, restored tribe. We have located a community that is willing to accept the Tribe and welcomes the proposed casino. The land is located in Los

[8] The Chickasaw Nation is a very large tribe that owns twenty-three (23) casinos in Oklahoma. It is a commercially successful tribe, with at least 200 business ventures. Its long list of gaming establishments includes WinStar World Casino and Resort in Thackerville, Oklahoma, which the tribe bills as the largest casino in the world. See, https://www.pressdemocrat.com/article/news/koi-partnering-with-chickasaw-nation-on-shiloh-casino/

[9] Material in this section is found on the Koi Nation Wikipedia page, https://en.wikipedia.org/wiki/Koi_Nation. The page includes links to many news articles that tell the story of Koi's attempts to take lands into trust that are well outside the Tribe's ancestral territory and were all rejected by local governments and voters.

Banos, Merced County, California and would be subject of a "two-part, best interests" determination under the Indian Gaming Regulatory Act."[10]

Curiously, on the same date, Lower Lake Chairman Daniel Beltran wrote a different letter to Secretary of the Interior asking for the Secretary to deem the following land as eligible for gaming under 25 U.S.C. §2719(b):[11]

1631 Airport Boulevard – comprised of two irregularly shaped, continuous parcels (APN 059-271-004 and 059-271-045) Sonoma County;
Land in Lake County within or near the Tribe's former reservation;
Land in Lake County commonly referred to as Konocti Harbor Resort and Spa;
Any land located in the counties listed above.

It is unfortunate that the Tribe seems to have dropped the requests for restored lands in determination for lands within the Tribe's aboriginal area. However, the Tribe and its advisors must have realized at some point that the Tribe did not actually qualify for restored lands at the time because it did not meet the requirements to be deemed a "restored tribe." However, they continued to search outside of the Tribe's homelands to find a better casino location.

C. Koi Tries Another Site in Vallejo.

Rather than learning the lesson from the battle over taking land into trust for gaming in Oakland, and continuing to look at possible gaming sites in the Clear Lake area, Koi was one of eight applicants for the development of a site in Vallejo, California in 2014. [12] The Tribe partnered with developer Cordish Company for a proposed $850 million project, promising to pay the city between $10 million and $ 20 million a year, along with generating thousands of jobs. Cordish is a development company based in Baltimore, Maryland, and whose focus is mixed-use entertainment districts. In January 2015, after considerable controversy, the Vallejo City Council voted to reject all gambling proposals and to concentrate solely on industrial proposals for the site.

D. Koi Seeks to Purchase Land in Petaluma from Dry Creek Rancheria.

It is Cloverdale's understanding that Dry Creek representatives met with Mr. Newland in 2018, along with Koi Nation leaders, and the Tribe's longstanding attorney, Michael Anderson. The purpose of the meeting was to hear a request from Koi to purchase land owned by the Dry Creek Rancheria in Petaluma, California. Bryan Newland participated in the telephone conference and assured Dry Creek representatives that Koi would be able to meet the requirements of the applicable regulations if Dry Creek supported the acquisition.

It was clear that attorneys Michael Anderson and Ryan Newland had access to Interior officials due to Mr. Anderson's prior tenure in the BIA and Mr. Newland's tenure as Counselor and Policy Advisor to the Assistant Secretary of the Interior from 2009 to 2012.[13] They assured Dry Creek that they would

[10] See, Letter dated March 29, 2006 from Daniel Beltran, Lower Lake Rancheria Koi Nation to Secretary Gale Norton.

[11] See, Letter dated March 29, 2006 from Daniel Beltran, Lower Lake Rancheria Koi Nation to Secretary Gale Norton #2.

[12] Id.

[13] We note a letter dated October 14, 2011 from Dino Beltran, Treasurer, Lower lake Rancheria Koi Nation to Bryan Newland, Policy Advisor to the Deputy Assistant Secretary of Indian Affairs. The letter requests a "Secretarial Waiver under 25 C.F.R. §1.2

make sure Koi's application for restored lands in Petaluma would be successful even though the site did not qualify under the then-existing regulation.

Dry Creek officials did not hear back from Koi Nation regarding the proposed project. The next time the Dry Creek Rancheria heard about a Koi Nation project, was an announcement that the Tribe had acquired land in Windsor, less than nineteen (19) miles from the Dry Creek Rancheria.

It is clear that Koi has been reservation shopping for a long time – searching for a gaming location outside of its aboriginal area to conduct gaming. In doing so it has presented arguments that expand the statutory exceptions for the IGRA gaming lands prohibition far beyond the intent of Congress. Allowing the Tribe to move forward will create a dangerous precedent for all tribes in California.

V. Cloverdale Believes that Secretary Newland has Inappropriately Advocated for Koi Nations Restored Lands Opinions.

Assistant Secretary Newland represented Koi Nation prior to his appointment as Assistant Secretary. As discussed above, Dry Creek representatives met with Mr. Newland in 2018, along with Koi Nation leaders and the Tribe's longstanding attorney, Michael Anderson.

When Mr. Newland became Assistant Secretary, he made it a priority to pursue an update to the Part 292 and 151 regulations. The primary change in the regulations was to loosen the standards for restored lands in the fee to trust regulations. The update also refused to further clarify the Part 292 regulations. This is despite several courts interpreting the 2008 Part 292 regulations to require a showing that restored lands are ancestral homelands. Clearly, there has been a bias in favor of Koi during the Newland administration at DOI. In fact, in a recent letter to the Congressional Natural Resources Committee, Secretary Newland brazenly stated,

> "During its rule making the Department received a number for comments seeking a more restrictive standard than "significant historical connection" but ultimately rejected more restrictive standards and explained such restrictions did not have a basis in IGRA. Some of the more restrictive standards included: "exclusive use and occupancy," "uninterrupted connection," a Tribe's "ancestral [or aboriginal] homelands," as well as requirements to "acquire their former reservation land if it is available" or "analyze sites that are close to [ancestral or] aboriginal homelands." The Department specifically rejected ancestral or aboriginal homelands because "newly acquired lands with significant historical connections may or may not include those close to aboriginal homelands."[14]

What the letter failed to state is that despite court rulings that required a *closer* connection to the land, he had made the determination that the rule did not need to be clarified to be consistent with applicable court decisions, even over the objection of tribal representatives that sought to have the rule recognize traditional tribal territories for the purpose of restored lands. While IGRA may be silent on the

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clarifying that the Tribe should be treated as a restored tribe for purposes under the Section 20 regulation at C.F.R. §§292.7-292.10, which would complete correction of the administrative error that has left the Tribe behind for decades." The letter outlines the "Regulatory Effect of Secretarial Waiver" of 25 C.F.R. §§292.7-292.10. As Assistant Secretary, Bryan Newland has granted the requested waiver.

[14] See, Letter dated August 13, 2024, from Assistant Secretary Bryan Newland to Congressman Bruce Westerman, Chairman, Committee on Natural Resources, at page 3.

language that would be within the implementing regulations, it is contrary to logic that the regulations would be changed in a manner that would provide a wildly new standard for newly restored tribes that would allow them to essentially "choose" to move into the traditional territory of other tribes, rather than seek lands within their own homelands. Moreover, the fact that numerous courts have interpreted the 292 regulations would have been sufficient to update the regulations to be consistent with those

rulings. Failure to do so reflects inherent bias by the Assistant Secretary in the promulgation of the regulations.

VI. Conclusion

The Cloverdale Rancheria of Pomo Indians of California urges the department to deny the Koi Tribe's Request for Restored Lands Opinion for the Windsor Site. Failure to do so will set a precedent that will harm all Tribes in California. Please contact me should you have any questions.

Sincerely,

Patricia Hermosillo

Patricia Hermosillo
Chairperson, Cloverdale Rancheria of Pomo Indians of California

From: Vanessa Pence - GO \ Tribal Board Assistant <Vanessa.Pence@cowcreek-nsn.gov> on behalf of Carla Keene - GO \ Tribal Board Chairman <CKeene@cowcreek-nsn.gov>
Sent: Thursday, December 19, 2024 11:24 AM
To: Dutschke, Amy <Amy.Dutschke@bia.gov>; Broussard, Chad N <Chad.Broussard@bia.gov>
Subject: [EXTERNAL] Comments on the Final Environmental Impact Statement / Koi Nation of Northern California

Good afternoon,

Please find attached the comments on the Final Environmental Impact Statement / Koi Nation of Northern California's 68.6-acre Shiloh Resort and Casino Project.

Kind Regards,

Carla Keene | Tribal Chairman
Cow Creek Band of Umpqua Tribe of Indians
carla.keene@cowcreek-nsn.gov
2371 NE Stephens St., Roseburg, OR. 97470
www.cowcreek-nsn.gov
Office: (541) 672.9405 |

COW CREEK BAND OF UMPQUA TRIBE OF INDIANS

GOVERNMENT OFFICES
2371 NE STEPHENS STREET, SUITE 100
ROSEBURG, OR 97470-1399
Phone: 541-672-9405
Fax: 541-673-0432

December 19, 2024

VIA EMAIL AND U.S. MAIL

Amy Dutschke, Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way, Room W-2820
Sacramento, CA 95825
Amy.Dutschke@bia.gov
chad.broussard@bia.gov

Re: Final Environmental Impact Statement/Koi Nation of Northern California's 68.6-acre Shiloh Resort and Casino Project

Dear Director Dutschke:

The Cow Creek Band of Umpqua Tribe of Indians ("Cow Creek Tribe") submits these comments on the Final Environmental Impact Statement ("FEIS") prepared by the Bureau of Indian Affairs ("BIA") to assess the environmental effects resulting from the Koi Nation of Northern California's ("Koi Nation") Shiloh Resort and Casino Project, which includes the acquisition by the BIA of a 68.6-acre property in unincorporated Sonoma County, California, into federal trust status for the benefit of the Tribe for gaming purposes. The FEIS fails to adequately address National Historic Preservation Act ("NHPA") compliance or the obvious environmental impacts of allowing a tribe with no ancestral ties to a parcel of land to game thereon under the "restored lands" exception to the Indian Gaming Regulatory Act ("IGRA").

The BIA's Response to Comments on the Draft Environmental Impact Statement ("DEIS") goes to great lengths to except the lack of ancestral ties to land and planned unlawful use of these lands for gaming pursuant to IGRA from consideration in the EIS, claiming "the NEPA process is intended 'to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment' (40 CFR §1500.1(c))," but apparently relying on the colloquial meaning of "environment," rather than the meaning under NEPA. Response to Comments, p. 3-6. NEPA defines "human

environment or environment" as: "comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment. (*See also* the definition of "effects" in paragraph (i) of this section.)" 40 CFR § 1508.1(r). Paragraph (i) of this section, in pertinent part, reads:

> (4) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

40 CFR § 1508.1(i)(4)(emphasis added). Thus, the effects of a tribe with no ancestral ties to an area coming in and opening a gaming facility there will have on the historic, cultural, economic, social, or health of nearby tribes are squarely within the purview of NEPA and must be addressed in an Environmental Impact Statement.

Compliance with IGRA also falls squarely within NEPA's edict. NEPA requires federal agencies to prepare environmental documents for all federal actions effecting the human environment. However, NEPA specifically states that an agency need not complete an environmental review where, as here, "the preparation of such a document would clearly and fundamentally conflict with the requirements of another provision of law." 42 USC § 4336(a)(3). That the National Indian Gaming Commission is listed as a Cooperating Agency in the introduction to the FEIS furthermore belies the BIA's position that IGRA compliance is somehow unrelated to the NEPA process. FEIS, p. ES-1.

The BIA's failure to comply with the NHPA is so egregious that it is currently subject to litigation and a motion for a temporary restraining order. Moreover, the FEIS relies on a Cultural Resources Information report that has been "bound separately" and kept from public view, depriving the public and affected tribes of an opportunity to analyze or rebut whatever self-serving information the Koi Nation has submitted. FEIS Appendix H. However, it is well documented that the Koi Nation's ancestral territory is in what is now known as Lake County—the Koi people lived aboriginally on an island in Clear Lake—at least fifty (50) miles away from the 68.6-acre, Sonoma County property that they seek to develop for gaming. The Koi Nation's gaming project represents an unfortunate trend of tribes seeking to develop casinos in the territories aboriginal to other Indigenous peoples and Tribal nations.

The negative environmental impact, as that term is defined by NEPA, of allowing a tribe to develop a 68.6-acre project in a place where it does not belong causes irreparable socio-economic, historic, and cultural harm to aboriginal Indigenous peoples and Tribal nations. NEPA requires the BIA to take a "hard look" at the identified impacts of the Koi Nation's proposed casino, including the environmental and interrelated socio-economic, historic, and cultural impacts of the proposed action. 42 U.S.C. § 4332(A)–(C); 40 C.F.R. § 1502.16 (2020). It appears, however, that the BIA has failed to take that hard look. Nor does it appear from the FEIS that the BIA considered comments on the DEIS from other Tribal nations regarding the Koi Nation's lack of aboriginal connection to the 68.6-acre property.

For these reasons, the Cow Creek Tribe urges the BIA to select Alternative D – No Action.

Sincerely,

Carla Keene

Carla Keene, Chairman
Cow Creek Band of Umpqua Tribe of Indians

T5

December 6, 2024

VIA EMAIL (amy.dutschke@bia.gov) AND FEDEX

Amy Dutschke
Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way, Room W-2820
Sacramento, CA 95825

Re: Support for the Koi Nation of Northern California's Shiloh Project

Dear Regional Director Dutschke,

The Jamul Indian Village of California is pleased to provide our support for the Koi Nation of Northern California's Shiloh Project and offer these comments on the BIA's publication of the Final Environmental Impact Statement ("FEIS"). We first note that the FEIS contains several revisions from the Draft Environmental Impact Statement ("DEIS"), which reflect a careful reading of the public comments of the DEIS. The result is a strong, well-reasoned FEIS, which addresses in-depth water resources, traffic, fire evacuation and other environmental issues of concern to the community.

While the DEIS addressed community concerns related to existing water resources and the potential for groundwater depletion, the FEIS contains additional analysis as well as responsive mitigations pertaining to water resources following the construction and operation of the Shiloh Project. This additional work demonstrates that the BIA genuinely considered and incorporated into its analyses the comments submitted pursuant to the publication of the DEIS.

Likewise, the FEIS considered a more expansive list of measures intended to mitigate traffic concerns raised by the local community, including alternative modifications to local roadways and modified fair share contributions. These modifications strengthened the FEIS and confirmed that local community input was an effective component in the environmental review process for this project.

It is evident from the FEIS that the BIA has taken a hard look at all the environmental issues that were raised during the DEIS comment period, including water resources, traffic, fire evacuation, and tribal consultations, and has addressed these concerns and others in the FEIS. Each stage of the Shiloh Project environmental analysis has been thoughtful in its consideration of environmental risks associated with any project of this nature, but this Final Environmental Impact Statement represents a review and analysis of highest quality. In sum, we wholeheartedly support the final approval of the Shiloh Project and believe that it will create jobs and have a favorable overall economic impact for the long term.

info@jamulindianvillage.com
619.669.4785
619.669.4817
P. O. Box 612
Jamul, CA 91935
jamulindianvillage.com

Please contact me at *epinto@jiv-nsn.gov* or (619) 322.0552 with any questions you may have regarding our support.

Respectfully,

Erica M. Pinto, Chairwoman
Jamul Indian Village of California

T6

LYTTON RANCHERIA • Lytton Band of Pomo Indians

1500 Falling Oak Way • Windsor, California 95492

(707) 575-5917 • Fax (707) 575-6974

12/17/2024

Wizipan Garriott
Principal Deputy Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Amy Dutschke, Regional Director
Pacific Region Regional Office
Bureau of Indian Affairs
2800 Cottage Way, Suite W-2820
Sacramento, CA 95825

Re: Lytton Rancheria Second Request for Extension of Koi Nation Final EIS Public Review Period

Dear Principal Deputy Assistant Secretary Garriott, and Director Dutschke:

On behalf of the Lytton Rancheria of California ("Lytton"), I am again writing to request a 45-day extension of the Koi Nation Final EIS Public Review Period.

As mentioned in our previous letter and in our meeting with you on December 10th, the Final EIS and included appendices consists of over 10,000 pages of environmental review documents and the tribe is scrambling to prepare comments ahead of the December 23rd deadline. Lytton is being forced to expend considerable resources to review the documents and prepare informed comments over the holidays, whilst still managing our day-to-day operations.

We reiterate our call for the BIA to extend the public comment period for 45-days, in order to give Lytton and others time to properly review the final documents. The holiday time period and weather conditions in Sonoma County have limited our ability to properly respond to the Final EIS and we are certain this is true of other Tribes and Sonoma County residents. We

also again urge the BIA to engage in meaningful consultation with the local tribes who will be severely harmed by this project, and to hold a public hearing on the Final EIS as had been done for each of the previous drafts.

Additionally, we have heard from numerous concerned parties seeking to submit comments on the FEIS who do not know how as https://www.shilohresortenvironmental.com/ the website hosting the FEIS has taken down the instructions. For every previous document, the BIA has had detailed instructions on how to submit comments whether via email or mail. A similar application from the Coquille Indian Tribe at the site: https://coquille-eis.com/ contains detailed instructions on how to submit comments for their FEIS. It is unclear to us why instructions on how to submit comments would be taken down, or not included for the FEIS. We encourage the BIA to get these instructions back onto the page as soon as possible.

Please contact me should you have any questions.

Sincerely,

Andy Mejia

Andy Mejia
Chairperson, Lytton Rancheria of California

From: Vickey Macias <VMacias@cloverdalerancheria.com>
Sent: Friday, December 20, 2024 2:36 PM
To: Dutschke, Amy <Amy.Dutschke@bia.gov>
Cc: Broussard, Chad N <Chad.Broussard@bia.gov>
Subject: [EXTERNAL] Koi Nation EIS Finalized

Dear Principal Deputy Assistant Secretary Garriott and Regional Director Dutschke
Attached is the comments from the Cloverdale Rancheria of Pomo Indians of California's comments regarding the FEIS Shiloh Resort and Casino Project.
On behalf of the Cloverdale Rancheria Tribal Council,
Vickey Macias
Tribal Treasurer

If you have any questions or comments, please feel free to contact Maria Elliott, Tribal Vice Chairperson or Vickey Macias Tribal Treasurer

Cloverdale Rancheria

555 S. Cloverdale Blvd. ~ Cloverdale, CA 95425
(707) 894-5775 ~ Fax (707) 894-5727

Wizipan Garriott
Principal Deputy Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Amy Dutschke
Regional Director
Bureau of Indian Affairs, Pacific Regional Office
2800 Cottage Way, Room W–2820, Sacramento, CA 95825

Via email to: chad.broussard@bia.gov

Re: FEIS Comments, Shiloh Resort and Casino Project

Dear Principal Deputy Assistant Secretary Garriott and Director Dutschke,

The Cloverdale Rancheria of Pomo Indians of California, (Cloverdale), is a federally recognized Indian Tribe with reservation lands in Sonoma County, California. Cloverdale is on record opposing the Koi Nation's application to the United States Department of Interior to acquire 68.6 acres of land in trust (Project Site) for the benefit of the Koi Nation for gaming purposes (Proposed Action). Koi Nation now proposes to use the Project Site to develop a casino facility, hotel, spa, and associated infrastructure. As described in this and previous comments, Cloverdale has serious concerns regarding the potential effects of the Proposed Project on local Tribes—which notably do not include the Koi Nation itself, whose historic and cultural ties are instead to Lake County—and the surrounding community and environment. The Final Environmental Impact Statement (FEIS) released by the Bureau of Indian Affairs (BIA) is inadequate to address those concerns, and indeed does not even fully acknowledge them.

As a threshold matter, Cloverdale and the rest of the public have not been provided with sufficient opportunity for meaningful review and comment on the environmental implications of this major proposed development, despite the potential for significant impacts to the reservation homelands of Sonoma County Tribes. As the volume of materials has increased dramatically with each step of the review process, the time to review and submit comments on those materials has markedly decreased. Cloverdale has not received proper government-to-government consultation on this project, and our letters requesting such have gone unanswered. Moreover, the homelands of our fellow Sonoma County Tribes do not appear to be accounted for in the data underpinning the BIA's wildfire and traffic studies, despite repeated warnings to this effect and the BIA's unsupported assertion to the contrary in its response to comments. Finally, the FEIS fails to adequately account for impacts to water, wildlife, cultural, or economic resources, and continues to

rely on proposed mitigation measures that are either speculative, unenforceable, or outsourced to third parties not under the purview of the BIA.

In short, despite Council on Environmental Quality (CEQ) regulations requiring that an EIS "provide full and fair discussion of significant environmental impacts and . . . inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment," 40 C.F.R. § 1502.1, the BIA's rushed timeline and failure to meaningfully address Sonoma County Tribes' legitimate concerns have arbitrarily and capriciously deprived Cloverdale and other local Tribes of the opportunity to fully review and analyze the Proposed Project.

Cloverdale therefore reiterates its request that the BIA either adopt Alternative D, the No-Action Alternative, or revisit the environmental analysis underlying the FEIS, which Cloverdale believes to be inadequate, to meaningfully address these shortcomings and to allow for careful, complete consideration of the likely impacts of the Proposed Project to the surrounding Tribes, communities, and environment. Failing either of these remedies, the BIA must at the very least issue a supplement to the FEIS under 40 C.F.R. § 1502.9(d)(1) to account for new construction not incorporated within the 2022 studies the FEIS cites.

I. Procedural Deficiencies Have Plagued the Proposed Project Since its Early Stages.

From the outset, the BIA's timing of Environmental Assessment (EA), DEIS, and FEIS releases and corresponding public comment periods appears designed to minimize public input in service of a pre-determined schedule, rather than to fully resolve outstanding issues identified by local Tribes and others. Not only does the FEIS outright violate statutory length limitations, but the BIA's rushed timelines appear to have affected the FEIS's contents. Symptoms of the BIA's condensed timing include, *inter alia*, its failure to account for substantial changes to the vicinity of the Project Site (identified by the Sonoma County Tribes in prior comments), the dearth of information provided to local Tribes during the scoping process, and the inadequacy of the public comment periods. The BIA's failure to meet the standards laid out in the National Environmental Policy Act (NEPA), its implementing regulations, and governing case law is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of NEPA and the Administrative Procedure Act (APA). 5 U.S.C. §§ 701–706.

a. The Timing and Length of Materials Violate NEPA and its Implementing Regulations.

In September of 2022, an Environmental Assessment (EA) was prepared and made available for public comment for a 45-day period, which was then extended for an additional 15-day period that concluded on November 13, 2023. The BIA then decided to prepare a Draft EIS

(DEIS), the publication of which initiated a 45-day comment period that concluded on August 26, 2024. On November 22, 2024, the BIA released the FEIS for a 30-day period "after which the BIA may proceed with a decision." FEIS at 3-2. As the time allotted for public review and comment on the Proposed Project has decreased, the materials provided in support of the Proposed Project have multiplied. Sonoma County Tribes have consistently raised as problematic the limited timeframes provided to review and comment on the Proposed Project's voluminous technical appendices. And when the BIA released its approximately 6,000-page Draft EIS (DEIS) for only 45 days over a holiday weekend, numerous commenters noted the length and complexity of the materials, and requested extensions to allow for independent review, meaningful comment, and required consultation. *See* FEIS App. P. None were granted.

On November 22, 2024, the BIA released the FEIS, this time for a 30-day comment period, and with holiday weekends on either end. Though the body of the FEIS alone totals 321 pages, there are approximately 10,000 pages of technical materials included in the appendices. To date, the BIA has not responded to requests for extension.

In the FEIS, the BIA points to its adherence to the **minimum** timelines set forth by the CEQ as evidence of procedural compliance. FEIS at 3-l ("Agencies shall allow at least 45 days for comment on a Draft EIS . . . Consistent with this requirement, a NOA for the Draft EIS was issued on July 8, 2024 . . . ."). However, since the BIA bases its analyses on thousands of technically complex pages attached as appendices to the already-lengthy Draft and Final EIS, the BIA's strict adherence to the regulatory minimums does not "ensure that environmental information is available to public officials and citizens **before** decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). Moreover, both NEPA and the CEQ regulations direct that the text of a final EIS—exclusive of citations or appendices—should not exceed 150 pages, except for proposals of extraordinary complexity, "which **shall not exceed 300 pages**." 40 C.F.R. § 1502.7 (emphasis added);[1] *see also* 42 U.S.C. § 4336a(e)(l) (same). Excluding citations and appendices, the FEIS totals **311 pages**. On these grounds alone, the FEIS violates CEQ regulations and NEPA.

In the face of these violations, the BIA's refusal to even grant the public commenters' request for extension is all the more arbitrary and capricious. Public commenters were given a total of **30 days** to pore over tens of thousands of pages of technical data, and to identify the shortcomings of the same. Such a condensed timeline cannot support a finding that the BIA gave the public's concerns due consideration. To the contrary, the decreasing timelines—coupled with the exponential increase in materials to review—indicate that the BIA did not and could not engage

[1] In describing the reason for this change, the CEQ noted in the January 10, 2020 Notice of Proposed Rulemaking (NPRM) that "every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information."

in a meaningful dialogue with commenters, who were not provided the opportunity to fully review the materials. Actions that undermine public participation and obscure the actual proposed action under review—such as the BIA's actions here—violate fundamental NEPA requirements. *See* Indian Affairs NEPA Guidebook (Aug. 2012) at § 2.1 (emphasizing that "[t]he NEPA process is intended to facilitate public participation and disclosure in the Federal planning process") (emphasis added); *id.* § 2.4 ("Public disclosure and involvement is a key requirement of NEPA.").[2]

b. The BIA Failed to Adequately Consult or Coordinate with Affected Parties Including Sonoma County Tribes.

Aside from those cultural and paleontological failures discussed in greater detail below, *see* § VIII, the BIA's refusal to consult with or otherwise properly involve Sonoma County Tribes, including Cloverdale and the Lytton Rancheria—whose reservation homeland abuts the Town of Windsor—is fatal to the FEIS analyses. The CEQ regulations call for the involvement of Tribes that may be affected by a Federal proposal, 40 C.F.R. § 1501.2(b)(4)(ii) ("The Federal agency consults **early** with appropriate State, Tribal, and local governments and with interested persons and organizations when their involvement is reasonably foreseeable.") (emphasis added), and require that agencies integrate the environmental review process with other planning "at the **earliest possible time** to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts," *id.* § 1501.2 (emphasis added).

Here, the BIA's failure to coordinate with Cloverdale and Lytton from the early stages of the Proposed Project has resulted in several critical oversights. As Lytton explained in its comments of July 12, 2024:

> The Lytton Rancheria also takes great umbrage at the EIS's failure to account for the Tribe's new homeland and the possibility that the Koi Nation project could see it and its members destroyed due to evacuation delays the project will inevitably cause. We encourage the Bureau to meet and meaningfully consult with the Sonoma County Tribes who are understandably upset with such a project being pushed through for a Tribe whose homeland is in a different county.

FEIS App. P at 270. In later comments, Lytton identified "new housing projects in the construction phase around the project site which are not accounted for." *Id.* at 281.

Moreover, a number of the mitigation measures relied upon in the FEIS and that directly affect Lytton (rendering Lytton an "affected Tribe" entitled to deference on preferred mitigation

[2] 2https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59_IAM_3-H_v1.1_508_OIMT.pdf.

strategies) failed to incorporate Lytton's input during development. To the extent the BIA has consistently failed to consult with Lytton, and excludes Lytton entirely from consideration within the FEIS, *see, e.g.*, § 3.12, the federal government has breached its trust responsibility. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir.1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)) (holding BIA violated trust obligation when failing to comply with own regulations).

As the BIA knows, the Lytton Rancheria, which borders the town of Windsor, has initiated a new development in the area adding hundreds of residents, and possesses its own evacuation plans. Yet the mitigation measures described at ES-31 require the Koi Nation **only** to "coordinate with Sonoma County and the Town of Windsor on their respective emergency operation plans and implement or contribute to the implementation of measures intended to improve early detection of wildfire events, and evacuation times for the Project Site and vicinity." The FEIS' proposed mitigation plan ignores the inherent conflict in the existence of two potentially contradictory (or identical) evacuation plans covering the same area.[3]

Finally, it is particularly galling for Cloverdale and other affected Tribes that the Koi Nation—which does not have its cultural or historic ties to this area[4]—need not consult with the Tribes that maintain their traditional connections to the land regarding use and protection of the area. Even as Koi Nation is engaged in litigation with the City of Clearlake over disturbances to their ancestral sites over 50 miles away.[5]

Cloverdale has not yet received a response to our requested Section 106 consultation. Thus, it is clear that the BIA does not prioritize consultation with **all** affected government entities or Tribes. Indeed, with respect to mitigation, the BIA commits the Tribe to coordinate only with "Sonoma County and the Town of Windsor on their respective emergency operation plans," FEIS at 3-136, illogically omitting any reference to the Lytton Rancheria, whose homelands and housing project neighbor the same. *See also id.* at ES-31 (omitting Lytton from evacuation mitigation plans); ES-42 (failing to account for new Lytton housing development); Table 3.12-6 (excluding Lytton from Trigger Evacuation Zone); 3-133 (not incorporating Lytton into evacuation times).

[3] It is true that in Appendix P, the BIA claims the Lytton homeland and housing development have been incorporated into the underlying studies informing these mitigation measures, among others. But aside from this self-serving statement, there is no evidence of the same, particularly as the studies pre-date the construction of the housing development.

[4] FEIS 3-62 (determining "no ethnographic villages or camp sites reported within one mile of the APE").

[5] Https://www.record-bee.com/2023/08/03/koi-nation-sues-city-of-clearlake-over-sports-complex-development/

II. The FEIS' Proposed Mitigation Measures Remain Largely Unaddressed and Unenforceable.

According to the BIA, "[a]ny mitigation measure must be enforceable[,] and it is important for BIA Regional and Agency Offices to establish monitoring programs to ensure that mitigation is carried out." Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. Any analysis of alternatives must include a discussion of mitigation measures where mitigation is feasible, and of any monitoring designed for adaptive management. Moreover, "[f]ederal agencies are mandated to specifically consider . . . affected tribes' preferred mitigation strategies." Council on Env't Quality, Exec. Office of President, *Environmental Justice: Guidance Under the National Environmental Policy Act* 16 (1997). Sonoma County Tribes have raised a number of concerns related to the mitigation strategies identified by the BIA. These concerns remain unresolved in the FEIS.

Instead, the BIA points to the CEQ rules directing that a mitigation monitoring and compliance plan "be prepared and incorporated into the BIA's ROD," and claims that "[t]he EIS is not the document that commits the agency to mitigation."[6] Master Response at 3-11. The Master Response also asserts that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." *Id.* Neither of these responses—which, again, are not included within the FEIS itself, but rather the Appendices—address the underlying concerns with the mitigation measures identified in the FEIS, even pre- enforcement. The limited mitigation measures that **do** exist are facially unenforceable, in violation of BIA policy and the NEPA itself.

First, many of the mitigation measures identified in the FEIS rely on a threshold determination by the Koi Nation or another third party that adverse impacts will occur or have already occurred. *See, e.g.* FEIS at 4-1 (deferring to Town of Windsor's eventual determination that aquifer connectivity results in a "substantial decrease in water levels"). Others seek to reduce impacts "to the maximum extent possible," *id.* at 4-7, or suggest what measures "could be" included, *id.* at 4-26. Still others acknowledge that there is no feasible mitigation within the jurisdiction of the Tribe or the BIA. *Id.* at ES-18;19 (describing instances in which "no mitigation [is] feasible" and acknowledging that "[w]hile the timing for the off-site roadway improvements is not within the jurisdiction or ability of the Tribe or BIA to control, the Tribe shall make good faith efforts"). Where mitigation measures rely on the voluntary future actions of a third party, such as the Town of Windsor, they are speculative and cannot form the basis for rational decision making

[6] While the FEIS itself does not commit the agency to mitigation, this argument misses the point because the FEIS must adequately describe how the agency or applicant are to be held accountable to ensure the proposed mitigation occurs.

by the BIA. Plans to make plans after the Proposed Project has begun construction, which are outside of the NEPA process, and which are shielded from public review or comment, are not NEPA-compliant. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding no "hard look" had occurred when mitigation measures addressed post-construction impacts and explaining that "[m]itigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval.").

Nor does an FEIS that merely lists mitigation options comply with NEPA, because "snippets do not constitute real analysis." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (mere mention that protected species may be exposed to risks of oil spills did not provide lawful NEPA analysis). Even if included in the ROD, then, the BIA's vague, subjective, conclusory, or non-existent mitigation measures are, as a practical matter, unenforceable by Cloverdale or others (and illegal under the NEPA).

In its Public Comments on the DEIS, the Lytton Rancheria identified anticipated issues with the enforceability of any mitigation measures eventually adopted against the Koi Nation, a sovereign. In response, the BIA asserted that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." App. P at 3-11. But it is not at all clear that Cloverdale, Lytton, or any affected party, will have any enforcement recourse under the Koi Nation of Northern California Gaming Ordinance (Ordinance). Rather, the Ordinance provides in relevant part only that

> In the event an affected state or local governmental entity with an interest in the Applicable Mitigations **files a complaint with the NIGC** alleging that the Nation has not complied with the Applicable Mitigations in accordance with this Chapter 14 of the Gaming Ordinance, **upon notice from the NIGC** that such a complaint has been made, the Nation will submit to the NIGC's review and enforcement authority as set forth in 25 C.F.R. 573.1 . . .

Ordinance, attached as Appendix Q to the EIS, at 14.01 (emphasis added). Not only is "state or local government entity" undefined (and therefore potentially exclusive of Cloverdale or other Tribes), but it remains unclear under what circumstances the NIGC would accept—much less act upon—an enforcement claim by Cloverdale or other affected parties regarding environmental impacts of the Proposed Project. The existence of the Ordinance does not at all guarantee that "any mitigation required by the ROD will be enforceable as a matter of Tribal law," as the BIA claims. App. P at 3-11.

Finally, it is uncertain to what extent Cloverdale can even rely upon the BIA's repeated representations that the ROD will include enforcement measures (subjective or tenuous as they may be). Cloverdale notes with particular concern the recent holding in *Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*, 2024 WL 4745044 (D.C. Cir. Nov. 12, 2024), wherein the United States Court of Appeals for the District of Columbia Circuit determined that CEQ regulations were promulgated *ultra vires*, and thus unlawfully. Cloverdale is concerned that should any enforcement actions be brought pursuant to the FEIS or any eventual ROD, the BIA and Koi Nation will attempt to cite *Audubon* for the proposition that enforceability regulations are void. Thus, while the BIA defers any mitigation enforcement to the development of a ROD under CEQ regulations, compliance under those regulations is not necessarily assured or even practically enforceable.

III. The FEIS Still Fails to Adequately Address—Much Less Mitigate—Wildfire Concerns.

Despite Cloverdale and other affected Tribes raising wildfire as a primary concern in response to the DEIS, the FEIS dedicates remarkably little space to addressing the matter. Though the FEIS acknowledges that "the Project Site is primarily designated as 3 (high) wildfire risk," FEIS at 3-125, and concedes that the construction of the Project could increase the risks of wildfires, ES-26, the BIA nevertheless concludes wildfire hazards and impacts are not significant or less than significant. Further, the FEIS fails to incorporate a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. 350. Rather, as with the DEIS, the FEIS shoehorns what should be an independent wildfire risk analysis into its evacuation analysis and defers on the basis that "wildfire evacuation analysis is a new area of study under NEPA and few studies of this type have been completed for NEPA purposes." FEIS App. P at 3-16. And "while . . . federal agencies have substantial discretion to define the scope of NEPA review, an agency may not disregard its statutory obligation to take a 'hard look' at the environmental consequences of a proposed action, including its cumulative impacts, where appropriate." *Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022).

The FEIS readily concedes that

> [a] project would be considered to have a significant impact if it were to increase wildfire risk on-site or in the surrounding area. This includes, but is not limited to, building in a high-risk fire zone without project design measures to reduce inherent wildfire risk, increasing fuel loads, exacerbating the steepness of the local topography, introducing uses that would increase the chance of igniting fires, eliminating fire barriers, inhibiting local emergency response to or evacuation routes from wildfires, and conflicting with a local wildfire management plan.

FEIS at 3-129. As identified in earlier comments, **each** of these factors is implicated in some fashion by the Proposed Project, which would bring thousands of daily visitors to a site that Sonoma County has already determined to be at high risk.

But despite the significant risk to safety inherent in operating such a large casino facility in such a high-risk location, the FEIS relies on speculative mitigation measures, including "the establishment of public service agreements, such as with the Sonoma County Fire District (SCFD) and other relevant agencies," which the BIA assures "**would** include the resources necessary to effectively manage the increase in service calls without placing an undue financial burden on local fire and EMS." App. P at 3-54; *see* FEIS at 2-13 (emphasis added). To cite a non-existent mitigation measure that "would" somehow address all concerns "without . . . undue financial burden" based on the unquestioning consent of independent third parties is a complete deferral of the BIA's self-imposed obligation to develop enforceable mitigation measures. Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. And although there is a Letter of Intent between Koi Nation and SCFD, FEIS App. O, the Letter does not guarantee that the SCFD would actually respond to fire incidents at the Project Site. Nevertheless, the FEIS concludes that potential impacts to fire protection plans is less than significant. *Id.* at ES-17.

NEPA prohibits reliance on assumptions such as this one. *See e.g., Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 874 (9th Cir. 2022), *cert. denied sub nom. Am. Petroleum Inst. v. Env't Def. Ctr.*, 143 S. Ct. 2582, 216 L. Ed. 2d 1192 (2023) (agreeing with plaintiff "that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts."*); City of Los Angeles, California v. Fed. Aviation Admin.*, 63 F.4th 835, 850 (9th Cir. 2023) (finding FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not operate simultaneously).

The BIA also acknowledges that the Proposed Project's construction "could increase the risk of wildfire," FEIS at ES-26, but relies on Best Management Practices (BMPs) including "the prevention of fuel being spilled" and spark arresters to conclude that construction "would not increase wildfire risk onsite or in the surrounding area." *Id.* at 3-130. It is unclear how the BIA arrived at the conclusion that 'preventing fuel spillage' is (a) enforceable, or (b) effective. Further unclear is how such a vague mechanism might reduce fire risk to insignificance, which lays the groundwork for an arbitrary and capricious finding. *See Wilderness Society v. Bosworth*, 118 F.Supp.2d 1082, 1107 (D.Mt. 2000) ("Because BMPs have not been assessed for their effectiveness against landslide events and because a high risk of landslides is acknowledged . . . the Court finds it is not reasonable for the Defendants to just summarily rely on BMPs to mitigate this environmental impact. Therefore, the Court finds the FEIS conclusion that the project will have no

effect on water quality to be arbitrary and capricious based on the undisputed risk of landslides in the FEIS").

As with the DEIS, the only factors preventing the BIA from finding the wildfire risks presented by the Proposed Project constitute a significant impact are the hypothetical mitigation measures the Tribe **might** take to reduce wildfire risks. The circular finding is unsupported by the record before the BIA and should be revisited.

IV. Traffic and Evacuation Concerns Have Not Been Addressed.

Related to the wildfire concerns set forth above, Cloverdale and many others have raised alarm regarding the BIA's failure to adequately grapple with the Proposed Project's effects on traffic and evacuation concerns. In response, Appendix P to the FEIS simply states that the improvements discussed in the DEIS are "far from illusory," App. P at 3-96, and assures Sonoma County Tribes that its evacuation model "included within its assumptions the development of the Lytton Housing Project in Windsor, Shiloh Terrance, Shiloh Crossing, Clearwater, and other development projects. The model also included Shiloh Estates and other developments in the Mayacamas Mountains both in the opening year (2028) and the cumulative year (2040) scenarios." *Id.* at 3.1.11. But the BIA has failed to identify how it might require independent third parties to comply with the referenced mitigation measures, or support its claim that Lytton's housing development has been considered with any underlying data, studies, or references.

Specifically, though the Evacuation Travel Time Assessment cited in the BIA's response describes "key assumptions . . . used in the development of background and evacuation traffic demand," App. N-2 at 6, **neither the Lytton Housing Project nor any of the other projects identified in the Master Response are listed in these assumptions**. The Evacuation Travel Time Assessment states that "Background traffic data was based on outputs from the SCTA travel demand model from the traffic study for the Project[,]" which we assume refers to the Revised Traffic Impact Study at Appendix I. The Revised Traffic Impact Study bases its "Existing Conditions" on data collected in July 2022, prior to the existence of Lytton's new housing development. The Study further provides that Opening Year 2028 No Project Conditions "includes Existing Conditions, but with the addition of traffic from **approved projects** that are in the development pipeline in the Town of Windsor and Sonoma County, as well as effects from planned roadway improvements constructed by approved projects." (Emphasis added). It notes that "trips from the following approved projects were also added to the study intersections to estimate year 2028 traffic demands," providing a list of projects that **notably does not include the Lytton Housing Project in Windsor.** The BIA has thus failed to support its claim that the additional Lytton development is accounted for in the Study.

In the event of evacuation, the residents of Lytton's housing project will be among those forced to flee across Windsor and travel south on Route 101. They will be directly impacted and threatened by the delay the Koi Nation's Proposed Project will impose. These impacts, which are apparently not incorporated into the Study supporting BIA's analysis, could harm not only Lytton members, but the entire community. The BIA's bare statement that these impacts are considered is not supported by any citation to the actual analysis and Cloverdale could not independently locate where or how Lytton's housing development is accounted for in the analysis. A conclusory finding "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind . . . affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives," *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), and therefore violates NEPA.

V. The FEIS Fails to Adequately Address Impacts to Water Resources

The FEIS's water resources analysis remains incomplete and inadequate to address the environmental impacts that the Project will have on surface and groundwater resources. Maintaining the same deficiencies as the DEIS, the FEIS does not and cannot identify or articulate whether the Project's known and potential environmental impacts are likely to be significant for two primary reasons: First, like the DEIS, the FEIS relies entirely upon BMPs that are speculative or unenforceable. Second, like the DEIS, the FEIS does not rely upon adequate water surveys, monitoring, or studies and provides no baseline water quality data upon which to base its conclusions. As such, the FEIS cannot determine that all impacts to water resources would be "less than significant" or offer surrounding Tribes, organizations, or community members any assurance that their health and the human environment will not be harmed as a result of the Project.

As the FEIS concedes, the Project would significantly impact both surface and groundwater resources if certain circumstances were to occur. FEIS at 3-18. In particular, impacts would be significant when (1) runoff from the site causes localized flooding or introduces contaminants to waterways off site; (2) pumping at the proposed wells impedes groundwater recharge or creates drawdown that would affect local water supply; (3) pumping at the proposed wells interfere with the implementation of local groundwater management plans by causing or contributing to "chronic lowering of groundwater levels; depletion of groundwater storage; water quality degradation due to induced contaminant migration or interference with cleanup efforts or water quality management plans; depletion of interconnected surface waters, including potential flow in Pruitt Creek or impacts to groundwater-dependent ecosystems (GDEs); and/or land subsidence"; or (4) wastewater or runoff generated by the Project impacts the water quality of receiving waterbodies or groundwater. *Id.* Despite acknowledging that wastewater or runoff could impact the water quality of "receiving waterbodies," the FEIS claims that the Project would not impact surface water

supplies because it "is a sufficient distance from surface waters, such as the Russian River, used by water suppliers."[7] *Id.*

1. Speculative or Unenforceable BMPs

The FEIS concludes that adverse impacts would not occur and any impacts that will occur will be "less than significant" based on BMPs. However, all BMPs relied upon are entirely speculative or unenforceable. As a result, the BIA cannot conclude that any known or potential impacts to water resources will be "less than significant."

Both construction and operation of the Project would significantly impact surface and groundwater. *Id.* at 3-18–20. Construction of the Project could lead to soil erosion and sedimentation in nearby surface waters, which would inevitably degrade water quality and could even violate applicable water quality standards. Construction would also include the use of hazardous materials, including concrete washings, oil, and grease, the discharge of which into surface waters or groundwater would result in significant pollution. *Id.* at 3-18. The FEIS almost entirely relies upon the Koi Nation's future—and wholly speculative—adherence to the National Pollutant Discharge Elimination System (NPDES) general permit for construction stormwater discharges (NPDES General Construction Permit), issued pursuant to the Clean Water Act, to ensure that impacts to surface waters from construction activities would only be "less than significant." *See* NPDES Permit No. CAS000002 (Sept. 8, 2022), available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2022/wqo_2022-0057-dwq.pdf.

The Koi Nation has not yet obtained coverage under the NPDES General Construction Permit, nor has it prepared the requisite Stormwater Pollution Prevention Plan (SWPPP). Yet, the FEIS almost entirely relies on the Koi Nation's promised implementation of and adherence to the permit and SWPPP to conclude that sufficient BMPs would "minimize adverse impacts to the local and regional watershed from construction activities . . . ." *Id.* As a result, any assurance that the above-described impacts would be "less than significant" is entirely speculative. Moreover, without reviewing the exact SWPPP to which Koi Nation would be bound, the BIA cannot now conclude that it is (or will be) sufficient to protect against stormwater pollution. In other words,

[7] We note that "sufficient distance" is not defined, and without proper consideration of potential receiving waters, the Project may still impact surface waters that are not immediately adjacent to the site. *See County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 183–185 (2020) (holding that a point source may still discharge into navigable waters as regulated by the Clean Water Act when there is the "functional equivalent of a direct discharge," based upon considerations of various factors, including: time, distance, nature of material through which a pollutant travels, the extent to which a pollutant is diluted, and the amount of pollutant that enters the water, among others).

the BIA must conduct its own environmental review rather than rely on an entirely nonexistent SWPPP that may or may not be approved by the EPA sometime in the future. Rather than rely on speculation and future promises, the BIA must require Koi Nation to prepare the requisite SWPPP and conduct its own review to ensure that such SWPPP is adequate to protect against adverse environmental impacts before or concurrently to its own environmental review. Because the BIA's decision necessarily relies on the Koi Nation's future coverage under the NPDES General Construction Permit and SWPPP, these actions are connected and must be considered in the same NEPA review. *See* 40 C.F.R. § 1501.3(b) ("The agency shall also consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that: (1) Automatically trigger other actions that may require NEPA review; (2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) Are interdependent parts of a larger action and depend on the larger action for their justification."); *id.* § 1502.24(a) ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws [including the Clean Water Act] and Executive orders applicable to the proposed action . . . ."); *Friends of Animals v. U.S. Fish & Wildlife Svc.*, 28 F.4th 19, 34 (9th Cir. 2022).

Operation of the Project may also impact surface waters due to the increase of impervious surfaces, which would result in increased stormwater flows and discharge from the site during precipitation events. FEIS at 3-19. The FEIS assures that "[s]tormwater treatment and detention would be provided by bioswales, a detention basin, and/or the wastewater treatment plant (WWTP)" and that additional BMPs would include "weekly sweeping of internal roadways and parking areas to reduce sediment and debris from entering the stormwater drainage system." *Id.* Additionally, various facilities would be constructed within the 100-year floodplain. *Id.* The FEIS relies on balanced earthwork to ensure that changes to the delineated floodplain mapping would be prevented and floodplain impacts would be "less than significant." *Id.*

The FEIS, however, only relies on its grading and drainage plan to treat stormwater, and does not require the Koi Nation to route all stormwater to the wastewater treatment plant. The FEIS therefore does not require the Koi Nation to apply for or obtain an individual NPDES permit for any stormwater discharges into Pruitt Creek that may occur, except those from the wastewater treatment plant. *See id.* at 2-11–13. Pruitt Creek is a tributary of Pool Creek, which flows into Windsor Creek, the Laguna de Santa Rosa, and ultimately the Russian River. *See* FEIS, App. G-8 (Approved Jurisdictional Decision), at 3–4. As such, the portion of Pruitt Creek that runs directly through the Project site and into which the Project proposes to discharge stormwater is a navigable water subject to the permitting requirements in the Clean Water Act, 33 U.S.C. §§ 1342, 1344. *Id.* at 2. To that end, the Project proposes no future or ongoing SWPPPs beyond construction of the site, including any BMPs, to which it would be subject during operation. Accordingly, aside from

various design features, there is no enforcement mechanism, regulatory compliance requirements, or oversight to which the Project would be subject that ensures all stormwater discharged from the Project site meets water quality standards and prevents contaminants from entering nearby surface waters, which are already impaired.[8]

The FEIS proposes that, as a mitigation measure to impacts to "Biological Resources" from construction of the site, "[i]f impacts to Waters of the U.S. or wetland habitat are unavoidable, a 404 permit and 401 Certification under the Clean Water Act shall be obtained from the USACE and U.S. Environmental Protection Agency (USEPA)." FEIS at 4-9. However, as with the NPDES General Construction Permit, any coverage under a 404 permit is entirely speculative, and relying on the Koi Nation's future promise of adherence to a yet-obtained permit is inadequate justification for a determination of "less than significant" impacts. The BIA must require the Koi Nation to determine whether a 404 permit is required and, if so, obtain—or at the very least apply for—such permit before or concurrently to its review. Without knowing whether or what impacts to Waters of the U.S. or wetland habitat are unavoidable, there is no way for the BIA to now determine whether such impacts can or would be mitigated by a 404 permit, or whether such permit (if obtained, which is entirely dependent on the U.S. Army Corps of Engineers' own environmental analysis) would provide adequate mitigation under the BIA's own review. Furthermore, future environmental analyses cannot constitute adequate mitigation measures; the BIA must review what is before it *now* and cannot rely on the promise of future environmental review to ensure protection of resources at risk by the agency's action. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011).

Additionally, the grading and drainage plan is designed for a 100-year, 24-hour storm event. FEIS at 2-11, 3-19. However, due to the impacts of climate change, 100-year, 24-hour storm events are occurring more often and precipitation is increasingly more severe. *See* FEIS App. E, at 16. The stormwater management system should therefore be modeled and sized based on larger storm events to adequately manage increased stormwater as a result of climate change and prevent pollution discharges. *See* 40 C.F.R. § 1502.16(a)(6) (requiring environmental consequences section of EIS to include analysis of "climate-change related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives *and the effects of climate change on the proposed action and alternatives*." (emphasis

[8] Pruitt Creek and other tributaries of Windsor Creek are currently listed as impaired for sedimentation/siltation and temperature on California's most recently approved § 303(d) List from 2018. *See* 2018 Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report), available at https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2018_integrated_report.html.

added)); *see also* EPA Comments on EA, A-7 (advising BIA to "clarify whether and how increased precipitation intensity occurring under climate change has been accommodated in the drainage plans and if pre-development hydrology would be maintained considering these larger flows").

Lastly, the FEIS does not adequately address groundwater drawdown concerns or consider the impact to the new Lytton Rancheria development in its groundwater assessments. In particular, the Supplemental Groundwater Resources Impact Assessment ("SGRIA") still does not take into account the Lytton Rancheria housing development project and its reliance on groundwater wells for community water supply. *See* FEIS, Appendix D-4. As with fire evacuation and traffic concerns, the FEIS fails to consider the 146 families residing in the new Lytton Rancheria housing development with regard to groundwater drawdown. The FEIS has failed to incorporate the prior input from Sonoma County Tribes or to meaningfully consider the concerns in comments on the DEIS. Without considering the Lytton Rancheria housing development—which consists of approximately 150 homes and structures—and its use of groundwater wells, the FEIS entirely fails to accurately assess the impact the Project would have on local water supplies. By failing to properly consult with Sonoma County's Tribes and excluding the new Lytton homeland entirely from consideration within the FEIS, the BIA has breached its trust responsibility. *See Oglala Sioux Tribe*, 603 F.2d at 721.

2. No Baseline Water Quality Data

In addition to relying upon speculative or unenforceable BMPs, the FEIS further relies on nonexistent environmental analyses and fails to provide baseline water quality data upon which to base its determination that impacts would be less than significant. In particular, the FEIS does not include, nor has the BIA considered, any adequate water quality assessments of current conditions, benthic data, or comprehensive field data of nearby receiving waters or wetlands. The Water and Wastewater Feasibility Study conducted in February 2023, upon which the BIA relies, discusses a future "Baseline Monitoring Program" and notes,

> In order to begin detailed discussions with the [Regional Water Quality Control Board ("RWQCB")] on the feasibility of discharging to the Pruitt Creek, *the Project would need to begin to collect receiving water quality data* near anticipated discharge site and at the Mark West Creek gauge station. This data would help the RWQCB evaluate the background water quality of receiving waters, identify potential water quality restrictions, and understand the impacts of the proposed new discharge on the aquatic habitat.

FEIS, App. D-1, at 4-4 (emphasis added). Clearly then, neither the Koi Nation nor the BIA has yet collected or reviewed any water quality data of the receiving waters. But without this crucial baseline data, the BIA cannot now make a determination as to the existing structure and function of

Pruitt Creek or other waterways to determine what the direct, indirect, or cumulative effects on such water would be as a result of construction or operation of the Project. *See* 40 C.F.R. § 1508.1(i)(4) (defining the environmental "effects" or "impacts" that must be identified and considered under NEPA to include, among other things, "ecological (such as the effects on natural resources *and on the components, structures, and functioning of affected ecosystems*)" (emphasis added)). If any survey was conducted that actually collected water samples, conducted testing, and considered the water quality and benthic data of the site, it was nearly three years ago in February 2022 and only accounted for plant species and soil in surface waters and wetlands in the immediate vicinity of the Project area; it did not consider other benthic data—such as the presence of macroinvertebrates or other aquatic ecosystems—or the quality of nearby surface waters or wetlands offsite. *See* FEIS, App. G-4, at 11–15, App. A.

Likewise, as a mitigation measure, the FEIS proposes a "Baseline Groundwater Level and Stream Discharge Monitoring Program" and "GDE Verification Monitoring," wherein the Koi Nation would monitor the groundwater levels and stream discharges and collect baseline data (importantly) in the future, after the BIA issues its final Record of Decision. FEIS at 4-3–5. A similar set of circumstances was determined by the Ninth Circuit to be arbitrary and capricious. *See N. Plains Res. Council*, 668 F.3d at 1084–85. There, the Surface Transportation Board had agreed to conduct certain wildlife studies and surveys as a mitigation measure to the construction of a railroad, pre-construction but post-agency approval. *Id.* at 1083–84. The Ninth Circuit held that "[b]ecause the [Final Supplemental EIS] does not provide baseline data for many of the species, and instead plans to conduct surveys and studies as part of its post-approval mitigation measures, we hold that the Board did not take a sufficiently 'hard look' to fulfill its NEPA-imposed obligations at the impacts to these species prior to issuing its decision." *Id.* In explaining its decision, the Ninth Circuit noted:

> Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.
>
> This is inconsistent with what NEPA requires. NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. The use of mitigation measures as a proxy for baseline data does not further either purpose. First, without this data, an agency cannot carefully consider information about significant environmental impacts. Thus, the agency 'fail[s] to consider an important aspect of the problem,' resulting in an arbitrary and capricious decision. Second, even if the mitigation measures may guarantee that the data will be

collected sometime in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Id. at 1084–85 (citations omitted).

The same is true here. The BIA cannot rely on future surveys to determine the baseline water quality or biological data of the site; the agency must consider that information now in its pre-approval analysis. Without even the most basic understanding of the existing conditions, the BIA is entirely unable to determine what the effects of the Project will be on water resources or ensure that all proposed BMPs or mitigation measures will in fact guarantee the protection or restoration of such resources. The BIA must therefore collect such data or require the Koi Nation to collect such data, provide that data to the public, and then adequately consider such data before issuing its final Record of Decision or risk arbitrary and capricious agency decision-making.

VI. The FEIS Fails to Adequately Address Impacts to Wildlife Resources

Like in its review of impacts to water resources, the FEIS similarly bases a determination of "less than significant" impacts to wildlife resources on speculative and unenforceable BMPs and mitigation measures and fails to consider baseline data. Specifically, to avoid impacts to wildlife and other biological resources, the FEIS assures that the Project construction would comply with the NPDES General Construction Permit and SWPPP and other mitigation measures. FEIS at 3-52–54, 4-7–9. However, as discussed above, the promise of future compliance with yet-obtained NPDES permits is inadequate justification upon which to base a determination that any impacts to wildlife and biological resources would be "less than significant." Additionally, as discussed above, without an adequate understanding of the baseline conditions of the site, the BIA has no way to determine what the actual impacts to wildlife or biological resources would be and thus cannot ensure that the proposed measures will avoid or mitigate such impacts.

The FEIS does not discuss the direct, indirect, or cumulative impacts to all wildlife. Rather, it only specifically discusses the Project's impacts to federally listed or protected special-status species, critical and essential habitat, and migratory birds. *Id.* at 3-53–56. To support its determination that impacts to certain identified species would be "less than significant," the BIA ensures the adherence to conditions of other (not-yet issued) permits and implementation of BMPs and other mitigation measures. Specifically, this includes compliance with the NPDES General Construction Permit and SWPPP, both of which are entirely speculative. *Id.* at 2-15–16. Further, the FEIS proposes certain mitigation measures, nearly all of which are inadequate and fail to provide the BIA with baseline data of the water and biological resources necessary to make a

determination as to the Project's impacts. Again, as explained above, without baseline data, the BIA risks arbitrary and capricious decision-making.

Lastly, with regard to special-status fish species, particularly certain species of Pacific salmonids, the FEIS further acknowledges "that BIA has begun consultation with NOAA Fisheries," but that such consultation is still ongoing and no decision on the BIA's Biological Assessment has been issued. *FEIS* at 3-54, 5-1, App. G-7. The FEIS notes that NOAA provided comments on BIA's first Biological Assessment on February 9, 2024, but those comments are not available to the public. *Id.* at 5-1. To ensure it takes an adequate "hard look" at the impacts to special-status fish species, the BIA must not issue a final Record of Decision until consultation with NOAA has been completed.

VII. Economic Studies

In comments to the DEIS, concerns were raised regarding the economic impact studies. The first being that the studies upon which the BIA relied are woefully dated and inaccurate. In response to these comments, the BIA agrees that the data is dated, but claims that "[i]t is not practical nor required by NEPA to continually update financial analyses for the passage of time that inevitably takes place during any project and public review." T5-18. This ignores the fact, however, that "[r]eliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious." *N. Plains Res. Council*, 668 F.3d at 1086 (citing *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005)). Here, while economic data prepared by governmental agencies may lag, the BIA assigns great weight to the particular economic impact study here, which does not account for major changes in circumstance, like the fact that the study was conducted while the community was still recovering from the COVID-19 pandemic or without taking into account the Scotts Valley Casino. The data in that particular economic impact study is therefore too stale to carry the weight assigned to it by the BIA.

Cloverdale is pleased that a supplemental substitution effects cumulative analysis that assumes the opening of the Scotts Valley Casino was prepared. FEIS, Appendix B-5. However, the FEIS still fails to address or mitigate the fact that the cumulative economic adverse effects of the Project will be far more impactful to the Tribes, including Cloverdale, actually located in Sonoma County and the result of those impacts on the quality of life and services available to their members. *See id.* at 3-166–67. Particularly the FEIS does not analyze the effects the casino would have, should Cloverdale proceed with a similar project in order to provide for its members, who are actually from Sonoma County. There is no analysis on what market share would be available to Cloverdale, and to what degree of success a project from the Tribe could see. In other words, the BIA's supplemental study still does not take the requisite "hard look" at the economic impacts of this Project.

VIII. Cultural and Paleontological Resources

As the FEIS acknowledges, there are "records of sacred lands on or in the vicinity" of the Project site. However, the BIA has not properly complied with the National Historic Preservation Act (NHPA) and has not properly consulted with the necessary tribes regarding these cultural resources. On July 10, 2024, Juliane Polanco, the State Historic Preservation Officer (SHPO) for the California Department of Parks and Recreation, Office of Historic Preservation, sent the BIA a letter that: (1) advised the BIA to conduct consultation in a manner that complies with 36 C.F.R. § 800.2(c)(2)(ii)(A); (2) objected to a finding of no historic properties affected, noting that the BIA's efforts to identify historic properties was "insufficient, inadequate, and not reasonable"; and (3) requested BIA re-initiate Section 106 consultation. *See* T6, Comments of Federated Indians of Graton Rancheria (Aug. 26, 2024) (FIGR DEIS Comments), Attachment 27 (SHPO Letter). After it received notice of the SHPO's objection letter, Cloverdale provided the BIA with a letter, explaining that the Tribe agreed with the SHPO and formally requesting that the Section 106 consultation process be re-initiated. (See attachment). The Tribe has not received a response to our letter and the BIA has never re-initiated the Section 106 consultation process.

The NHPA requires federal agencies to consult with federally recognized Indian tribes that may attach religious and cultural significance to a property early in the planning process. 36 C.F.R. § 800.1. Such tribes should be given a reasonable opportunity to identify their concerns, advise on the identification and evaluation of properties, articulate its views on a project's effects on such properties, and participate in the resolution of adverse effects. *Id.* § 800.2(c)(2)(ii)(A). This duty for federal agencies to consult with tribes is nondiscretionary.

Here, the BIA failed to consult with the necessary tribes early in the planning process, and sent letters only after field surveys, trenching, and collection of obsidian samples for destruction had already been conducted. These surveys and other activities should not have occurred until *after* the proper Section 106 consultation with the necessary tribes. Furthermore, as discussed in the FIGR DEIS Comments, the BIA improperly "rushed ahead" without consulting the necessary tribes, and dismissed, ignored, or did not take seriously Tribal concerns regarding effects and identification efforts or requests to review documents and participate in surveys. FIGR DEIS Comments at 7–8. The SHPO's objection letter reiterated these failures, explaining that it objected to the BIA's finding of no historic properties affected and finding "the efforts to identify historic properties, including those of religious and cultural significant to Tribes to be insufficient, inadequate, and not reasonable." SHPO Letter at 3. Based on these concerns, failures, and deficiencies, the BIA should have re-initiated the Section 106 consultation process and invited all identified Tribes to participate in consultation again. Cloverdale specifically made such a request, which went ignored. Without adequate or proper Section 106 consultation, the FEIS does not and

cannot adequately protect Tribal sacred sites and cultural resources at risk as a result of the Project's construction and operation.

Conclusion

We appreciate the opportunity to provide comment to the BIA, and would like to emphasize our concerns that allowing a Tribe from Lake County to establish this Proposed Project will impinge on the Tribal sovereignty of Sonoma County Tribes as well as dramatically increase the risk of injury and death in the event of a wildfire. We reiterate our request that the Bureau opt for Alternative D or at least create an accurate Environmental Impact Statement.

Sincerely,

Patricia Hermosillo

Patricia Hermosillo
Cloverdale Rancheria Tribal Chairperson

From: Andy Mejia <andymejia@lyttonrancheria.com>
Sent: Monday, December 23, 2024 11:45 AM
To: Broussard, Chad N <Chad.Broussard@bia.gov>
Cc: Dutschke, Amy <Amy.Dutschke@bia.gov>
Subject: [EXTERNAL] FEIS Comments - Shiloh Resort and Casino Project - Lytton Rancheria of California

Mr. Chad Broussard,

Attached to this email you will find the FEIS Comments for Koi Nation's Shiloh Resort and Casino Project from Lytton Rancheria of California.

Andy Mejia
Chairperson
Lytton Rancheria of California
1500 Falling Oak Way
Windsor, CA 95492
Ph: 707-575-5917 Fax: 707-575-6974
andymejia@lyttonrancheria.com

LYTTON RANCHERIA • Lytton Band of Pomo Indians

1500 Falling Oak Way • Windsor, California 95492

(707) 575-5917 • Fax (707) 575-6974

Wizipan Garriott
Principal Deputy Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Amy Dutschke
Regional Director
Bureau of Indian Affairs, Pacific Regional Office
2800 Cottage Way, Room W–2820, Sacramento, CA 95825

Via email to: chad.broussard@bia.gov

Re: FEIS Comments, Shiloh Resort and Casino Project

Dear Principal Deputy Assistant Secretary Garriott and Director Dutschke,

The Lytton Rancheria of California, also known as the Lytton Band of Pomo Indians (Lytton), is a federally recognized Indian Tribe with reservation lands in Windsor, California. The Tribe has its homeland 4 miles from the Koi Nation of California's (Koi Nation, or Tribe) proposed Shiloh Resort and Casino project (Proposed Project). Lytton is on record opposing the Koi Nation's application to the United States Department of Interior to acquire 68.6 acres of land in trust (Project Site) for the benefit of the Koi Nation for gaming purposes (Proposed Action). Koi Nation now proposes to use the Project Site to develop a casino facility, hotel, spa, and associated infrastructure. As described in this and previous comments, Lytton has serious concerns regarding the potential effects of the Proposed Project on local Tribes—which notably do not include the Koi Nation itself, whose historic and cultural ties are instead to Lake County—and the surrounding community and environment. The Final Environmental Impact Statement (FEIS) released by the Bureau of Indian Affairs (BIA) is inadequate to address those concerns, and indeed does not even fully acknowledge them.

As a threshold matter, Lytton and the rest of the public have not been provided with sufficient opportunity for meaningful review and comment on the environmental implications of this major proposed development, despite the potential for significant impacts to Lytton's reservation homelands. As the volume of materials has increased dramatically with each step of the review process, the time to review and submit comments on those materials has markedly decreased. Lytton has also been excluded from Tribal consultation and from mitigation measures relied upon in the FEIS that require or involve coordination and cooperation between tribal and

local governments in the vicinity of the Proposed Project. Moreover, Lytton's newly constructed homelands still do not appear to be accounted for in the data underpinning the BIA's wildfire and traffic studies, despite Lytton's repeated warnings to this effect and the BIA's unsupported assertion to the contrary in its response to comments. Finally, the FEIS fails to adequately account for impacts to water, wildlife, cultural, or economic resources, and continues to rely on proposed mitigation measures that are either speculative, unenforceable, or outsourced to third parties not under the purview of the BIA.

In short, despite Council on Environmental Quality (CEQ) regulations requiring that an EIS "provide full and fair discussion of significant environmental impacts and . . . inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment," 40 C.F.R. § 1502.1, the BIA's rushed timeline and failure to meaningfully address Lytton's legitimate concerns have arbitrarily and capriciously deprived Lytton and other local Tribes of the opportunity to fully review and analyze the Proposed Project.

Lytton therefore reiterates its request that the BIA either adopt Alternative D, the No-Action Alternative, or revisit the environmental analysis underlying the FEIS, which Lytton believes to be inadequate, to meaningfully address these shortcomings and to allow for careful, complete consideration of the likely impacts of the Proposed Project to the surrounding Tribes, communities, and environment. Failing either of these remedies, the BIA must at the very least issue a supplement to the FEIS under 40 C.F.R. § 1502.9(d)(1) to account for new construction not incorporated within the 2022 studies the FEIS cites.

I. Procedural Deficiencies Have Plagued the Proposed Project Since its Early Stages.

From the outset, the BIA's timing of Environmental Assessment (EA), DEIS, and FEIS releases and corresponding public comment periods appears designed to minimize public input in service of a pre-determined schedule, rather than to fully resolve outstanding issues identified by Lytton and others. Not only does the FEIS outright violate statutory length limitations, but the BIA's rushed timelines appear to have affected the FEIS's contents. Symptoms of the BIA's condensed timing include, *inter alia*, its failure to account for substantial changes to the vicinity of the Project Site (identified by Lytton in prior comments), the dearth of information provided to Lytton during the scoping process, and the inadequacy of the public comment periods. The BIA's failure to meet the standards laid out in the National Environmental Policy Act (NEPA), its implementing regulations, and governing case law is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of NEPA and the Administrative Procedure Act (APA). 5 U.S.C. §§ 701–706.

a. The Timing and Length of Materials Violate NEPA and its Implementing Regulations.

In September of 2022, an Environmental Assessment (EA) was prepared and made available for public comment for a 45-day period, which was then extended for an additional 15-day period that concluded on November 13, 2023. The BIA then decided to prepare a Draft EIS (DEIS), the publication of which initiated a 45-day comment period that concluded on August 26, 2024. On November 22, 2024, the BIA released the FEIS for a 30-day period "after which

the BIA may proceed with a decision." FEIS at 3-2. As the time allotted for public review and comment on the Proposed Project has decreased, the materials provided in support of the Proposed Project have multiplied. Lytton has consistently raised as problematic the limited timeframes provided to review and comment on the Proposed Project's voluminous technical appendices. And when the BIA released its approximately 6,000-page Draft EIS (DEIS) for only 45 days over a holiday weekend, Lytton—and numerous other commenters—noted the length and complexity of the materials, and requested extensions to allow for independent review, meaningful comment, and required consultation. *See* FEIS App. P. None were granted.

On November 22, 2024, the BIA released the FEIS, this time for a 30-day comment period, and with holiday weekends on either end. Though the body of the FEIS alone totals 321 pages, there are approximately 10,000 pages of technical materials included in the appendices. To date, the BIA has not responded to Lytton's request for extension.

In the FEIS, the BIA points to its adherence to the **minimum** timelines set forth by the CEQ as evidence of procedural compliance. FEIS at 3-l ("Agencies shall allow at least 45 days for comment on a Draft EIS . . . Consistent with this requirement, a NOA for the Draft EIS was issued on July 8, 2024 . . . ."). However, since the BIA bases its analyses on thousands of technically complex pages attached as appendices to the already-lengthy Draft and Final EIS, the BIA's strict adherence to the regulatory minimums does not "ensure that environmental information is available to public officials and citizens **before** decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). Moreover, both NEPA and the CEQ regulations direct that the text of a final EIS—exclusive of citations or appendices—should not exceed 150 pages, except for proposals of extraordinary complexity, "which **shall not exceed 300 pages**." 40 C.F.R. § 1502.7 (emphasis added);[1] *see also* 42 U.S.C. § 4336a(e)(l) (same). Excluding citations and appendices, the FEIS totals **311 pages**. On these grounds alone, the FEIS violates CEQ regulations and NEPA.

In the face of these violations, the BIA's refusal to even grant the public commenters' request for extension is all the more arbitrary and capricious. Public commenters were given a total of **30 days** to pore over tens of thousands of pages of technical data, and to identify the shortcomings of the same. Such a condensed timeline cannot support a finding that the BIA gave the public's concerns due consideration. To the contrary, the decreasing timelines—coupled with the exponential increase in materials to review—indicate that the BIA did not and could not engage in a meaningful dialogue with commenters, who were not provided the opportunity to fully review the materials. Actions that undermine public participation and obscure the actual proposed action under review—such as the BIA's actions here—violate fundamental NEPA requirements. *See* Indian Affairs NEPA Guidebook (Aug. 2012) at § 2.1 (emphasizing that "[t]he NEPA process is intended to facilitate public participation and disclosure in the Federal planning

[1] In describing the reason for this change, the CEQ noted in the January 10, 2020 Notice of Proposed Rulemaking (NPRM) that "every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information."

process") (emphasis added); *id.* § 2.4 ("Public disclosure and involvement is a key requirement of NEPA.").[2]

b. The BIA Failed to Adequately Consult or Coordinate with Lytton, an Affected Party.

Aside from those cultural and paleontological failures discussed in greater detail below, *see* § VIII, the BIA's refusal to consult with or otherwise involve Lytton—whose reservation homeland abuts the Town of Windsor—is fatal to the FEIS analyses. The CEQ regulations call for the involvement of Tribes that may be affected by a Federal proposal, 40 C.F.R. § 1501.2(b)(4)(ii) ("The Federal agency consults **early** with appropriate State, Tribal, and local governments and with interested persons and organizations when their involvement is reasonably foreseeable.") (emphasis added), and require that agencies integrate the environmental review process with other planning "at the **earliest possible time** to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts," *id.* § 1501.2 (emphasis added).

Here, the BIA's failure to coordinate with Lytton from the early stages of the Proposed Project has resulted in several critical oversights. As Lytton explained in its comments of July 12, 2024:

> The Lytton Rancheria also takes great umbrage at the EIS's failure to account for the Tribe's new homeland and the possibility that the Koi Nation project could see it and its members destroyed due to evacuation delays the project will inevitably cause. We encourage the Bureau to meet and meaningfully consult with the Sonoma County Tribes who are understandably upset with such a project being pushed through for a Tribe whose homeland is in a different county.

FEIS App. P at 270. In later comments, Lytton identified "new housing projects in the construction phase around the project site which are not accounted for." *Id.* at 281.

Moreover, a number of the mitigation measures relied upon in the FEIS and that directly affect Lytton (rendering Lytton an "affected Tribe" entitled to deference on preferred mitigation strategies) failed to incorporate Lytton's input during development. To the extent the BIA has consistently failed to consult with Lytton, and excludes Lytton entirely from consideration within the FEIS, *see, e.g.*, § 3.12, the federal government has breached its trust responsibility to Lytton. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir.1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)) (holding BIA violated trust obligation when failing to comply with own regulations).

As the BIA knows, the Lytton Rancheria, which borders the town of Windsor, has initiated a new development in the area adding hundreds of residents, and possesses its own

[2] https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59_IAM_3-H_v1.1_508_OIMT.pdf.

evacuation plans. Yet the mitigation measures described at ES-31 require the Koi Nation **only** to "coordinate with Sonoma County and the Town of Windsor on their respective emergency operation plans and implement or contribute to the implementation of measures intended to improve early detection of wildfire events, and evacuation times for the Project Site and vicinity." The FEIS' proposed mitigation plan ignores the inherent conflict in the existence of two potentially contradictory (or identical) evacuation plans covering the same area.[3]

Finally, it is particularly galling for Lytton and other affected Tribes that the Koi Nation—which does not have its cultural or historic ties to this area[4]—need not consult with the Tribes that maintain their traditional connections to the land regarding use and protection of the area. Particularly as Koi Nation is engaged in litigation with the City of Clearlake over disturbances to their ancestral sites over 50 miles away.[5]

Lytton requested Section 106 consultation in September of 2024 to no response, it is clear that the BIA does not prioritize consultation with **all** affected government entities or Tribes. Indeed, with respect to mitigation, the BIA commits the Tribe to coordinate only with "Sonoma County and the Town of Windsor on their respective emergency operation plans," FEIS at 3-136, illogically omitting any reference to Lytton, whose homelands and housing project neighbor the same. *See also id.* at ES-31 (omitting Lytton from evacuation mitigation plans); ES-42 (failing to account for new Lytton housing development); Table 3.12-6 (excluding Lytton from Trigger Evacuation Zone); 3-133 (not incorporating Lytton into evacuation times).

c. The BIA Failed to Adequately Respond to Previous Lytton Comments.

Although the BIA failed to consult or coordinate with Lytton as an affected Tribe, Lytton has nevertheless made a concerted effort, to the best of its ability, to review and submit comments on the environmental review documents within the constraints of BIA's compressed timelines. NEPA requires agencies to "address or refute the concern presented" in comments, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003), and an FEIS must "'analyze,' 'respond to,' and 'discuss'" specific issues raised therein. *Pac. Coast Fed'n of Fishermens Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1255 (W.D. Wash. 2007). NEPA thus obligates the BIA to respond in the FEIS to Lytton's specific concerns—including, but not limited to, Lytton's new homelands, its housing development, and cultural monitoring—but the BIA failed to do so. Instead, the BIA directs Lytton to its Master Responses, where the BIA makes blanket (unsupported) claims dismissing but not truly addressing the concerns raised by Lytton and other commenters.

In its prior comments, Lytton repeatedly raised the construction of new housing on its reservation homelands, which were only recently completed in 2024, as a substantial change to

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[3] It is true that in Appendix P, the BIA claims the Lytton homeland and housing development have been incorporated into the underlying studies informing these mitigation measures, among others. But aside from this self-serving statement, there is no evidence of the same, particularly as the studies pre-date the construction of the housing development.

[4] FEIS 3-62 (determining "no ethnographic villages or camp sites reported within one mile of the APE").

[5] https://www.record-bee.com/2023/08/03/koi-nation-sues-city-of-clearlake-over-sports-complex-development/

the existing environment in the vicinity of the Proposed Project. This notice should have triggered the BIA's mandatory duty to supplement its draft or final environmental impact statements. 40 C.F.R. § 1502.9(d)(1) (requiring federal agency to supplement EIS "if a major Federal action is incomplete or ongoing, and . . . [t]here are substantial new circumstances or information about the significance of adverse effects that bear on the analysis."); *see also League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) ("That the policy change raised substantial questions regarding the project's impact was enough to require further analysis before allowing the project to proceed") (internal quotations omitted); *Leavenworth Audubon Adopt-A-Forest Alpine Lakes Protection Soc'y v. Ferraro*, 881 F. Supp. 1482 (W.D. Wash. 1995) (finding supplemental EA required to consider new scientific information, new policy directives, and 1994 wildfires that burned within quarter mile of timber sale area).

The Ninth Circuit's decision in *Warm Springs Dam Task Force v. Gribble* is particularly instructive on the question of "substantial new information." 621 F.2d 1017, 1025 (9th Cir. 1980). There, the plaintiffs challenged a supplemental EIS (SEIS) prepared by the Army Corps of Engineers for the construction of a dam. *Id.* at 1019. The SEIS, which addressed seismic safety and water quality, assumed that two faults could generate the most destructive force on the proposed dam. *Id.* As the Corps prepared its SEIS, it was made aware of a geological survey indicating that another fault could generate an earthquake of greater magnitude than the dam could withstand. *Id.* at 1020. As the court pointed out, while "[t]he Corps merely argued that the environmental considerations raised by [the study] had been adequately explored," neither the EIS nor SEIS **dealt with the specific fault addressed in the study**. *Id.* Accordingly, the Ninth Circuit concluded that the Corps' response in that case was insufficient to satisfy NEPA. *Id.* Here, the BIA's failure to respond to Lytton's warnings and incorporate consideration of Lytton's newly developed homelands is similarly insufficient.

Nor does the BIA's mere dismissal of Lytton's opposition in Appendix 9 constitute adequate exploration. As the Ninth Circuit has explained, "public comment procedures [] at the heart of the NEPA review process . . . require[] responsible opposing viewpoints to be included in the final EIS." *State of Cal. v. Block*, 690 F.2d 753, 768 (9th Cir. 1982). An FEIS must "identify opposing views found in the comments," must provide "reasoned analysis in response," *id.* at 773, and must discuss "any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised," *Pac. Coast Fed'n of Fishermen's Assns.*, 482 F. Supp. 2d at 1254. (quoting 40 C.F.R. § 1502.9(b)). "[R]elegation [of opposition] to the comment and response section of the appendix," as the BIA did here, "wholly fails to meet the standards for adequate disclosure and discussion" of opposing views because "[d]isclosures and discussions must be in the body of the EIS itself," which "must not only recite dissenting opinions, [but] must 'analyze,' 'respond to,' and 'discuss' them." *Id.* at 1254–55.

Here, the lack of analysis with respect to Lytton's prior comments is a fatal oversight. The change to the area occasioned by Lytton's new housing development has implications for multiple aspects of the EIS, including the fact that the new development will result in an approximately five hundred additional residents to the wildfire evacuation route identified in the FEIS. In response to these comments, and to Lytton's substantial concerns that the impact of the Proposed Project to wildfire evacuation times could put the Lytton Rancheria's very existence in

jeopardy, the BIA's only response was to summarily conclude in its Master Response to comments that "[t]he wildfire evacuation model included within its assumptions the development of the Lytton Housing Project in Windsor, Shiloh Terrace, Shiloh Crossing, Clearwater, and other development projects," App. P at 3-17. The BIA did not support this response with any explanation or citation to any part of the analysis that accounted for the Lytton homelands development, and Lytton could find none—as further discussed in Section IV below. As in *Warm Springs*, there is no specific reference in the underlying studies here to the homeland or construction. To the extent the BIA fails to adopt Alternative D or revisit the environmental analysis underlying the FEIS altogether, it must issue a supplement to the FEIS to address the gap in its analysis. 40 C.F.R. § 1502.9(d)(1).

Finally, the BIA points to its revised definition of "Interested Sonoma County Tribes" to include "the tribes who requested to be consulted with under Section 106 (i.e. FIGR, Kashia Band of Pomo Indians of the Stewarts Point Rancheria, and Dry Creek Rancheria Band of Pomo Indians), as well as any other Sonoma County tribe that expresses interest in writing to the BIA prior to the initiation of construction," App. P at 3-25. But Lytton, which (1) requested Section 106 consultation in September of 2024, and (2) expressed in multiple public comments its interest in the Proposed Project, is concerned by the BIA's ongoing failure to consult with Lytton under Section 106 or more informally. The logical outgrowth of this failure is a lack of tribally-informed mitigation strategies, in violation of NEPA and its regulations.

II. The FEIS' Proposed Mitigation Measures Remain Largely Unaddressed and Unenforceable.

According to the BIA, "[a]ny mitigation measure must be enforceable[,] and it is important for BIA Regional and Agency Offices to establish monitoring programs to ensure that mitigation is carried out." Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. Any analysis of alternatives must include a discussion of mitigation measures where mitigation is feasible, and of any monitoring designed for adaptive management. Moreover, "[f]ederal agencies are mandated to specifically consider . . . affected tribes' preferred mitigation strategies." Council on Env't Quality, Exec. Office of President, *Environmental Justice: Guidance Under the National Environmental Policy Act* 16 (1997). Here, Lytton—an affected Tribe—has raised a number of concerns related to the mitigation strategies identified by the BIA. These concerns remain unresolved in the FEIS.

Instead, the BIA points to the CEQ rules directing that a mitigation monitoring and compliance plan "be prepared and incorporated into the BIA's ROD," and claims that "[t]he EIS is not the document that commits the agency to mitigation."[6] Master Response at 3-11. The Master Response also asserts that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." *Id.* Neither of these responses—which, again, are not included within the FEIS itself, but rather the Appendices—address the underlying concerns with the mitigation measures identified in the FEIS, even pre-

[6] While the FEIS itself does not commit the agency to mitigation, this argument misses the point because the FEIS must adequately describe how the agency or applicant are to be held accountable to ensure the proposed mitigation occurs.

enforcement. The limited mitigation measures that **do** exist are facially unenforceable, in violation of BIA policy and the NEPA itself.

First, many of the mitigation measures identified in the FEIS rely on a threshold determination by the Koi Nation or another third party that adverse impacts will occur or have already occurred. *See, e.g.* FEIS at 4-1 (deferring to Town of Windsor's eventual determination that aquifer connectivity results in a "substantial decrease in water levels"). Others seek to reduce impacts "to the maximum extent possible," *id.* at 4-7, or suggest what measures "could be" included, *id.* at 4-26. Still others acknowledge that there is no feasible mitigation within the jurisdiction of the Tribe or the BIA. *Id.* at ES-18;19 (describing instances in which "no mitigation [is] feasible" and acknowledging that "[w]hile the timing for the off-site roadway improvements is not within the jurisdiction or ability of the Tribe or BIA to control, the Tribe shall make good faith efforts"). Where mitigation measures rely on the voluntary future actions of a third party, such as the Town of Windsor, they are speculative and cannot form the basis for rational decision making by the BIA. Plans to make plans after the Proposed Project has begun construction, which are outside of the NEPA process, and which are shielded from public review or comment, are not NEPA-compliant. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding no "hard look" had occurred when mitigation measures addressed post-construction impacts and explaining that "[m]itigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval.").

Nor does an FEIS that merely lists mitigation options comply with NEPA, because "snippets do not constitute real analysis." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (mere mention that protected species may be exposed to risks of oil spills did not provide lawful NEPA analysis). Even if included in the ROD, then, the BIA's vague, subjective, conclusory, or non-existent mitigation measures are, as a practical matter, unenforceable by Lytton or others (and illegal under the NEPA).

In its Public Comments on the DEIS, Lytton identified anticipated issues with the enforceability of any mitigation measures eventually adopted against the Koi Nation, a sovereign. In response, the BIA asserted that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." App. P at 3-11. But it is not at all clear that Lytton—or any affected party—will have any enforcement recourse under the Koi Nation of Northern California Gaming Ordinance (Ordinance). Rather, the Ordinance provides in relevant part only that

> In the event an affected state or local governmental entity with an interest in the Applicable Mitigations **files a complaint with the NIGC** alleging that the Nation has not complied with the Applicable Mitigations in accordance with this Chapter 14 of the Gaming Ordinance, **upon notice from the NIGC** that such a complaint has been made, the Nation will submit to the NIGC's review and enforcement authority as set forth in 25 C.F.R. 573.1 . . .

Ordinance, attached as Appendix Q to the EIS, at 14.01 (emphasis added). Not only is "state or local government entity" undefined (and therefore potentially exclusive of Lytton or other Tribes), but it remains unclear under what circumstances the NIGC would accept—much less act upon—an enforcement claim by Lytton or other affected parties regarding environmental impacts of the Proposed Project. The existence of the Ordinance does not at all guarantee that "any mitigation required by the ROD will be enforceable as a matter of Tribal law," as the BIA claims. App. P at 3-11.

Finally, it is uncertain to what extent Lytton can even rely upon the BIA's repeated representations that the ROD will include enforcement measures (subjective or tenuous as they may be). Lytton notes with particular concern the recent holding in *Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*, 2024 WL 4745044 (D.C. Cir. Nov. 12, 2024), wherein the United States Court of Appeals for the District of Columbia Circuit determined that CEQ regulations were promulgated *ultra vires*, and thus unlawfully. Lytton is concerned that should any enforcement actions be brought pursuant to the FEIS or any eventual ROD, the BIA and Koi Nation will attempt to cite *Audubon* for the proposition that enforceability regulations are void. Thus, while the BIA defers any mitigation enforcement to the development of a ROD under CEQ regulations, compliance under those regulations is not necessarily assured or even practically enforceable.

III. The FEIS Still Fails to Adequately Address—Much Less Mitigate—Wildfire Concerns.

Despite Lytton and other affected Tribes raising wildfire as a primary concern in response to the DEIS, the FEIS dedicates remarkably little space to addressing the matter. Though the FEIS acknowledges that "the Project Site is primarily designated as 3 (high) wildfire risk," FEIS at 3-125, and concedes that the construction of the Project could increase the risks of wildfires, ES-26, the BIA nevertheless concludes wildfire hazards and impacts are not significant or less than significant. Further, the FEIS fails to incorporate a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. 350. Rather, as with the DEIS, the FEIS shoehorns what should be an independent wildfire risk analysis into its evacuation analysis and defers on the basis that "wildfire evacuation analysis is a new area of study under NEPA and few studies of this type have been completed for NEPA purposes." FEIS App. P at 3-16. And "while . . . federal agencies have substantial discretion to define the scope of NEPA review, an agency may not disregard its statutory obligation to take a 'hard look' at the environmental consequences of a proposed action, including its cumulative impacts, where appropriate." *Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022).

The FEIS readily concedes that

> [a] project would be considered to have a significant impact if it were to increase wildfire risk on-site or in the surrounding area. This includes, but is not limited to, building in a high-risk fire zone without project design measures to reduce inherent wildfire risk, increasing fuel loads, exacerbating the steepness of the local topography, introducing uses that would increase the chance of

> igniting fires, eliminating fire barriers, inhibiting local emergency response to or evacuation routes from wildfires, and conflicting with a local wildfire management plan.

FEIS at 3-129. As Lytton identified in its earlier comments, **each** of these factors is implicated in some fashion by the Proposed Project, which would bring thousands of daily visitors to a site that Sonoma County has already determined to be at high risk.

But despite the significant risk to safety inherent in operating such a large casino facility in such a high-risk location, the FEIS relies on speculative mitigation measures, including "the establishment of public service agreements, such as with the Sonoma County Fire District (SCFD) and other relevant agencies," which the BIA assures "**would** include the resources necessary to effectively manage the increase in service calls without placing an undue financial burden on local fire and EMS." App. P at 3-54; *see* FEIS at 2-13 (emphasis added). To cite a non-existent mitigation measure that "would" somehow address all concerns "without . . . undue financial burden" based on the unquestioning consent of independent third parties is a complete deferral of the BIA's self-imposed obligation to develop enforceable mitigation measures. Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. And although there is a Letter of Intent between Koi Nation and SCFD, FEIS App. O, the Letter does not guarantee that the SCFD would actually respond to fire incidents at the Project Site. Nevertheless, the FEIS concludes that potential impacts to fire protection plans is less than significant. *Id.* at ES-17.

NEPA prohibits reliance on assumptions such as this one. *See e.g., Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 874 (9th Cir. 2022), *cert. denied sub nom. Am. Petroleum Inst. v. Env't Def. Ctr.*, 143 S. Ct. 2582, 216 L. Ed. 2d 1192 (2023) (agreeing with plaintiff "that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts."); *City of Los Angeles, California v. Fed. Aviation Admin.*, 63 F.4th 835, 850 (9th Cir. 2023) (finding FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not operate simultaneously).

The BIA also acknowledges that the Proposed Project's construction "could increase the risk of wildfire," FEIS at ES-26, but relies on Best Management Practices (BMPs) including "the prevention of fuel being spilled" and spark arresters to conclude that construction "would not increase wildfire risk onsite or in the surrounding area." *Id.* at 3-130. It is unclear how the BIA arrived at the conclusion that 'preventing fuel spillage' is (a) enforceable, or (b) effective. Further unclear is how such a vague mechanism might reduce fire risk to insignificance, which lays the groundwork for an arbitrary and capricious finding. *See Wilderness Society v. Bosworth*, 118 F.Supp.2d 1082, 1107 (D.Mt. 2000) ("Because BMPs have not been assessed for their effectiveness against landslide events and because a high risk of landslides is acknowledged . . . the Court finds it is not reasonable for the Defendants to just summarily rely on BMPs to mitigate this environmental impact. Therefore, the Court finds the FEIS conclusion that the project will have no effect on water quality to be arbitrary and capricious based on the undisputed risk of landslides in the FEIS").

As with the DEIS, the only factors preventing the BIA from finding the wildfire risks presented by the Proposed Project constitute a significant impact are the hypothetical mitigation measures the Tribe **might** take to reduce wildfire risks. The circular finding is unsupported by the record before the BIA, and should be revisited.

IV. Traffic and Evacuation Concerns Have Not Been Addressed.

Related to the wildfire concerns set forth above, Lytton and many others have raised alarm regarding the BIA's failure to adequately grapple with the Proposed Project's effects on traffic and evacuation concerns. In response, Appendix P to the FEIS simply states that the improvements discussed in the DEIS are "far from illusory," App. P at 3-96, and assures Lytton that its evacuation model "included within its assumptions the development of the Lytton Housing Project in Windsor, Shiloh Terrance, Shiloh Crossing, Clearwater, and other development projects. The model also included Shiloh Estates and other developments in the Mayacamas Mountains both in the opening year (2028) and the cumulative year (2040) scenarios." *Id.* at 3.1.11. But the BIA has failed to identify how it might require independent third parties to comply with the referenced mitigation measures, or support its claim that Lytton's housing development has been considered with any underlying data, studies, or references.

Specifically, though the Evacuation Travel Time Assessment cited in the BIA's response describes "key assumptions . . . used in the development of background and evacuation traffic demand," App. N-2 at 6, **neither the Lytton Housing Project nor any of the other projects identified in the Master Response are listed in these assumptions**. The Evacuation Travel Time Assessment states that "Background traffic data was based on outputs from the SCTA travel demand model from the traffic study for the Project[,]" which we assume refers to the Revised Traffic Impact Study at Appendix I. The Revised Traffic Impact Study bases its "Existing Conditions" on data collected in July 2022, prior to the existence of Lytton's new housing development. The Study further provides that Opening Year 2028 No Project Conditions "includes Existing Conditions, but with the addition of traffic from **approved projects** that are in the development pipeline in the Town of Windsor and Sonoma County, as well as effects from planned roadway improvements constructed by approved projects." (Emphasis added). It notes that "trips from the following approved projects were also added to the study intersections to estimate year 2028 traffic demands," providing a list of projects that **notably does not include the Lytton Housing Project in Windsor.** The BIA has thus failed to support its claim that the additional Lytton development is accounted for in the Study.

In the event of evacuation, the residents of Lytton's housing project will be among those forced to flee across Windsor and travel south on Route 101. They will be directly impacted and threatened by the delay the Koi Nation's Proposed Project will impose. These impacts, which are apparently not incorporated into the Study supporting BIA's analysis, could harm not only Lytton members, but the entire community. The BIA's bare statement that these impacts are considered is not supported by any citation to the actual analysis and Lytton could not independently locate where or how its housing development is accounted for in the analysis. A conclusory finding "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind . . . affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives," *Seattle*

Audubon Society v. Moseley, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), and therefore violates NEPA.

V. The FEIS Fails to Adequately Address Impacts to Water Resources

The FEIS's water resources analysis remains incomplete and inadequate to address the environmental impacts that the Project will have on surface and groundwater resources. Maintaining the same deficiencies as the DEIS, the FEIS does not and cannot identify or articulate whether the Project's known and potential environmental impacts are likely to be significant for two primary reasons: First, like the DEIS, the FEIS relies entirely upon BMPs that are speculative or unenforceable. Second, like the DEIS, the FEIS does not rely upon adequate water surveys, monitoring, or studies and provides no baseline water quality data upon which to base its conclusions. As such, the FEIS cannot determine that all impacts to water resources would be "less than significant" or offer surrounding Tribes, organizations, or community members any assurance that their health and the human environment will not be harmed as a result of the Project.

As the FEIS concedes, the Project would significantly impact both surface and groundwater resources if certain circumstances were to occur. FEIS at 3-18. In particular, impacts would be significant when (1) runoff from the site causes localized flooding or introduces contaminants to waterways off site; (2) pumping at the proposed wells impedes groundwater recharge or creates drawdown that would affect local water supply; (3) pumping at the proposed wells interfere with the implementation of local groundwater management plans by causing or contributing to "chronic lowering of groundwater levels; depletion of groundwater storage; water quality degradation due to induced contaminant migration or interference with cleanup efforts or water quality management plans; depletion of interconnected surface waters, including potential flow in Pruitt Creek or impacts to groundwater-dependent ecosystems (GDEs); and/or land subsidence"; or (4) wastewater or runoff generated by the Project impacts the water quality of receiving waterbodies or groundwater. *Id.* Despite acknowledging that wastewater or runoff could impact the water quality of "receiving waterbodies," the FEIS claims that the Project would not impact surface water supplies because it "is a sufficient distance from surface waters, such as the Russian River, used by water suppliers."[7] *Id.*

1. Speculative or Unenforceable BMPs

The FEIS concludes that adverse impacts would not occur and any impacts that will occur will be "less than significant" based on BMPs. However, all BMPs relied upon are

[7] We note that "sufficient distance" is not defined, and without proper consideration of potential receiving waters, the Project may still impact surface waters that are not immediately adjacent to the site. *See County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 183–185 (2020) (holding that a point source may still discharge into navigable waters as regulated by the Clean Water Act when there is the "functional equivalent of a direct discharge," based upon considerations of various factors, including: time, distance, nature of material through which a pollutant travels, the extent to which a pollutant is diluted, and the amount of pollutant that enters the water, among others).

entirely speculative or unenforceable. As a result, the BIA cannot conclude that any known or potential impacts to water resources will be "less than significant."

Both construction and operation of the Project would significantly impact surface and groundwater. *Id.* at 3-18–20. Construction of the Project could lead to soil erosion and sedimentation in nearby surface waters, which would inevitably degrade water quality and could even violate applicable water quality standards. Construction would also include the use of hazardous materials, including concrete washings, oil, and grease, the discharge of which into surface waters or groundwater would result in significant pollution. *Id.* at 3-18. The FEIS almost entirely relies upon the Koi Nation's future—and wholly speculative—adherence to the National Pollutant Discharge Elimination System (NPDES) general permit for construction stormwater discharges (NPDES General Construction Permit), issued pursuant to the Clean Water Act, to ensure that impacts to surface waters from construction activities would only be "less than significant." *See* NPDES Permit No. CAS000002 (Sept. 8, 2022), available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2022/wqo_2022-0057-dwq.pdf.

As explained in Lytton's comments on the DEIS, the Koi Nation has not yet obtained coverage under the NPDES General Construction Permit, nor has it prepared the requisite Stormwater Pollution Prevention Plan (SWPPP). Yet, the FEIS almost entirely relies on the Koi Nation's promised implementation of and adherence to the permit and SWPPP to conclude that sufficient BMPs would "minimize adverse impacts to the local and regional watershed from construction activities . . . ." *Id.* As a result, any assurance that the above-described impacts would be "less than significant" is entirely speculative. Moreover, without reviewing the exact SWPPP to which Koi Nation would be bound, the BIA cannot now conclude that it is (or will be) sufficient to protect against stormwater pollution. In other words, the BIA must conduct its own environmental review rather than rely on an entirely nonexistent SWPPP that may or may not be approved by the EPA sometime in the future. Rather than rely on speculation and future promises, the BIA must require Koi Nation to prepare the requisite SWPPP and conduct its own review to ensure that such SWPPP is adequate to protect against adverse environmental impacts before or concurrently to its own environmental review. Because the BIA's decision necessarily relies on the Koi Nation's future coverage under the NPDES General Construction Permit and SWPPP, these actions are connected and must be considered in the same NEPA review. *See* 40 C.F.R. § 1501.3(b) ("The agency shall also consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that: (1) Automatically trigger other actions that may require NEPA review; (2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) Are interdependent parts of a larger action and depend on the larger action for their justification."); *id.* § 1502.24(a) ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws [including the Clean Water Act] and Executive orders applicable to the proposed action . . . ."); *Friends of Animals v. U.S. Fish & Wildlife Svc.*, 28 F.4th 19, 34 (9th Cir. 2022).

Operation of the Project may also impact surface waters due to the increase of impervious surfaces, which would result in increased stormwater flows and discharge from the site during precipitation events. FEIS at 3-19. The FEIS assures that "[s]tormwater treatment and detention

would be provided by bioswales, a detention basin, and/or the wastewater treatment plant (WWTP)" and that additional BMPs would include "weekly sweeping of internal roadways and parking areas to reduce sediment and debris from entering the stormwater drainage system." *Id.* Additionally, various facilities would be constructed within the 100-year floodplain. *Id.* The FEIS relies on balanced earthwork to ensure that changes to the delineated floodplain mapping would be prevented and floodplain impacts would be "less than significant." *Id.*

The FEIS, however, only relies on its grading and drainage plan to treat stormwater, and does not require the Koi Nation to route all stormwater to the wastewater treatment plant. The FEIS therefore does not require the Koi Nation to apply for or obtain an individual NPDES permit for any stormwater discharges into Pruitt Creek that may occur, except those from the wastewater treatment plant. *See id.* at 2-11–13. Pruitt Creek is a tributary of Pool Creek, which flows into Windsor Creek, the Laguna de Santa Rosa, and ultimately the Russian River. *See* FEIS, App. G-8 (Approved Jurisdictional Decision), at 3–4. As such, the portion of Pruitt Creek that runs directly through the Project site and into which the Project proposes to discharge stormwater is a navigable water subject to the permitting requirements in the Clean Water Act, 33 U.S.C. §§ 1342, 1344. *Id.* at 2. To that end, the Project proposes no future or ongoing SWPPPs beyond construction of the site, including any BMPs, to which it would be subject during operation. Accordingly, aside from various design features, there is no enforcement mechanism, regulatory compliance requirements, or oversight to which the Project would be subject that ensures all stormwater discharged from the Project site meets water quality standards and prevents contaminants from entering nearby surface waters, which are already impaired.[8]

The FEIS proposes that, as a mitigation measure to impacts to "Biological Resources" from construction of the site, "[i]f impacts to Waters of the U.S. or wetland habitat are unavoidable, a 404 permit and 401 Certification under the Clean Water Act shall be obtained from the USACE and U.S. Environmental Protection Agency (USEPA)." FEIS at 4-9. However, as with the NPDES General Construction Permit, any coverage under a 404 permit is entirely speculative, and relying on the Koi Nation's future promise of adherence to a yet-obtained permit is inadequate justification for a determination of "less than significant" impacts. The BIA must require the Koi Nation to determine whether a 404 permit is required and, if so, obtain—or at the very least apply for—such permit before or concurrently to its review. Without knowing whether or what impacts to Waters of the U.S. or wetland habitat are unavoidable, there is no way for the BIA to now determine whether such impacts can or would be mitigated by a 404 permit, or whether such permit (if obtained, which is entirely dependent on the U.S. Army Corps of Engineers' own environmental analysis) would provide adequate mitigation under the BIA's own review. Furthermore, future environmental analyses cannot constitute adequate mitigation measures; the BIA must review what is before it *now* and cannot rely on the promise

[8] Pruitt Creek and other tributaries of Windsor Creek are currently listed as impaired for sedimentation/siltation and temperature on California's most recently approved § 303(d) List from 2018. *See* 2018 Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report), available at https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2018_integrated_report.html.

of future environmental review to ensure protection of resources at risk by the agency's action. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011).

Additionally, the grading and drainage plan is designed for a 100-year, 24-hour storm event. FEIS at 2-11, 3-19. However, due to the impacts of climate change, 100-year, 24-hour storm events are occurring more often and precipitation is increasingly more severe. *See* FEIS App. E, at 16. The stormwater management system should therefore be modeled and sized based on larger storm events to adequately manage increased stormwater as a result of climate change and prevent pollution discharges. *See* 40 C.F.R. § 1502.16(a)(6) (requiring environmental consequences section of EIS to include analysis of "climate-change related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives *and the effects of climate change on the proposed action and alternatives*." (emphasis added)); *see also* EPA Comments on EA, A-7 (advising BIA to "clarify whether and how increased precipitation intensity occurring under climate change has been accommodated in the drainage plans and if pre-development hydrology would be maintained considering these larger flows").

Lastly, the FEIS does not adequately address groundwater drawdown concerns or consider the impact to the new Lytton Rancheria development in its groundwater assessments. In particular, the Supplemental Groundwater Resources Impact Assessment ("SGRIA") still does not take into account the Lytton Rancheria housing development project and its reliance on groundwater wells for community water supply. *See* FEIS, Appendix D-4. As with fire evacuation and traffic concerns, the FEIS fails to consider the 146 families residing in the new Lytton Rancheria housing development with regard to groundwater drawdown. As explained above, *supra* §§ I.3 & II, the FEIS has failed to incorporate Lytton's prior input or meaningfully consider the concerns raised by Lytton in its comments on the DEIS. Without considering the Lytton Rancheria housing development—which consists of approximately 150 homes and structures—and its use of groundwater wells, the FEIS entirely fails to accurately assess the impact the Project would have on local water supplies. By failing to properly consult with Lytton and excluding the new Lytton homeland entirely from consideration within the FEIS, the BIA has breached its trust responsibility. *See Oglala Sioux Tribe*, 603 F.2d at 721.

2. No Baseline Water Quality Data

In addition to relying upon speculative or unenforceable BMPs, the FEIS further relies on nonexistent environmental analyses and fails to provide baseline water quality data upon which to base its determination that impacts would be less than significant. In particular, the FEIS does not include, nor has the BIA considered, any adequate water quality assessments of current conditions, benthic data, or comprehensive field data of nearby receiving waters or wetlands. As discussed in Lytton's comments on the DEIS, the Water and Wastewater Feasibility Study conducted in February 2023, upon which the BIA relies, discusses a future "Baseline Monitoring Program" and notes,

> In order to begin detailed discussions with the [Regional Water Quality Control Board ("RWQCB")] on the feasibility of discharging to the Pruitt Creek, *the Project would need to begin to collect receiving water quality data* near anticipated discharge site

> and at the Mark West Creek gauge station. This data would help the RWQCB evaluate the background water quality of receiving waters, identify potential water quality restrictions, and understand the impacts of the proposed new discharge on the aquatic habitat.

FEIS, App. D-1, at 4-4 (emphasis added). Clearly then, neither the Koi Nation nor the BIA has yet collected or reviewed any water quality data of the receiving waters. But without this crucial baseline data, the BIA cannot now make a determination as to the existing structure and function of Pruitt Creek or other waterways to determine what the direct, indirect, or cumulative effects on such water would be as a result of construction or operation of the Project. *See* 40 C.F.R. § 1508.1(i)(4) (defining the environmental "effects" or "impacts" that must be identified and considered under NEPA to include, among other things, "ecological (such as the effects on natural resources *and on the components, structures, and functioning of affected ecosystems*)" (emphasis added)). If any survey was conducted that actually collected water samples, conducted testing, and considered the water quality and benthic data of the site, it was nearly three years ago in February 2022 and only accounted for plant species and soil in surface waters and wetlands in the immediate vicinity of the Project area; it did not consider other benthic data—such as the presence of macroinvertebrates or other aquatic ecosystems—or the quality of nearby surface waters or wetlands offsite. *See* FEIS, App. G-4, at 11–15, App. A.

Likewise, as a mitigation measure, the FEIS proposes a "Baseline Groundwater Level and Stream Discharge Monitoring Program" and "GDE Verification Monitoring," wherein the Koi Nation would monitor the groundwater levels and stream discharges and collect baseline data (importantly) in the future, after the BIA issues its final Record of Decision. FEIS at 4-3–5. A similar set of circumstances was determined by the Ninth Circuit to be arbitrary and capricious. *See N. Plains Res. Council*, 668 F.3d at 1084–85. There, the Surface Transportation Board had agreed to conduct certain wildlife studies and surveys as a mitigation measure to the construction of a railroad, pre-construction but post-agency approval. *Id.* at 1083–84. The Ninth Circuit held that "[b]ecause the [Final Supplemental EIS] does not provide baseline data for many of the species, and instead plans to conduct surveys and studies as part of its post-approval mitigation measures, we hold that the Board did not take a sufficiently 'hard look' to fulfill its NEPA-imposed obligations at the impacts to these species prior to issuing its decision." *Id.* In explaining its decision, the Ninth Circuit noted:

> Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.
>
> This is inconsistent with what NEPA requires. NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. The use of mitigation measures as a proxy for baseline data does not further either purpose. First, without this

> data, an agency cannot carefully consider information about significant environmental impacts. Thus, the agency 'fail[s] to consider an important aspect of the problem,' resulting in an arbitrary and capricious decision. Second, even if the mitigation measures may guarantee that the data will be collected sometime in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Id. at 1084–85 (citations omitted).

The same is true here. The BIA cannot rely on future surveys to determine the baseline water quality or biological data of the site; the agency must consider that information now in its pre-approval analysis. Without even the most basic understanding of the existing conditions, the BIA is entirely unable to determine what the effects of the Project will be on water resources or ensure that all proposed BMPs or mitigation measures will in fact guarantee the protection or restoration of such resources. The BIA must therefore collect such data or require the Koi Nation to collect such data, provide that data to the public, and then adequately consider such data before issuing its final Record of Decision or risk arbitrary and capricious agency decision-making.

VI. The FEIS Fails to Adequately Address Impacts to Wildlife Resources

Like in its review of impacts to water resources, the FEIS similarly bases a determination of "less than significant" impacts to wildlife resources on speculative and unenforceable BMPs and mitigation measures and fails to consider baseline data. Specifically, to avoid impacts to wildlife and other biological resources, the FEIS assures that the Project construction would comply with the NPDES General Construction Permit and SWPPP and other mitigation measures. FEIS at 3-52–54, 4-7–9. However, as discussed above, the promise of future compliance with yet-obtained NPDES permits is inadequate justification upon which to base a determination that any impacts to wildlife and biological resources would be "less than significant." Additionally, as discussed above, without an adequate understanding of the baseline conditions of the site, the BIA has no way to determine what the actual impacts to wildlife or biological resources would be and thus cannot ensure that the proposed measures will avoid or mitigate such impacts.

The FEIS does not discuss the direct, indirect, or cumulative impacts to all wildlife. Rather, it only specifically discusses the Project's impacts to federally listed or protected special-status species, critical and essential habitat, and migratory birds. *Id.* at 3-53–56. To support its determination that impacts to certain identified species would be "less than significant," the BIA ensures the adherence to conditions of other (not-yet issued) permits and implementation of BMPs and other mitigation measures. Specifically, this includes compliance with the NPDES General Construction Permit and SWPPP, both of which are entirely speculative. *Id.* at 2-15–16. Further, the FEIS proposes certain mitigation measures, nearly all of which are inadequate and fail to provide the BIA with baseline data of the water and biological resources necessary to

make a determination as to the Project's impacts. Again, as explained above, without baseline data, the BIA risks arbitrary and capricious decision-making.

Lastly, with regard to special-status fish species, particularly certain species of Pacific salmonids, the FEIS further acknowledges "that BIA has begun consultation with NOAA Fisheries," but that such consultation is still ongoing and no decision on the BIA's Biological Assessment has been issued. *FEIS* at 3-54, 5-1, App. G-7. The FEIS notes that NOAA provided comments on BIA's first Biological Assessment on February 9, 2024, but those comments are not available to the public. *Id.* at 5-1. To ensure it takes an adequate "hard look" at the impacts to special-status fish species, the BIA must not issue a final Record of Decision until consultation with NOAA has been completed.

VII. Economic Studies

In its comments to the DEIS, Lytton raised several concerns regarding the economic impact studies. The first being that the studies upon which the BIA relied are woefully dated and inaccurate. In response to these comments, the BIA agrees that the data is dated, but claims that "[i]t is not practical nor required by NEPA to continually update financial analyses for the passage of time that inevitably takes place during any project and public review." T5-18. This ignores the fact, however, that "[r]eliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious." *N. Plains Res. Council*, 668 F.3d at 1086 (citing *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005)). Here, while economic data prepared by governmental agencies may lag, the BIA assigns great weight to the particular economic impact study here, which does not account for major changes in circumstance, like the fact that the study was conducted while the community was still recovering from the COVID-19 pandemic or without taking into account the Scotts Valley Casino. The data in that particular economic impact study is therefore too stale to carry the weight assigned to it by the BIA.

Lytton is pleased that a supplemental substitution effects cumulative analysis that assumes the opening of the Scotts Valley Casino was prepared. FEIS, Appendix B-5. However, the FEIS still fails to address or mitigate the fact that the cumulative economic adverse effects of the Project will be far more impactful to the Tribes, including Lytton, actually located in Sonoma County and the result of those impacts on the quality of life and services available to their members. *See id.* at 3-166–67. In other words, the BIA's supplemental study still does not take the requisite "hard look" at the economic impacts of this Project.

VIII. Cultural and Paleontological Resources

As the FEIS acknowledges, there are "records of sacred lands on or in the vicinity" of the Project site. However, the BIA has not properly complied with the National Historic Preservation Act (NHPA) and has not properly consulted with the necessary tribes regarding these cultural resources. On July 10, 2024, Juliane Polanco, the State Historic Preservation Officer (SHPO) for the California Department of Parks and Recreation, Office of Historic Preservation, sent the BIA a letter that: (1) advised the BIA to conduct consultation in a manner that complies with 36 C.F.R. § 800.2(c)(2)(ii)(A); (2) objected to a finding of no historic properties affected, noting that the BIA's efforts to identify historic properties was "insufficient, inadequate, and not reasonable"; and (3) requested BIA re-initiate Section 106 consultation. *See*

T6, Comments of Federated Indians of Graton Rancheria (Aug. 26, 2024) (FIGR DEIS Comments), Attachment 27 (SHPO Letter). When it received notice of the SHPO's objection letter, Lytton provided the BIA with a letter on September 17, 2024, explaining that the Tribe agreed with the SHPO and formally requested that the Section 106 consultation process be re-initiated. (See attachment). The Tribe never received a response to their September 17 letter and the BIA has never re-initiated the Section 106 consultation process.

The NHPA requires federal agencies to consult with federally recognized Indian tribes that may attach religious and cultural significance to a property early in the planning process. 36 C.F.R. § 800.1. Such tribes should be given a reasonable opportunity to identify their concerns, advise on the identification and evaluation of properties, articulate its views on a project's effects on such properties, and participate in the resolution of adverse effects. *Id.* § 800.2(c)(2)(ii)(A). This duty for federal agencies to consult with tribes is nondiscretionary.

Here, the BIA failed to consult with the necessary tribes early in the planning process, and sent letters only after field surveys, trenching, and collection of obsidian samples for destruction had already been conducted. These surveys and other activities should not have occurred until *after* the proper Section 106 consultation with the necessary tribes. Furthermore, as discussed in the FIGR DEIS Comments, the BIA improperly "rushed ahead" without consulting the necessary tribes, and dismissed, ignored, or did not take seriously Tribal concerns regarding effects and identification efforts or requests to review documents and participate in surveys. FIGR DEIS Comments at 7–8. The SHPO's objection letter reiterated these failures, explaining that it objected to the BIA's finding of no historic properties affected and finding "the efforts to identify historic properties, including those of religious and cultural significant to Tribes to be insufficient, inadequate, and not reasonable." SHPO Letter at 3. Based on these concerns, failures, and deficiencies, the BIA should have re-initiated the Section 106 consultation process and invited all identified Tribes to participate in consultation again. Lytton specifically made such a request, which went ignored. Without adequate or proper Section 106 consultation, the FEIS does not and cannot adequately protect Tribal sacred sites and cultural resources at risk as a result of the Project's construction and operation.

Conclusion

We appreciate the opportunity to provide comment to the BIA, and would like to emphasize our concerns that allowing a Tribe from Lake County to establish this Proposed Project will impinge on the Tribal sovereignty of Sonoma County Tribes as well as dramatically increase the risk of injury and death in the event of a wildfire. We reiterate our request that the Bureau opt for Alternative D or at least create an accurate Environmental Impact Statement.

Sincerely,

Andy Mejia
Chairperson
Lytton Rancheria of California

From: Spaulding, Skip <SSpaulding@sflaw.com>
Sent: Monday, December 23, 2024 4:56 PM
To: Broussard, Chad N <Chad.Broussard@bia.gov>
Cc: Nathan Voegeli <nvoegeli@jmandmplaw.com>
Subject: [EXTERNAL] FEIS Comments, Shiloh Resort and Casino Project

Dear Mr. Broussard,

I enclose the written comments of Shartsis Friese, LLP, on behalf of the Federated Indians of Graton Rancheria, on the Final EIS for the Shiloh Resort and Casino Project.

If you have any technical difficulties with the document, please let me know. We request confirmation that these comments were received.

Thank you. Best regards, Skip Spaulding

Paul P. ("Skip") Spaulding, III | **SHARTSIS FRIESE LLP**
425 Market Street, 11th Floor
San Francisco, CA 94105
T +1 415 773-7203
O +1 415 421-6500
sspaulding@sflaw.com |www.sflaw.com

SHARTSIS FRIESE LLP
425 Market Street ♦ Eleventh Floor
San Francisco, California 94105-2496

Paul P. "Skip" Spaulding, III
SSpaulding@sflaw.com
(415) 773-7203
Fax: (415) 421-2922

December 23, 2024

Via Electronic Transmission (chad.broussard@bia.gov)

Amy Dutschke
Regional Director
United States Bureau of Indian Affairs, Pacific Region
2800 Cottage Way
Sacramento, California 95825

Chad Broussard
Environmental Protection Specialist
United States Bureau of Indian Affairs, Pacific Region
2800 Cottage Way, Room W-2820
Sacramento, California 95825
Email: chad.broussard@bia.gov

Re: **Final Environmental Impact Statement Comments**
Shiloh Resort and Casino Project

Dear Ms. Dutschke and Mr. Broussard:

We represent the Federated Indians of Graton Rancheria ("FIGR") and hereby provide written comments on FIGR's behalf regarding the Final Environmental Impact Statement ("Final EIS") for the Koi Nation of Northern California Shiloh Resort and Casino Project ("Koi Project"). The Notice of Availability of the Final EIS ("Notice") was published in the Federal Register on November 22, 2024, and the Notice invited public comments on the Final EIS that are due by December 23, 2024. 89 Fed. Reg. 92713 (November 22, 2024). Kindly ensure that these comments are made a part of the administrative record for all federal proceedings relating to the Koi Project.

FIGR is comprised of Southern Pomo and Coast Miwok people. FIGR's aboriginal territory includes Sonoma and Marin Counties and its reservation is located next to the City of Rohnert Park in Sonoma County. Its congressionally recognized service area includes Sonoma and Marin Counties. Many of FIGR's ancestors and its irreplaceable cultural resources are located in Sonoma County, and many of the 1,500 FIGR citizens reside in Sonoma County. FIGR's government offices and the Graton Resort and Casino ("GRC") in Sonoma County are only an

approximate 15-minute drive from the site of the proposed Koi Project ("Koi Site"). The cultural, environmental and economic interests of FIGR will be significantly and irreversibly adversely affected if the Koi Project is approved.

We enclose four Appendices to this letter that consist of technical reports prepared by expert consultants in their respective subject areas. Each of these consultants prepared a technical report critiquing the Draft Environmental Impact Statement ("Draft EIS") and have now evaluated the minor revisions to the Final EIS that supposedly address their concerns. In fact, as these new reports reflect, the exact same substantive flaws remain in the Final EIS, including the substantial inadequacies in comparing alternatives, analyzing environmental effects, identifying their significance, and purporting to identify effective mitigation measures. These technical reports are specifically incorporated into this comment letter.

The comments in this letter supplement and add to the two sets of written comments submitted by FIGR on the Draft EIS, one by Chairman Greg Sarris on behalf of the Tribe dated August 26, 2024 ("Chairman Sarris Cmt. Ltr.") and one by Shartsis Friese on behalf of the Tribe dated August 26, 2024 ("Shartsis Cmt. Ltr."), collectively referred to herein as the "FIGR DEIS Comments." All of the comments in the FIGR DEIS Comments remain valid and appropriate and are specifically incorporated herein by reference as comments on the Final EIS.

INTRODUCTION AND SUMMARY

The Final EIS is a fatally flawed document that fails to comply with the important requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq*. ("NEPA"), and its implementing regulations, 40 C.F.R., Parts 1500-1508. In its premature rush to complete the Final EIS, the Bureau of Indian Affairs ("BIA") cut corners, made only superficial changes to the inadequate Draft EIS, and attempted to explain away the many deficiencies in the original document. However, no amount of minor tweaking and cosmetic changes can cover up the clear inadequacies in the Final EIS.

BIA concedes that the Final EIS is not substantially different from the Draft EIS. It admits: "Substantial changes relevant to environmental concerns in the Proposed Action have not been made, nor has a new alternative been introduced as the Proposed Action." FEIS, at 3-3. Moreover, according to BIA, "[w]hile new information has been presented, the information has not resulted in substantial changes in the EIS's conclusions regarding the environmental impacts of the Proposed Action or the identification of any new significant impacts." *Id*. Accordingly, all of the NEPA inadequacies in the Draft EIS are still present in the Final EIS.

One prominent deficiency in the Final EIS, which carries over from the Draft EIS, is that the BIA has resolutely refused to examine a reasonable range of alternatives. In the FIGR DEIS Comments, FIGR explained that the Draft EIS inexplicably fails to include an analysis of any alternative site within Lake County, where the Koi Nation's demonstrated ancestral territory is located. Many other Draft EIS comments echoed this concern, including Governor Newsom's August 16, 2024 comment letter, which states that the U.S. Department of the Interior ("DOI")

"has thus far failed to consider whether the purposes of the… [Koi Project and one other] could be served by sites within the Tribes' aboriginal homelands—which is to say that [DOI] has, thus far, failed to adequately consider reasonable geographic alternatives as required by NEPA." FEIS, Appx. P, at Letter A4. The BIA's continuing refusal to consider alternative Lake County sites defies well-accepted NEPA law and invalidates the Final EIS.

Many sections of the Final EIS (transportation, air quality, noise, etc.) are also fundamentally undermined by the failure of the Final EIS to correctly calculate the number of daily vehicle trips for the new casino/hotel. Remarkably, the Final EIS finds that there will be only about 11,000 daily trips, when in fact the correct number is about 29,000 trips (almost three times this amount). In response to FIGR's expert report identifying this critical mistake, the Final EIS attempts to explain it away by asserting that it did not rely on the accepted Institute of Traffic Engineers' casino trip generation model because it wanted to avoid the supposed "Las Vegas" calculations therein, and instead used calculations from older (and significantly outdated) traffic reports for other casinos. However, once again, this approach to traffic trip calculations is incorrect. The accepted model explicitly states that rates are not based on Las Vegas type casinos, but are based on actual counts in California and other states.

Another noteworthy critical deficiency in the Final EIS is its complete failure to analyze the huge wildfire risks in this community, which has recently suffered two of the largest wildfires in California history. The Final EIS implausibly asserts that such risks will be less than significant. In reaching this wholly unsupported conclusion, BIA has failed to prepare a comprehensive wildfire risk analysis, which is standard practice now for addressing wildfire risks, and has proposed an evacuation plan that is woefully deficient. For instance, the Final EIS "doubles-down" on the wildfire evacuation study (which it previously relied on in the Draft EIS), even though it lacked an *in situ* analysis that would establish baseline conditions for the roadway/intersection system that would be impacted by a wildfire evacuation. Moreover, a thorough review of the study showed no actual field measurements of traffic nature or volumes keyed to the road segments and intersections that would be involved in an evacuation process.

These are only examples of the major NEPA deficiencies on display in the Final EIS. And, unfortunately, they reflect the simplistic level of analysis and major factual gaps in the impact analyses, significance determinations, and proposed mitigation measures in the document. Instead of taking the avalanche of public comments on the Draft EIS seriously and addressing the many problems in the Draft EIS, BIA has incorrectly "stayed the course" and stuck with its original analyses and conclusions, apparently because it wanted to rush the Final EIS out now.

We will set forth a full summary of the many deficiencies in the Final EIS in the following sections.

TABLE OF CONTENTS

We provide the following table of contents to FIGR's written comments on the Final EIS for the convenience of the reader. The section numbers of these comments correspond to the Sections of the Final EIS:

SECTION 1 - INTRODUCTION

BIA has failed to clarify, in its response to the FIGR DEIS Comments on this section, whether it was seeking public comment on the underlying decisions it refers to here. Accordingly, the FIGR DEIS Comments for this section still stand and continue to identify an inadequacy in the Final EIS.

SECTION 2 - PROPOSED PROJECT AND ALTERNATIVES

A. Incomplete Description Of The Koi Project

In the FIGR DEIS Comments, FIGR delineated the inadequacies in the BIA's description of the Koi Project (designated "Alternative A - Proposed Project")—namely that certain key information was missing from the Draft EIS which undermined the analyses of the significant environmental impacts and prevented an adequate comparison of alternatives across these environmental parameters. *See* Shartsis Cmt. Ltr., Sect. 2(A).

The BIA attempts to respond to this critique in Appendix P of the Final EIS. *See generally* FEIS, Appx. P. There, the BIA claims that the Draft EIS was "consistent with the NEPA 'hard look' standard" because "the determinations and mitigation recommendations described therein were supposedly informed by research and expert studies. FEIS, Appx. P, Master Resp. 2 at 3-2. Even assuming that the conclusions drawn by the Draft EIS were informed by such studies, the BIA's reliance is unreasonable because many of these studies were based on faulty assumptions, analyses, and conclusions.

Instead of addressing these study inadequacies, the BIA failed to update or conduct additional studies to support its Final EIS positions. Instead, the BIA merely updated the text in the Final EIS and a few of the associated technical studies to clarify or include additional minor details. FEIS, Appx. P, Master Resp. 2 at 3-3. The BIA's continuing reliance on these faulty studies and addition of clarifying language do not constitute the "hard look" required under NEPA. *See*, *e.g.*, *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085-87 (2011) (finding that Board's reliance on stale data during the environmental impact analysis process and failure to properly update the data with additional studies and surveys does not meet the "hard look" requirement).

This defect, among others (discussed in further detail in subsequent sections), is why the Final EIS continues to be riddled with critical information "gaps" and therefore deficiencies on important environmental effects, significance determinations and mitigation measures for the Koi Project. These serious inadequacies in the Koi Project description undermine the analyses of the significant impact and impair the ability to compare alternatives across these environmental parameters. Furthermore, these information "gaps" defeat the purpose of NEPA, which is to "ensure that an agency will not act on incomplete information, only to regret its decision after it's too late." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

B. Lack Of Reasonable Range Of Alternatives

NEPA and its implementing regulations require the careful development and discussion of alternatives. 42 U.S.C. §§ 4332(2)(C)(iii) and 2(E); 40 C.F.R. § 1502.10(e). In fact, NEPA requires an exceptionally robust discussion of alternatives in which the EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives," "discuss each alternative considered in detail," and "include reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14.

Section 2 of the Draft EIS, which incorporated the Scoping Report and Supplemental Scoping Report in Appendix A-2, evaluated only four alternatives, all of which would be located on the Project site: (1) the proposed Project, (2) a reduced resort/casino project, (3) a hotel/spa/winery project, and (4) the "No Action" alternative. *See generally* DEIS, Sect. 2. Critically, no off-site alternative—in particular, any alternative that would be constructed in Lake County where Koi Nation's ancestral homeland is located—was evaluated in the Draft EIS.

The BIA noted in Section 2.6 of the Draft EIS that five criteria—"Alternatives Screening Criteria"—were used to reject alternatives.[1] DEIS, Sect, 2.6 and Appx. A-2. However, in rejecting *any* and *all* off-site alternatives, the Draft EIS justified its decision using the following basis, none of which fall within the Alternatives Screening Criteria outlined in Section 2.6 of the Draft EIS: (1) the Koi Nation does not currently own or have an option on any suitable off-site property; (2) it is "speculative" whether the Koi Nation could purchase an alternative site that would meet its needs, thereby supposedly making all other sites infeasible from an economic and technical standpoint; and (3) evaluation of an alternative site would not meet the definition of a "reasonable alternative." *See* Shartsis Cmt. Ltr., Sect. 2(A).

In Appendix P of the Final EIS, the BIA clarified that alternatives sites were reviewed and rejected based on ***undisclosed*** further bases in addition to Alternatives Screening Criteria. FEIS, Appx. P, Master Resp. 5 at 3-8. Addressing an alternative site in Lake County, the BIA explained that the Koi Nation considers the Lower Lake Rancheria to be uninhabitable, that the Lower Lake Rancheria is not within 25 miles of the Tribe's headquarters in the City of Santa Rosa, and that it is outside of Sonoma County. *Id.* at 3-9.

These new undisclosed "criteria" are both misdirected and are improperly designed to exclude consideration of any site outside of Sonoma County. First, it is immaterial that Koi Nation members did not like living in the Lake County rancheria that it acquired in 2016. FIGR never stated that this Project needed to be sited on that exact property. Rather, FIGR (and the other Draft

[1] The five criteria are: (1) whether they meet the purpose and need for the Proposed Action; (2) whether they are feasible from a technical or economic standpoint; (3) whether they are feasible from a regulatory standpoint (including ability to meet the requirements for establishing connections to newly acquired lands for the purposes of the "restored lands" exception set forth in 25 C.F.R. § 292.12); (4) whether they avoid or minimize environmental impacts; and/or (5) whether they contribute to a reasonable range of alternatives. FEIS, Sect, 2.6 and Appx. A-2.

EIS commenters) stated that a site for the Project within the tribe's greater ancestral homeland area in Lake County should have been carefully evaluated. Second, the new "criteria" that a Project site must be within 25 miles of its current headquarters is not a valid criteria because it ignores the ancestral homeland and would improperly motivate tribes to move their headquarters to attempt to "reservation shop" in new areas. Moreover, this element is a consideration but not a requirement in analyzing whether a site may qualify as restored lands for gaming under 25 C.F.R. Part 292, and it is not a requirement for taking land into trust under 25 C.F.R. Part 151 for non-gaming alternatives. Third, the newly announced criteria that the Project must be within Sonoma County is transparently designed only to eliminate sites in Lake County and constitutes a type of invalid steering that has been condemned in the case law.

The lodestar for establishing a reasonable range of alternatives is the purpose and need statement. It is undisputed here that the "purpose" of the proposed action "is to facilitate tribal self-sufficiency, self-determination, and economic development." FEIS, Section 1.2. And the "need" for the proposed action is for DOI to act in conformance with its governing Part 151 regulations. *Id*. There is no geographic restriction or particular site articulated within this purpose and need statement. The after-the-fact rationalizations in the Final EIS attempting to limit the action's geographic scope to Sonoma County or some distance from the new headquarters are no more than prohibited efforts to limit reasonable alternatives. *See, e.g*., '*Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006) (court found that the Army's after-the-fact attempt to geographically limit the alternatives for the proposed action to Hawaii was invalid because it did not conform to the purpose and need statement and illegally limited the scope of reasonable alternatives).

Indeed, courts have held that a Final EIS is invalid when an agency fails to rigorously examine a reasonable range of alternatives. *See*, *e.g.*, *National Parks & Conservation Ass'n v. BLM*, 586 F.3d 735, 746- 48 (9th Cir. 2009); *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 708-711 (10th Cir. 2009) (BLM failed to take a "hard look at all reasonable options before it" by foreclosing an alternative that would close an area to development); *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 668-70 (7th Cir. 1997) (court holds that it was error for the Corps to reject consideration of "one concrete alternative that seems reasonable" for a water project); *Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285 (D. Colo. 2007) (court finds Environmental Assessment inadequate because a directional drilling alternative from outside the action area was not technically or economically infeasible); *Matthews v. U.S. Dept. of Transportation*, 527 F. Supp. 1055, 1056 (W.D. N.C. 1981) (final EIS for transportation project was insufficient because it "failed to give adequate consideration to the [town] bypass alternative in the EIS.")

SECTION 3.3 - WATER RESOURCES

The Final EIS's evaluation of groundwater, wastewater, and Pruitt Creek impacts continues to be inadequate. As discussed below, the Final EIS improperly defers mitigation to a later time, and where the Final EIS does propose mitigation measures, such measures are insufficient because, among other reasons, the effectiveness of such measures are unknown.

FIGR's water/wastewater expert, AVD Management ("AVD"), has prepared a technical memorandum, included as Appendix 2 to this letter, regarding the Final EIS's inadequacies in the water resource subject areas ("AVD Report"). AVD's conclusions are included in the factual and legal discussions set forth below.

A. Improper Reliance On Best Management Practices To Avoid Proposing Mitigation Measures

As noted in the FIGR DEIS Comments, there is a shortage of groundwater to support projected municipal, agricultural, and casino demands in the Project Site area. Shartsis Cmt. Ltr., Sect. 3.3(A). The Final EIS acknowledges that "potentially significant impacts were identified with future increased pumping" and, as a result, mitigation measures were proposed. FEIS, Appx. P, Resp. Cmt. T8-6 at 3-113. However, the BIA improperly puts the onus on the Town of Windsor to implement the mitigation measures. *Id*. This decision to place the burden on Windsor is perplexing as the town is not responsible for ensuring that the impact of the casino's water demands are mitigated.

Moreover, the Final EIS states that "in the event that the Town does not implement mitigation when necessary, similar mitigation would be implemented by [Koi Nation]." *Id.* However, no mitigation measures were actually proposed. FEIS, ES-5, Table ES-1 at ES-5. Instead, the Final EIS claims that the use of Best Management Practices ("BMPs") would minimize the impact to the groundwater supply.[2] Conclusory statements as to the effectiveness of BMPs are not sufficient under NEPA. *See*, *e.g.*, *Wilderness Society v. Bosworth*, 118 F. Supp. 2d 1082 (D. Mont. 2000).

B. Mitigation Measures Are Ineffective Or Otherwise Lack Meaningful Information To Evaluate Effectiveness.

In the FIGR DEIS Comments, FIGR pointed out that one of the mitigation measures provides that well owners may submit claims for diminished well capacity or increased well maintenance costs. This same mitigation measure suggests that, as an alternative, Koi Nation may "at its sole discretion, elect to connect the claimant to an alternative potable water source such as the casino's water system at the Tribe's expense." Shartsis Cmt. Ltr., Sect. 3.3(A) (citing DEIS, Sect. 4 at 4-1 to 4-2). As noted in FIGR's comments, this mitigation measure does not assure that all water supply needs would be met or that the well owners would be compensated for the drawdown on their water supplies under non-dry year conditions. *Id.* Nor does reimbursement

[2] It is important to note that even though the Final EIS states there are no significant impacts and "no mitigation is required," in Section 4 of the Final EIS, a series of mitigation measures are listed, presumably to address significant environmental impacts of increased groundwater pumping. Compare FEIS, ES-5, Table ES-1 and Sect. 3.3.3.2, *with* Sect. 4 and App. D-4. Thus, it is unclear from the Draft EIS whether BIA has determined that there is a significant impact. But it is clear from our review that groundwater will be significantly impacted. Equally as perplexing, a review of the Final EIS reveal that "the Final EIS ***removes*** (rather than adds or refines) mitigation for groundwater impacts. Appx. 1 (AVD Report) at 1.

remedy the decreases in groundwater supply and loss of function of existing wells. *Id.* It was also noted that "[s]uch connections would require trenching for pipelines, which could impact cultural and/or biological resources. Pipeline installation also could affect traffic if construction in public roads is required." *Id.*

In response to these comments, the BIA states that "interconnection to the Tribe's water system may be hampered by jurisdictional issues and ***thus the option of connection to the casino's water system has been removed from the Final EIS and Revised GRIA*** (Final EIS Appendix D-4)." FEIS, Appx. P, Resp. Cmt. T8-6 at 3-114. The now revised mitigation measure reads: "the Tribe may, at its sole discretion, elect to connect the claimant to an alternative potable water source at the Tribe's expense." *Id.*, Sect. 4 at 4-2. This revision merely removes any criticism that Koi Nation may face "jurisdictional" obstacles with this mitigation measure, but does not otherwise move the needle, especially because it is unclear whether Koi Nation could, at its sole discretion, "connect a private impacted party to another water system, even if such a system with adequate capacity was identified." Appx. 1 (AVD Report) at 2. There is no discussion in the Final EIS of the feasibility of, or the environmental impacts associated with, this proposal. This is insufficient under NEPA. *Northwest Indian Cemetery Protective Ass'n*, 795 F.2d at 697, rev'd on other grounds, 485 U.S. 439 ("[a] mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA").

With regard to wastewater, the Final EIS provides a series of options for wastewater treatment and disposal, all of which rely upon a future NPDES permit, which has not yet been applied for or issued. The treatment of wastewater (*i.e.*, recycling water) includes the use of a variety of hazardous chemicals and dangerous processes. Still, the Final EIS insists that such hazards are less than significant because "treatment implemented to produce recycled water will comply with federal requirements for the production and use of recycled water." *See* FEIS, Sect. 3.3.3.2 at 3-26; *id.*, Appx. P, Resp. Cmt. T8-9 at 3-115. As noted in the AVD Report, "[t]his response is disingenuous given that there are no federal requirements for recycled water production or use." Appx. 1 at 2.

The FIGR DEIS Comments pointed out that the Draft EIS provided no information or analysis of the large quantities of hazardous chemicals that must be used in the wastewater treatment process. Shartsis Cmt. Ltr., Sect. 3.3(B). The Final EIS does not address these omissions. The BIA's response to FIGR's critique in Appendix P refers the reader to A8-65. "Response to Comment A8-65, in turn, only provides generic citations to various regulations of federal agencies such as OSHA and DOT, and states that a SWPPP will be prepared to prevent chemical spills without actually providing any information or analysis of the large quantities of hazardous chemicals that must be used in the wastewater treatment process." Appx. 1 at 2. Thus, the Final EIS continues to have an information gap for the decisionmaker and the public to make an informed decision. *See*, *e.g.*, *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) ("Where the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide 'a reasonable, good faith, and objective presentation of the subjects required by NEPA.'").

C. No Consideration Of Indirect Effects

AVD Management's original technical memorandum on the Draft EIS noted that the Draft EIS contemplated that, as a possible mitigation measure, impacted neighboring landowners could be connected to other water systems if their wells are adversely impacted by the Project. However, no impacts or mitigation was identified for the construction or operation of these pipelines. Shartsis Cmt. Ltr., Appx. 2.

In response, the Final EIS refers the reader to Response to Comments A5-8 and A9-82 in Appendix P of the Final EIS. A review of Response to Comment A5-8 reveals that no information regarding the indirect effects of water pipelines has been disclosed. Furthermore, Response to Comment A9-82 also lacks any information or reference to the indirect impacts of the proposed pipeline construction. *See* FEIS, Appx. P, Resp. Cmt. A5-8, A9-82, T8-88. In other words, the Final EIS continues to ignore the foreseeable indirect effects of the Koi Project and its proposed mitigation measures, and completely overlooks the requirements under NEPA demanding the BIA to take a "hard look" at potential environmental consequences, which includes "considering all foreseeable direct and indirect impacts." *See Northern Alaska Environmental. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (internal quotation marks and citation omitted).

SECTION 3.4 - AIR QUALITY

Section 3.4 of the Final EIS covers topics involving air quality and the proposed Federal General Conformity Determination and contains all of the same inadequate assumptions, calculations and significance determinations contained in the Draft EIS. Based on the dramatically inaccurate trip generation and associated errors in the Final EIS updated traffic study discussed in Section 3.8 herein, the air quality analyses, and the associated Federal General Conformity Determination in Section 3.4, are inaccurate, are based on faulty empirical data, and cannot be relied upon. The significance level and other determinations in this Final EIS section are therefore invalid under NEPA.

The Final EIS mistakenly assumes that the Koi Project would "… generate 11,213 total daily weekday trips and 15,779 total daily Saturday trips, including 473 weekday a.m. peak hour trips (279 in, 194 out), 1,205 weekday p.m. peak hour trips (710 in, 495 out), and 1,340 midday Saturday peak hour trips (657 in, 683 out)." FEIS, Sect. 3.8.2.3 at 3-83. In fact, as explained in Appendix 2 to this letter and in Section 3.8 herein, the Koi Project will actually generate over 29,000 total daily weekday trips. Besides fatally undermining the traffic impact calculations in Section 3.8, the addition of over 18,000 daily vehicle trips will cause significant unreported air quality impacts because the majority of air quality impacts from the Koi Project are a result of mobile emissions from vehicle trips.

The BIA did not make a serious effort to respond to the FIGR DEIS Comments which identified these gross traffic estimate errors and deficient air quality analyses in the Draft EIS. Rather, in the Final EIS, BIA repeated its incorrect position that "[t]he air quality analyses in the Draft EIS and Final EIS are based on appropriate trip generation estimates." FEIS, Resp. Cmt.,

T8-15 and T8-91. It is not surprising that the BIA has no grounds to defend the error-filled traffic estimates that underlie its transportation air, noise, land use and other Final EIS sections. As a result, its determinations of less than significant impacts (with or without mitigation) in each of these areas are invalid.

For the same reasons, the draft Federal General Conformity Determination is not based on the correct data and cannot be adopted in its current form. Since the Project Site is located in an area that is not in attainment for ozone and is a maintenance area for carbon dioxide (two pollutants that are closely associated with emissions from vehicles), the calculations based on the updated Appendix I results are also unreliable and invalid.

SECTION 3.5 - BIOLOGICAL RESOURCES

In the FIGR DEIS Comments, FIGR points out several deficiencies with regard to the Draft EIS's analysis as it relates to the impact of the Koi Project on biological resources. *See generally* Shartsis Cmt. Ltr., Sect. 3.5. These deficiencies were not cured by the BIA and continue to pervade through the Final EIS. *See generally* FEIS, Sect. 3. at 3-44 to 3-56.

Notably, the Final EIS continues to assert that direct impacts to Pruitt Creek and its associated riparian corridor and the endangered species known to be present, would be reduced to less than significant levels with adherence to the conditions of applicable permits and implementation of BMPs and mitigation measures. *Id.* at 3-54 to 3-55. First, the Final EIS does not provide enough information to make an adequate assessment of the Project's impact on Pruitt Creek and the Riparian Corridor. Second, the mere fact that a future permit is required does not obviate the BIA's obligations to prepare a complete analysis and disclosure of foreseeable environmental impacts. *See 350 Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022); *Killgore v. SpecPro Professional Servs., LLC*, 51 F.4th 973, 989-90 (9th Cir. 2022); *S. Fork Band Council of Western Shoshone*, 588 F.3d 718, 727 (9th Cir. 2009) ("A non-NEPA document… cannot satisfy a federal agency's obligations under NEPA"); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004).

The Final EIS also continues to fail to discuss any of the reasonably foreseeable impacts of the development of the required infrastructure for the wastewater treatment plant on Pruitt Creek. In the Draft EIS, the BIA proposes horizonal drilling as an option for utility line crossing of Pruitt Creek. This option was removed from the Final EIS. Instead, the Final EIS states that utility lines would be attached to either the proposed pedestrian or vehicle bridge to avoid impacts to Pruitt Creek. According to the BIA, "[w]ith the removal of this option, no other clarifications of the analysis are warranted." *Id.*, Appx. P, Resp. Cmt. T8-18 at 3-118. This is an improper conclusion because attaching utility lines to the proposed bridges will have other foreseeable impacts which must be discussed under NEPA.

SECTION 3.6 - CULTURAL AND PALEONTOLOGICAL RESOURCES

Section 106 of the National Historic Preservation Act, 54 U.S.C. §§ 300101, *et seq.* ("NHPA") requires all federal agencies, including the BIA, to consider the impact on historic properties and cultural resources for any project or activity "requiring a Federal permit, license, or approval." 54 U.S.C. §§ 306108, 300320. As applicable here, the NHPA implementing regulations specifically require the BIA to undertake two consultations, which usually occur concurrently. First, the BIA must initiate a meaningful government-to-government consultation with any tribe that "attaches religious and cultural significance to historic properties that may be affected by an undertaking." 36 C.F.R. § 800.2(c)(2)(ii). Second, the BIA must consult with California's State Historic Preservation Officer ("SHPO") and seek concurrence that no property resources are eligible for inclusion in the National Register of Historic Places. 36 C.F.R. § 800.4(a). In this case, the BIA has clearly failed to diligently pursue and complete this consultation process.

First, the Final EIS conveys the false impression that the BIA has properly consulted and completed these statutory duties of consulting with affected tribes by explaining that "[c]onsultation under Section 106 has included correspondence with the tribes via letter and email, transmittal of cultural studies prepared for the APE, in-person and virtual meetings, and invitations to be present during some of the archaeological testing…." FEIS, Appx. P, Master Resp. 15 at 3-22. This text strategically omits the fact that FIGR sent many rounds of letters to BIA that specifically identified serious procedural and substantive inadequacies in the consultation process, including the BIA's failure to provide key documents, the BIA's disregard of FIGR's concerns, and the BIA's lack of meaningful engagement with the Tribe on these issues. The BIA's patently inadequate consultations with FIGR and other interested tribes led SHPO, in a July 10, 2024 letter to the BIA, to advise the BIA to "conduct consultation in a manner that provides Indian Tribes a reasonable opportunity to identify its concerns about historic properties, *advise on the identification and evaluation of historic properties*, including those of traditional religious and cultural importance, *articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects*." (emphasis added).

Second, the BIA failed to properly complete consultation with the SHPO despite the SPHO's July 10, 2024 letter objecting to a finding of no historic properties affected and concluding that the BIA's "efforts to identify historic properties, including those of religious and cultural significance to Tribes to be insufficient, inadequate and unreasonable." As a result, the SHPO letter requested "BIA reinitiate Section 106 consultation with Indian Tribes and the SHPO by redefining the APE [Area of Potential Effects] in a manner that considers the geographic area (including vertical extents) within which the undertaking may directly or indirectly cause alterations in the character or use of historic properties and consult on the efforts it proposed to identify historic properties within the APE."

The Tribe, in its prior comments letters on the Draft EIS, explained the numerous deficiencies in the BIA's NEPA review of impacts to cultural resources. Chief among the issues, the BIA has failed to meaningfully consult with the Tribe as required under the National Historic

Preservation Act. As a result, the Tribe was forced to file litigation in order to have the BIA meet its NHPA Section 106 consultation obligations. The Tribe reiterates its request that BIA reinitiate Section 106 consultation, as the SHPO advised in her July 10, 2024 letter to the BIA, and fulfill its legally required NHPA Section 106 duties before taking action on this Project.

The BIA's failed Section 106 consultation process is reflected in the deficiencies of the Final EIS. The BIA continues to insist that impacts to cultural resources will be less than significant through implementation of mitigation. FEIS at ES-14, ES-15, 3-66. This conclusion, however, entirely ignores: 1) the change from state to federal law governing cultural resource protection, and 2) the inadequacy of the proposed mitigation measures in avoiding impacts.

A. Change In Applicable Law Results In A Significant Impact to FIGR's Sovereignty And Cultural Resources.

The change from state cultural resource protection laws to the application of the Native American Graves and Repatriation Act ("NAGPRA") if the Project is approved constitutes a significant impact on FIGR and its Southern Pomo cultural resources. *See* Chairman Sarris Cmt. Ltr. at 19-21. Currently, any development by the Koi Nation or a private entity on the Project site would be subject to state cultural resource protection laws. As a result, if any ancestral remains or associated grave goods are discovered, the landowner would be required to work with the most likely descendants (MLD) of those remains, which is required by law to be a person or Native American group culturally affiliated with the remains. Cal. Pub. Resources Code § 5097.98; NAHC, Most Likely Descendant Procedures ("MLD Procedures") at 3-4. The Koi Nation is not eligible to be an MLD under state law because its ancestral territory is in Lake County, not Sonoma County. MLD Procedures at 6. It is not culturally affiliated with the Project site. See Letter from NAHC Cultural Resources Analyst Cameron Vela to Taylor Alshuth (August 28, 2022) (not including the Koi Nation in the contact list of tribes with cultural resource knowledge for the Project area). In contrast, FIGR as a Southern Pomo tribe, maintains a close cultural affiliation to the area and is an eligible MLD under state law.

Once the land is taken into trust as proposed for the preferred alternative in the Final EIS, the Project would be subject to federal cultural resource protection laws, namely, NAGPRA. NAGPRA establishes a priority order for who determines the disposition of human remains and cultural items found on federal or tribal lands. If no known lineal descendant can be identified, then the tribe on whose lands the items were found determines the disposition of the remains or objects. 43 C.F.R. §§ 10.2, 10.2. The clear intent of NAGPRA is to ensure that the tribe with the most direct cultural connection to the land will control the disposition of these important cultural items. 43 C.F.R. § 10.7(a). In the case of the Koi Nation's Project, however, transferring the land into trust for the Koi Nation will immediately result in FIGR and other Southern Pomo tribes losing any rights over the Southern Pomo cultural resources and remains on the property. This is a significant and unavoidable impact to FIGR's sovereignty and cultural rights that cannot be mitigated.

B. Ongoing Problems With Proposed Mitigation

The BIA attempts to gloss over the very real, direct, and significant impacts to FIGR and Southern Pomo cultural resources by proposing four mitigation measures. FEIS at 14-26. Each of these mitigation measures, however, is primarily oriented around data recovery, not avoidance of impacts. Data recovery, by its very nature, does not avoid impacts to historic sites. Instead, it is designed to try to preserve information about the impacted resources. ACHP Section 106 Guidance at 27. Data recovery is not adequate mitigation in the context of impacts to tribal cultural resource rights and sovereignty. It should only be used after all attempts have been made to avoid impacts. Only through adequate consultation with FIGR and other Southern Pomo tribes could appropriate mitigation measures be developed. Yet, the BIA has refused to engage in appropriate discussions about the Project impacts. Further exacerbating these problems with the use of mitigation, the mitigation measures proposed still do not require FIGR involvement in the establishment of an archaeological monitoring program and Archaeological Design and Treatment Plan. The mitigation measures also prioritize consultation with the Koi Nation, even though the Koi Nation has no cultural affiliation with the Southern Pomo land of the Project site.

SECTION 3.7 - SOCIOECONOMIC CONDITIONS AND ENVIRONMENTAL JUSTICE

The FIGR DEIS Comments addressed important deficiencies in Section 3.7 of the Draft EIS, entitled "Socioeconomic Conditions and Environmental Justice." Shartsis Cmt. Ltr., Sect. 3.7. Unfortunately, the BIA failed to meaningfully address these deficiencies in the Final EIS and these inadequacies still remain.

In the Draft EIS, the BIA misapplied environmental justice principles with regard to FIGR and other tribes. Among other errors, it failed to analyze the potential environmental effects of the Koi Project on FIGR or any other tribe except the Project proponent (Koi Nation). It also failed to recognize that these "environmental effects" include cultural, economic and social impacts, which for FIGR includes the cultural resources and ancestral remains of their ancestors which are likely present on the site. Moreover, the BIA completely disregarded the environmental justice requirements applicable to the selection and consideration of alternatives. Not only did the BIA fail to meaningfully consult with FIGR about its cultural concerns, but it rejected at the outset FIGR's repeated requests that the Draft EIS select and evaluate an off-site alternative in Lake County, where the Koi Nation's historic homeland is located.

In the Final EIS, the BIA makes no attempt to understand and specifically address any of these issues. It wrongly dismisses any possibility that the Project would have adverse environmental or associated economic effects on the Tribe. Rather, the Final EIS states, in a response to comment, that: "There are no tribal communities in proximity to the Project Site, and [the Project] would have no potential to cause environmental burdens that may create economic disadvantages for tribal communities." FEIS, Resp. Cmt. T8-27 at 3-120. This finding fails to appreciate that the loss or destruction of FIGR cultural resources and ancestral remains on the Site would have cultural, economic and social impacts which have been explained in the FIGR DEIS

Comments. And, of course, the BIA continues to refuse to evaluate any resort/casino Project alternative that would be located in or near the Koi Nation's homeland in Lake County.

FIGR engaged the firm of Meister Economic Consulting ("MEC") to analyze the socioeconomic analyses contained in the Draft EIS. MEC's conclusions were set forth in the expert review included with the FIGR DEIS Comments. The BIA provided responses to these comments in the Final EIS, which MEC has now responded to in the additional expert review that is included as Appendix 4 to this comment letter, which is specifically incorporated herein. MEC's latest expert review concludes that the key deficiencies in the reports underlying the Draft EIS, which include "faulty assumptions, ignoring important facts, faulty economic analysis, and failing to consider the impacts of decreased tribal government revenues on tribal and local communities, among others, remain." *Id*. at 1.

The new MEC review confirms that the economic analyses by Global Market Advisors ("GMA") and the comment responses provided by GMA and Acorn Environmental ("Acorn") in the Final EIS display the same group of significant errors that were evident in the Draft EIS. These deficiencies include, but are not limited to: GMA's use of outdated information; GMA's failure to understand key underlying assumptions in the prior work it relied upon; GMA and Acorn changed a Project scope without revising projections from the prior work they relied upon; GMA grossly understates total competitive impacts; Acorn incorrectly claims that competitive impacts dissipate over time; and GMA has made a number of important errors in their calculations. These and other related subjects are discussed in detail in Appendix 4.

One of the most important conclusions reached by MEC relating to the competitive effects caused by the Project is as follows:

> GMA's computed competitive effects are vastly understated, but even their results would yield significant detriment for a number of tribes, including the Federated Indians of Graton Rancheria. From an economic perspective, regardless of whether detriment is caused directly by the proposed casino itself or indirectly by the economic impacts of the proposed casino that in turn cause socioeconomic, environmental justice, and other impacts, the harm is real and significant and should be considered by the BIA.

Id., at 11.

SECTION 3.8 - TRANSPORTATION AND CIRCULATION

FIGR provided extensive comments on Section 3.8 of the Draft EIS, entitled "Transportation and Circulation," which evaluated the impacts of the proposed Koi Project on the current and projected future traffic conditions and transportation infrastructure in the area of the Project Site. Shartsis Cmt. Ltr., Sect. 3.8. The Draft EIS conclusions were based almost entirely on a Traffic Impact Analysis ("TIA") conducted for the Koi Project by TJKM, dated April 17, 2024. The TIA evaluated existing road and intersection conditions and attempted to calculate trip

generation and related information for the future construction and operation of the Koi Project. The results of this TIA led the BIA to conclude in the Draft EIS that five intersections would operate at an unacceptable level of service ("LOS"), but that with adoption of a few modest mitigation measures, there would be an acceptable LOS at these intersections and that traffic effects would thereby be reduced to a "less than significant" level. DEIS, Sect. 3.8.2.3 at 3-81 to 3-82.

FIGR engaged the firm of LLG Engineers ("LLG") to conduct a peer review of the TIA in the Draft EIS, LLG's report was enclosed as Exhibit 3 to the original Shartsis comment letter. LLG concluded that TKJM's trip generation calculations were "fatally flawed" and "under reported by over 18,000 trips" every day. While the TIA concluded that the Koi Project would generate 11,213 total daily weekday trips, the LLG review revealed that the accurately calculated number of such trips should have been "over 29,000" daily weekday trips during operation using industry standard methodology. Since "trip generation" is the heart of the traffic impact analysis for Koi Project operations, this huge error completely undermined the Draft EIS conclusions. LLG also identified a series of other major TIA insufficiencies that invalidated the transportation impacts, significance determinations and mitigation in the Draft EIS.

In response to the criticisms of FIGR and many other stakeholders, TJKM prepared an updated TIA report dated November 4, 2024, enclosed as Appendix I to the Final EIS. The Tribe's consultant LLG has now prepared a report, enclosed as Appendix 2 to this letter, that evaluates the updated TJKM report and the associated conclusions in the Final EIS. In brief, LLG has determined that all of the fatal flaws it identified in the original TJKM report (and reflected in the Draft EIS determinations) still exist.

On the critical "trip generation" issue, TJKM explained that it did not follow standard practice and use the Institute of Transportation Engineers ("ITE") casino trip rates because those rates are supposedly based on sites in Las Vegas, which has a different set of assumptions based on the Las Vegas strip configuration. In its new report, LLG points out that this statement is "patently false" because "the ITE description specifically states the rates are ***not*** based on Las Vegas type casinos (see ***Attachment A***) and instead are based on actual counts at casinos in South Dakota, California, Massachusetts and several other states." *Id*. at p. 1 (emphasis in original). TJKM instead relied on a nine year-old Wilson Rancheria study that was based on two even older casino studies. As a result, the TJKM conclusion of 11,000 weekday trips "substantially understates" the actual weekday trips calculated using the ITE standard of about 29,000 weekday trips. *Id*.

The latest TJKM study also fails to include in its traffic study the 30 cumulative building projects in the vicinity that are approved, under construction, or under review, which include "hundreds of new housing units under construction at multiple sites along Shiloh Road near the Koi parcel, most of which are not included in the current traffic study." *Id*. at 2. Instead, TJKM only took three of these 30 projects into account. *Id*. TJKM attempts to explain away this issue by asserting that the "annual growth factor" would include new projects. However, as LLG points

out, "[a] growth factor uniformly adds background traffic and does not account for specific projects that will add large amounts of traffic to specific roads." *Id*.

The updated TJKM study also fails to fix the inadequacies in several other key site specific analyses relating to the Project. Thus, TJKM fails to explain why it disregarded traffic patterns at several key access points to the Project and did not include potential routes for casino traffic coming from the south. According to LLG, "the event center trip generation calculations remain flawed." *Id*. at 3. TJKM has now disclosed the event trip assumptions used in its original study and LLG concludes from them that "it is clear the calculations provide a low, under-reported amount of trips." *Id*. Among other things, TJKM's analysis does not assume that the shows will be sold out, it mistakenly assumes that 25% of the attendees will already be staying at the hotel, and it assumes that only 15% of attendees will arrive between 1-2 hours before the show. According to LLG, no data has been provided to support these assumptions. *Id*. at 3-4.

LLG also concludes that the mitigation measures are similarly flawed. According to LLG, "[t]here is no evidence provided in the report that shows the feasibility of the recommended mitigation, nor is there any information provided as to the timings of when the improvements will be implemented. As written, all of the impacts will occur without any assurance that the mitigation will be implemented." *Id*. at 4.

These errors are huge flaws that render all of the transportation conclusions wholly unsupported, not minor differences that can be disregarded. The actual projected number of weekday trips (29,000) is almost three times the number of trips calculated by TJKM (11,000), and this means that the total traffic impacts, significance determinations, and ultimate conclusions are completely invalid. Similarly, all of the associated environmental impact calculations and conclusions in the areas of air quality, noise, land use and public service used vastly incorrect traffic assumptions and greatly understate the actual amounts, and levels of significance of the individual and cumulative Project environmental impacts.

SECTION 3.9 - LAND USE

Section 3.9 of the Draft EIS purported to fully evaluate the land use impacts of the proposed Koi Project. It listed various state and local land use laws, ordinances and plans for the Project Site and then asserted that, since none of these state and local legal requirements will apply to the Site once it obtains federal trust status, these laws and the associated impacts on the immediate community are immaterial and can be disregarded. Moreover, the analysis included a generic sentence stating (without support) that the proposed mitigation measures for other types of effects will (supposedly) address all of these concerns. The Draft EIS then concluded that the Project "would result in less-than-significant impacts associated with land use conflicts." DEIS, Sect. 3.9.3.2 at p. 3-92.

FIGR's DEIS Comments explained why this analysis was wholly inadequate and incorrectly trivializes the very strong concerns by hundreds of neighbors, the City of Windsor and the County of Sonoma regarding Project land use issues. Most importantly, the "less than

significant impact" conclusion ignores that the Project threatens to destroy the quiet residential character of this area that has been established over decades by the thoughtful and purposeful land use policies of the County and City. FIGR pointed out that the massive impacts of the Project on this neighborhood cannot be disregarded just because the current regulatory regime will be trumped by federal law.

The BIA's responses in the Final EIS to FIGR's DEIS Comments fail to address these inadequacies and have not resulted in a finding that the impacts will be significant. See FEIS, Sect. 3.9, Response to Comments Sect. 3.1.8 and T8-31. Against all evidence to the contrary, BIA insists that removal of the Site from the Windsor/Larkfield/Santa Rosa Separator supposedly would not be significant because it comprises only 2% of the total amount, thereby ignoring the strategic location of the property and its immediate adjacency to residential neighborhoods, schools and churches. BIA also continues to state that its mitigation measures for traffic, noise and other impacts (all of which have not been correctly calculated or shown to be effective due to the major flaws in the traffic analysis) will fully address these neighborhood issues and thereby keep land use impacts from becoming significant. These conclusions lack any factual or legal support.

BIA's Final EIS additional statements are no more than inadequate "window dressing" intended to cover up the land use analysis deficiencies. Accordingly, the land use analyses in the Final EIS remain inadequate and the "less than significant impact" conclusion is unsupported by the record.

SECTION 3.10 - PUBLIC SERVICES AND UTILITIES

The proposed Project is, without a doubt, a large construction project that during operation will utilize solid waste services, electricity and natural gas services, law enforcement, fire protection, and emergency medical services. *See generally* FEIS, Sect. 3.10. An increased use of any of these public services and utilities to support a project of this size would place undue burdens on these resources (*i.e.*, cause adverse impacts to the services and utilities) since they are not equipped to accommodate the Project's anticipated use. However, the BIA dismisses these very real consequences by incorrectly finding that the public service and utility impacts caused by the construction and operation of the Project supposedly would be less than significant.

A. Improper Reliance On Best Management Practices To Justify The Lack of Mitigation Measures

The Final EIS concedes that both construction and operation of the Project could generate quantities or types of waste that cannot be accommodated by regional waste disposal facilities. *Id.*, ES-5, Table ES-1 at ES-24. Yet, somehow, the Final EIS concludes that Project construction and operation would have a "less than significant" impact on solid waste services. *Id.*, Sect. 3.10.3.2 at 3-100. Not only that, no mitigation measures were proposed to combat any impact the Koi Project may have on waste disposal.

The BIA claims that "with the implementation of BMPs, no further mitigation is necessary because the available waste disposal facilities have sufficient capacity to accommodate the project's solid waste needs based on the analysis in Draft EIS Section 3.10.3." FEIS, Appx. P, Resp. Cmt. T8-32 at 3-122. The BIA reaches this conclusion in the Final EIS without discussing the effectiveness of these BMPs. Conclusory statements as to the effectiveness of BMPs is not sufficient under NEPA. *See*, *e.g.*, *Wilderness Society*, 118 F. Supp. 2d 1082.

B. Uncertainty As To Use Of Public Services And Utilities

In response to FIGR's critique that the BIA's conclusion related to electricity and natural gas is "flawed as it is based on speculation and unsupported assumption," the BIA maintains that its conclusion is not based on speculation because "the electrical capacity analysis was based on direct information from PG&E." FEIS, Appx. P, Resp. Cmt. T8-33 at 3-122. It is unclear whether the BIA understood FIGR's position. FIGR is not contesting whether the electrical capabilities analysis is based on fact and information. Rather, FIGR's criticism is directed towards the fact that while there are discussion and plans to construct additional infrastructure to potentially serve the Koi Project, these are mere plans. To date, no concrete service agreement has been reached between PG&E and Koi Nation to actually service the Koi Project once it is operational. In fact, the BIA admits in the Final EIS that "the Tribe has been in communication with PG&E, and negotiations with PG&E are ongoing as of the publication of the Final EIS to ensure that the power supply needs are met if the Proposed Action is approved." *Id.* Thus, the BIA's belief that PG&E will serve the Koi Project and its impact analysis are based on pure speculation. Reliance on mere speculation and faulty assumptions is not sufficient to meet the hard look requirement under NEPA. *See*, *e.g.*, *City of Los Angeles v. Fed. Aviation Adm'n, 63 F.4th 835 (9th Cir. 2023).* Furthermore, there is no discussion as to what would happen if Koi Nation does not come to an agreement with PG&E.

The uncertainty of the Koi Project and its effects on the ability to conduct an adequate analysis of the impact of the project on public services and utilities is further highlighted by the fact that the BIA admits that "the exact extent of infrastructure development needed to serve the selected alternative will be determined at a later date, once infrastructure improvements needed are finalized between the Tribe and PG&E." FEIS Appx. P, Resp. Cmt. T8-33 at 3-123. Under NEPA, the Draft EIS may not defer the analysis of foreseeable impacts that arise from a plan by arguing that their consequences are unclear or that they will be analyzed later when a site-specific program is proposed that implements the plan. *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).

Additionally, the BIA apparently defers the analysis for foreseeable impacts to a later time, which is prohibited under NEPA. It is well-established that "[a]gencies cannot postpone analysis of an environmental consequence to the last possible moment; they must consider impacts as soon as it can reasonably be done." *California v. Bernardt*, 472 F.Supp.3d 573, 618-19 (N.D. Cal. 2020) (internal quotations and citations omitted). Here, it is undisputed that additional infrastructure is needed. While the amount of infrastructure may vary depending on the negotiations between Koi

Nation and PG&E, there is an understanding of the baseline infrastructure needed and the types of improvements that are necessary. Thus, the BIA should have conducted this analysis.

With regard to law enforcement, fire response, and medical emergency services, providing such services to a project of this size will inevitably impact these entities and their ability to serve other members of Sonoma County. The Final EIS admits that "it is anticipated that the increased concentration of people due to [the Project] would lead to an increase in the number of service calls to local law enforcement." FEIS, Sect. 3.10.3.2 at 3-102. The Final EIS also acknowledges that "during construction, construction vehicles and equipment, such as welders, torches, and grinders, may accidentally spark and ignite vegetation or building materials" and that the operation of the Project would increase demand for fire protection and emergency services. *Id.* at 3-103. Nevertheless, the Final EIS concludes that the impact on these public services will be "less than significant." *Id.*, ES-5, Table ES-1 at ES-25.

The Final EIS claims that a handful of proposed mitigation measures and "BMPs" will alleviate any adverse impacts caused by the Project. Such mitigation measures include Koi Nation entering into future service agreements with Sonoma County Sheriff's Office ("SCSO") and Sonoma County Fire District ("SCFD"). However, the mere fact that a hypothetical service agreement may at some future time be in place does not mean that the increased demand for SCSO and SCFD services will not negatively impact these services. As of the date of this letter, there are no service agreements in place to ensure that the law enforcement, fire response, or medical emergency services would be provided to the Project. *Id.*, Sect. 3.10.3.2 at 3-102 to 3-103.

SECTION 3.12 - HAZARDS, WILDFIRE AND EVACUATION IMPACTS

In the FIGR DEIS Comments, FIGR identified the clear and present wildfire risks in the immediate area of the Project Site, which has recently suffered two of the largest wildfires in California history and the corresponding major flaws in the Draft EIS's analysis of the Project's impacts relating to wildfires and wildfire evacuations. *See generally* Shartsis Cmt. Ltr., Sect. 3.12. Notably, the Draft EIS relied on a wildfire evacuation study that was wholly inadequate because, among other reasons, that study lacked empirical evidence to support the conclusions reached in the Draft EIS. *See* Shartsis Cmt. Ltr., Appx. 1 at 6 (noting that the study did not include an in situ analysis to establish baseline conditions for the roadway/intersection system that would be impacted by a wildfire evacuation.) The Draft EIS failed to include any information regarding the proposed fire suppression features. *See* Shartsis Cmt. Ltr., Sect. 3.12(A). Moreover, the BIA somehow reached the implausible conclusion that wildfire hazards and impacts are not significant without providing a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. *See* DEIS, ES-5, Table ES-1 at ES-20; *id.*, Sect. 3.12.2 at Figure 3.12-2.

As explained in further detail below, these deficiencies (among others) were not cured by the BIA and continue to pervade the Final EIS. *See generally* FEIS, Sect. 3.12 at 3-120 to 3-137.

The wildfire consulting firm of TSS Consultants ("TSS") reviewed the adequacy of the Draft EIS analysis of wildfire issues and issued a comprehensive report that was enclosed as Appendix 1 to the Shartsis Comment Letter. TSS has now reviewed the adequacy of the Final EIS analysis on these issues and prepared a report that is enclosed as Appendix 3 ("TSS Review") to this letter.

A. Information Gaps Regarding Wildfires And Evacuations

FIGR pointed out in the FIGR DEIS Comments that the Draft EIS "lacked any information regarding water storage ponds or tanks, fire hydrant locations, or other fire suppression features that are particularly important on this site because it will not be served with municipal water." Shartsis Cmt. Ltr., Sect. 3.12(A). The BIA now admits that "[t]he current design of the Proposed Project was completed at a planning level and the specific location of fire hydrants and other fire suppression features is not known at this time." FEIS, Appx. P, Resp. Cmt. T8-35 at 3-124. Per the BIA, "[g]iven the extensive timelines and costs associated with preparation of construction level detail design plans, NEPA's requirement for analysis and consideration of reasonable alternatives, and CEQ regulations that encourage NEPA analysis as a practical contribution to the decision making process and at the feasibility analysis or equivalent stage, it is not appropriate to develop design level detail construction documents as part of the EIS process." FEIS, Appx. P, Master Resp. 2 at 3-4.

As a preliminary matter, under NEPA, an EIS needs to provide as much information and detail as necessary to provide "a reasonably thorough discussion of the significant aspects of the probable environmental consequence." *Citizen for a Better Henderson v. Hodel*, 768 F.2d 1051, 1058 (1985) (internal quotations and citations omitted); *see City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142,1150 (1997). Thus, if "design level detail construction documents" are necessary to meet these standards, these documents should be developed to "foster both informed decisions making and informed public participation." *City of Carmel-By-The-Sea*, 123 F.3d at 1150-51 (internal quotations and citations omitted).

As a secondary matter, merely developing "design level detail construction documents" does not achieve the level of specificity in the context of wildfires and associated evacuation. While it is important to know where each proposed fire suppression feature will be located, other information regarding the fire suppression feature is equally as important. For example, to properly evaluate whether the Koi Nation Project would have a significant impact on wildfire and wildfire evacuations, it is important to know, among other things, (i) how many fire suppression features are needed, (ii) whether it is feasible to house these features on the Project Site, (iii) the capacity of each feature, (iv) the delivery mechanism; and (v) the efficacy of each. *See* Appx. 3 (TSS Review) at 36. The Final EIS does not include any of these details which fails NEPA's public information requirements. As discussed in the following subsection, this is not the only information "gap" in the Final EIS relating to wildfire and wildfire evacuations.

B. Continued Reliance On Faulty Studies To Conduct Wildfire Evacuation Impact Analysis

As noted in the FIGR Draft EIS Comments, the BIA stated that with the Project, the evacuation time could increase to six to eight hours, but nevertheless concluded that the mass evacuation of the Koi Project "would not significantly inhibit local emergency response to or evacuation from wildfire or conflict with a local wildfire management plan." Draft EIS, Sect. 3.12.3.2 at 3-132. This conclusion, as FIGR pointed out, is based on Fehr and Peers' Evacuation Travel Time Assessment ("ETTA") which is a study that relies on faulty assumptions and "does not consider that the mountainous areas (residences/properties such as Shiloh Estates and Mayacama) east of the Town, located in the Wildland-Urban Interface (WUI) area, have only two evacuation routes to US 101 (through Pleasant Avenue and Shiloh Road) and has a high structure to exit ratio and could compound the issues at the intersection of Shiloh and ORH." Shartsis Cmt Ltr., Sect. 3.12 (B). Additionally, this study gives zero consideration to how panic and general human error would affect the time needed for a mass evacuation. *Id.*

The BIA concluded in Appendix P of the FEIS that the ETTA was sufficient because: (1) it was based on "Tubbs Fire and Kincade Fire, and the schedule for which the evacuation warning(s) and order(s) were issued"; (2) "[t]o reflect worst-case conditions, the ETTA assumed that the evacuation would occur at the same time as the peak hour of afternoon commute travel on the Friday before Labor Day"; and (3) "it assumed a 15% reduction in roadway capacity to account for inefficiencies during emergency events such as, the presence of debris, lowered visibility due to smoke, erratic/panicked driving, and other hazards." FEIS, Appx. P, Master Resp. 11; *see also id*., Appx. N-2.

TSS disagreed in its Review. "However, a thorough review of the ETTA showed no actual field measurements of traffic nature or volumes keyed to the road segments and intersections that would be involved in an evacuation process. The evacuation time requirements appeared to be based entirely on published information inputted into a traffic modeling routine." Appx. 3 (TSS Review) at 25-26. Additionally, as previously noted by TSS, ETTA lacked an *in situ* analysis that would establish baseline conditions for the roadway/intersection system and a wildfire evacuation scenario comprised of comparative traffic models for typical baseline traffic and modeling for the added traffic during a wildfire-related evacuation. *Id.* at 25. Moreover, "although conversations with local fire and law enforcement personnel were cited there did not seem to be consideration given to 1) potential wildfire hazard and risk levels within the study area or 2) the particular vulnerability of road segments, or intersections, to loss of function if involved in a wildfire incident." *Id.*

"Given the apparent reliance on results from computer modeling, the lack of field data collection, and lack of consideration for wildfire behavior effects, TSS does not concur that the assumptions and methodology used in the analysis were sufficient." Appx. 3 at 26. Where, as here, an agency relies on faulty studies to support its conclusions, courts have not hesitated to conclude that the agency failed to meet the "hard look" requirements under NEPA. *See*, *e.g.*, *Environmental Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 874 (9th. Cir. 2022)

(agreeing with plaintiff "that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts."); *City of Los Angeles,* 63 F.4th 835 (finding that the FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not operate simultaneously).

C. Failure To Consider The Direct, Indirect, And Cumulative Effects of Construction On Wildfire Risks

The Draft EIS acknowledged that the Koi Project is in a designated high fire risk area and concedes that the construction of the Project could increase the risks of wildfires. DEIS, ES-5, Table ES-1 at ES-20; see *id.*, Sect. 3.12.2 at Figure 3.12-2. Yet, the BIA curiously reached the implausible conclusion that wildfire hazards and impacts are not significant without providing a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. *350 Montana*, 50 F. 4th at 1272 (citing *Barnes v. U.S. Dept. of Transp*., 655 F.3d 1124, 1136 1141 (9th Cir. 2011); *see also Killgore*, 51 F.4th at 989-90 ("while… federal agencies have substantial discretion to define the scope of NEPA review, an agency may not disregard its statutory obligation to take a 'hard look' at the environmental consequences of a proposed action, including its cumulative impacts, where appropriate.") (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212,1214-15 (9th Cir. 1998)).

The BIA attempts to respond in the Final EIS to this critique by claiming that "[t]he direct, indirect, and cumulative effects of the [Koi] Project on wildfire hazards, and their impact significant determinations, are discussed throughout the Draft EIS." Final EIS, Appx. P, Resp. Cmt. T8-35 at 3-123. Specifically, the BIA claims that the direct effects of the Project on Wildfire Hazards are discussed in Section 3.12.3. In that section of the Final EIS, the BIA concedes that the "handling and transfer from one container to another or general usage, the potential for an accidental release" of "[h]azardous materials used during construction." *Id.*, Sect. 3.12.3.2 at 3-129. But, the BIA concludes that "the implementation of these BMPs and compliance with federal laws relating to the handling of hazardous materials, no adverse effects associated with the accidental release would occur during construction." *Id*. However, "[u]se of the general application of 'BMPs' provides no means of support for the 'Less Than Significant' finding." Appx. 3 (TSS Review) at 16. Under NEPA, conclusory statements as to the effectiveness of BMPs is not sufficient. *See, e.g., Wilderness Soc'y v. Bosworth*, 118 F. Supp. 2d 1082 (D. Mont. 2000).

The BIA further notes that the indirect effects of the implementation of the Riparian Corridor Wildfire Management Plan Mitigation are discussed in Section 3.15.2 and the Koi Project's cumulative effects on wildfire hazards are discussed in Section 3.14.11. FEIS, Appx. P, Resp. Cmt. T8-35 at 3-123. As a preliminary matter, a discussion of the indirect effects of Riparian Corridor Wildfire Management Plan Mitigation does not adequately address the indirect effect of the Koi Project on wildfire hazards and evacuation. With regards to the Koi Project's cumulative effects, Section 3.14.11 of the Final EIS states that "[n]ew developments on non-federal lands would be required to adhere to federal, State, and municipal regulations regarding the delivery, handling, and storage of hazardous materials, thereby reducing the risk to the public's health and

welfare due to accidental exposure. Therefore, there are no significant cumulative hazardous materials impacts associated with the project alternatives." *Id.*, Sect. 3.14.11 at 3-172.

The BIA agrees that "[t]here is the potential for impacts related to wildfire hazards in combination with other projects" but nevertheless concluded that "cumulative impacts associated with wildfire would be less than significant." The BIA came to this conclusion, in part, because of the results of the ETTA (FEIS, Appx. N-2), which, as discussed above, is flawed. *See* Sect. 3.12 (B). The BIA also supports its conclusion by claiming that "[n]ew developments would be required to adhere to federal, State, and local building codes and fire protection codes and standards" and with the implementation of project design features to reduce inherent wildfire risk described in Section 2, BMPs listed in Table 2.1-3, and mitigation measures in Section 4, construction or operation of the project alternatives would not increase wildfire risk onsite or in the surrounding area or inhibit local emergency response to or evacuation from wildfire." FEIS, Sect. 3.14.11 at 3-172 to 3-173. Once again, conclusory statements as to the effectiveness of BMPs are not sufficient. *See, e.g., Wilderness Soc'y v. Bosworth*, 118 F. Supp. 2d 1082 (D. Mont. 2000).

D. Failure To Appreciate the Differences Between Structural Fires And Wildfires

In its response to FIGR's DEIS Comment Letter in which FIGR noted that the DEIS did not contain sufficient mitigation measures, the BIA responds as follows:

> The Draft EIS included a detailed mitigation strategy, which involved entering into a service agreement with the SCFD to ensure the Project Site would be adequately supported by fire protection services. … However, if for whatever reason the service agreement with SCFD is not finalized, the Tribe would be required establish, equip, and staff an on site fire department as part of the public safety building specified in Draft EIS Section 4.

FEIS, Appx. P, Resp. Cmt. T8-37 at 3-124.

The idea that Koi Nation will just establish an on-site fire department if it does not enter into a service agreement with the SCFD, without any regard to the operational capabilities required and infrastructure needed, is an unreasonable alternative. Several important operational aspects, including but not limited to the following, need to be considered and addressed in the Final EIS:

- The facility would need to offer services in four categories of complex response types: Structure fire response, wildfire emergency response, mitigation planning and implementation, and medical response;
- Staff would need to be hired (with credible qualifications and experience) to deliver services in the four response categories on a 24-hour/7-days basis;
- Mobile equipment would need to be purchased, and maintained, appropriate to the response categories;

- Operational facilities, including emergency water storage and delivery infrastructure, vehicle garaging and maintenance facilities, and administrative space, would need to be constructed and maintained; and
- Staff would need to be provide appropriate on-going training.

Appx. 3 (TSS Review) at 29.

Not only that, this alternative plan highlights the BIA and Koi Nation's inability to appreciate the difference between structural fires and wildfires. In a structural fire, containment often consists of directly extinguishing the fire at its source whereas, in a wildfire, containment often consists of creating a barrier around the fire to prevent further spread. Structural fires are also generally more predictable and concentrated in one area. Wildfires, on the other hand, are unpredictable and can spread more expansively through various terrains which makes access and containment much more challenging. A vast number of resources, including staffing, are needed to combat wildfires as compared to structural fires; yet, this is not discussed anywhere in the Final EIS.

For these reasons, it is entirely speculative whether establishing an on-site fire department is even feasible, let alone sufficient to mitigate wildfire risks to "less than significant." It is well-established that perfunctory descriptions, such as establishing an on-site fire department, without any consideration as to operational needs, resources, and efficacy are insufficient under NEPA. *Alaska Survival v. Surface Trans. Bd.*, 705 F.3d 1073, 1088 (9th Cir. 2013). Rather, the agency must provide "an assessment of whether the proposed mitigation measures can be effective…." *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009). The Final EIS's failure to provide any discussion as to whether this mitigation measure is feasible and would actually work is legally deficient under NEPA. *See Northwest Indian Cemetery Protective Ass'n*, 795 F.2d at 697, rev'd on other grounds, 485 U.S. 439 ("[a] mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA"); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001) (finding that the National Park Service erred in making a finding of no significant impact where it was unknown whether mitigation measures would work).

SECTION 3.14 - CUMULATIVE EFFECTS

Section 3.14 of the Final EIS evaluates the potential for the Koi Project to contribute to cumulative environmental impacts. FEIS, Sect. 3.14 at 3-152 to 3-173. The CEQ regulations define cumulative effects as effects "on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions. 40 C.F.R. § 1508.1(i)(3). The Final EIS defines the "cumulative setting" to include "the growth and development envisioned in the Sonoma County General Plan and Town of Windsor 2040 General Plan." FEIS, Sect. 3.14 at 3-152. As discussed below, certain aspects of the cumulative resource impact assessments in particular subject areas are inadequate.

A. Water Resources

Section 3.14.2 attempts to analyze the cumulative impacts to groundwater, groundwater dependent ecosystems, and wastewater discharge issues arising from the Koi Project and other reasonably foreseeable actions and projects. For the reasons stated herein and in Section 3.3 of this letter, these analyses are fundamentally flawed in multiple respects.

As noted in the FIGR DEIS Comments, the assumption that only two new municipal wells that needed to be included in its cumulative impact analysis is misplaced. Shartsis Cmt. Ltr., Sect. 3.14(A). The BIA attempts to justify this assumption in the Final EIS on the basis that "an increase is not reasonably foreseeable." This is because, according to the BIA:

> (1) recent agricultural groundwater demand trends in the Santa Rosa Plain are variable to decreasing; (2) vineyard development in the Project Site vicinity has remained relatively constant in the last 10 years and there appears to be little available land that could be converted to develop additional vineyards; (3) Sonoma County and Town of Windsor planning documents do not indicate a projected increase in agricultural demand in this area; and (4) the post-2022 decline in groundwater levels forecast to occur in nearby Representative Monitoring Points in the GSP has not occurred.

Final EIS, Appx. P, Resp. Cmt. T8-38 at 3-125. This justification is flawed as it fails to consider the impacts of climate change on well usage and assumes that groundwater will rebound after a series of dry years. As previously note in the FIGR Draft EIS Comments, the cumulative analysis is also insufficient because it simulates pumping only during dry years rather than throughout the year. Shartsis Cmt. Ltr., Sect. 3.14(A) at 43. This shortcoming was not addressed anywhere in the Final EIS. Because agricultural well extractions (which will occur in both wet and dry years) are not included in the analysis and the wet year restoration is not justified, these cumulative impacts cannot be reduced to less than significant levels.

The BIA concedes that the cumulative impacts to groundwater dependent ecosystems (GDEs) would be potentially significant but contends that it did not try to minimize these impacts in the Draft EIS. Final EIS, Appx. P, Resp. Cmt. T8-39 at 3-126. According to the BIA, "[t]he available data indicates that while the [Koi] Project would make an incremental contribution to these impacts, the impacts of the [Koi] Project ***alone*** would be less than significant." *Id.* (emphasis added). This contention highlights the BIA's misunderstanding of the nature of cumulative impact analysis, which is to look at the total impacts across a larger area rather than focus on individual contributions.

B. Air Quality

The BIA claims that "[t]he cumulative air quality analyses in the Draft EIS and Final EIS are based on appropriate trip generation estimates." FEIS, Appx. P, Resp. Cmt. T8-41 at 3-127. However, as discussed in Sections 3.4 and 3.8 of this comment letter (and the original Shartsis

Comment Letter), the traffic impact analysis underlying the air quality calculations in the Draft EIS and the updated traffic impact analysis in Final EIS are fatally flawed in multiple respects. Therefore, the BIA's cumulative impact analyses relating to air quality lacks empirical support and an analytically adequate basis.

Thus, the analysis of cumulative adverse air quality impacts in Section 3.14.3 lacks a proper empirical foundation and is wholly inadequate.

C. Biological Resources

The Draft EIS's analysis of cumulative biological resource impacts in Section 3.14.4 totals only three sentences and mysteriously announces that, because regulatory agencies will be issuing future permits relating to biological resources, that will sufficiently protect biological resources for the Koi Project and all other development projects in the vicinity, there supposedly are no significant cumulative impacts. DEIS, Sect. 3.14.4. In attempt to address this critical flaw, the BIA expanded its discussion. FEIS, Appx. P, Resp. Cmt. T8-42, T8-149 and *id.*, Sect. 3.14.4 at 3-165. However, a close examination of this text reveals that little factual information is provided. It appears that the BIA continues to claim that because regulatory agencies will be issuing future permits relating to biological resources, this claim will sufficiently protect biological resources for the Koi Project and all other development projects in the vicinity, there supposedly are no significant cumulative impacts. However, this conclusion is legally invalid.

D. Transportation and Circulation

FIGR noted in its DEIS Comments that "for all of the reasons that the TIA underlying the original traffic impact calculations for the Koi Project is wholly inadequate to evaluate Koi Project impacts, this flawed traffic study is not an acceptable platform on which conduct a further transportation cumulative impact analysis." Shartsis Cmt. Ltr., Sect. 3.14(D). The BIA maintains, in the Final EIS, that "the methodology and assumptions used to evaluate Transportation and Circulation impacts in the Draft EIS are appropriate." FEIS, Appx. P, Resp. Cmt. T8-43 at 3-127. However, for all of the reasons discussed in Sections 3.4, 3.8, and 3.14(B), the traffic impact analysis is flawed and the resulting cumulative analysis in this section should be entirely disregarded.

E. Wildfire Hazards and Evacuation

In response to FIGR's critique that "the Draft EIS is completely silent on cumulative impacts related to wildfire hazards and evacuation plans," the BIA maintains that "Draft EIS Section 3.14.11 Hazardous Materials and Hazards discusses the Proposed Project's contribution to cumulative wildfire hazards and evacuation plans on pp. 3-161 and 3-162. Technical detail for this analysis is provided in Draft EIS Appendix N, which includes a Fire and Emergency Response Memorandum (Appendix N-1), an ETTA (Appendix N-2), an Evacuation Recommendations Memorandum (Appendix N3), and an Evacuation Mitigation Plan (Appendix N-4)." FEIS, Appx.

P, Resp. Cmt. T8-44 at 3-127. However, as discussed in Section 3.12(C) of this Letter, the BIA's cumulative impact analysis is flawed.

SECTION 4 - MITIGATION MEASURES

Similar to Section 4 of the Draft EIS, Section 4 of the Final EIS is essentially a compendium of the mitigation measures identified elsewhere in this document. Rather than repeating earlier portions of this letter that explain how many of these mitigation measures are inadequate, insufficient or unenforceable, FIGR incorporates in full herein its discussions of mitigation measures in all other portions of this letter.

However, a few critical issues regarding mitigation measures warrant discussion. First, in what may be an effort to avoid the imposition of mitigation measures, the Final EIS purports to identify what should be mitigation measures as "Protective Measures Best Management Practices." *See* FEIS, Sect. 2.1.10 and Table 2.1-3. According to the BIA, these BMPs will voluntarily be incorporated into the Koi Project by the Koi Nation. However, it is unclear how the BIA will compel the Koi Nation to actually implement these BMPs once it becomes the sovereign over the Koi Site. Additionally, it is not known who will monitor and implement these BMPs. Accordingly, these BMPs, which may never by implemented, must be viewed as phantom mitigation.

Not only that, the BIA claims, on multiple occasions, that mitigation measures do not need to be implemented because of the use of BMPs. *See, e.g.*, FEIS, ES-5, Table ES-1 at ES-5 and *id.*, Appx. P, Resp. Cmt. T8-32 at 3-122 . This is not allowed under NEPA. *See, e.g.*, *Wilderness Soc'y*, 118 F. Supp. 2d 1082 (finding that conclusory statements as to the effectiveness of BMPs is not sufficient under NEPA).

Additionally, there are many claimed BMPs and/or mitigation measures which are no more than a promise to formulate a plan or seek a permit in the future, which constitutes improper future deferral of mitigation in violation of NEPA. Thus, for example, two mitigation measures would require the Koi Nation, "prior to opening day," to develop a "riparian corridor wildfire management plan" and, "prior to occupancy," to develop a "project-specific evacuation plan." FEIS, ES-5, Table ES-1 at ES-26 and *id.*, Sect. 4 at 4-4. By failing to analyze the very serious wildfire risks now or to closely analyze the evacuation risks (as FIGR's wildfire consultant explains in detail), all of which are important for determining the severity and potential mitigation of risks, as well for effectively using the wildfire parameter to choose among alternatives, this improper future deferral essentially eliminates the Koi Project's huge wildfire risk parameter at the Koi Site as a NEPA decisional tool. *See S. Fork Band Council of Western Shoshone*, 588 F.3d at 726 ("BLM argues that the off-site impacts need not be evaluated because the Goldstrike facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document…cannot satisfy a federal agency's obligations under NEPA."); *see also N. Plains Resource Council, Inc.*, 668 F.3d at 1084 (Agencies may not avoid gathering the information needed to assess a proposed project's environmental impact by committing to

"mitigation measures" that take the form of information gathering efforts to be taken after the project commences).

CONCLUSION

FIGR requests that the BIA withdraw this inadequate Final EIS and decide not to approve the Project. The Final EIS continues to be riddled with major errors, fails to use "best available science," and is notable for its significantly flawed analyses of environmental impacts and its identification of phantom and/or ineffective mitigation measures. The purpose of NEPA is to ensure informed agency action. *Citizens for Better Forestry v. US. Dept. of Agriculture*, 341 F.3d 961, 970 (9th Cir. 2003). However, the Final EIS completely misses the mark and does not provide an adequate factual or legal basis for a Project decision.

The Final EIS does not evaluate any alternative project sites, including within Lake County (where the Koi Nation's ancestral territory is located), which constitutes a patent failure to rigorously and objectively evaluate a reasonable range of alternatives. The required NHPA Section 106 consultations with FIGR and other tribes have been "insufficient, inadequate and unreasonable" and the Final EIS ignores significant effects to FIGR's sovereignty and cultural rights that cannot be mitigated. The important transportation and air quality analyses are critically undermined by a fatally flawed traffic study that grossly underestimates the trips this project would generate. The conclusions of "no significant impact" or "less than significant impact" in many key impact areas are wholly unsupported. And the Final EIS's conclusion that wildfire hazards are not significant in this community (which has suffered two major wildfires with large evacuations in the last seven years) lacks any credibility.

Please let us know if we can answer any questions or provide further information.

Very truly yours,

/s/ Paul P. Spaulding, III

Paul P. "Skip" Spaulding, III

PPS:ATN

Enclosures:

Appendix 1 AVD Management LLC
Technical Memorandum - FEIS Comments - Water Resources (December 12, 2024)

Appendix 2 LLG Engineers
Shiloh Resort & Casino, Traffic Report Review, 2d Round (December 23, 2024)

Appendix 3 TSS Consultants
Final EIS Review For A Proposed Casino Complex At Windsor, California (December 20, 2024)

Appendix 4 Meister Economic Consulting, LLC
Review of Final EIS Responses (December 23, 2024)

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Appendix 1

FEIS Comments _ - Water Resources

Comments on Water Resources Responses in Koi Nation of Northern California Shilo Resort and Casino Project Final EIS, November 2024

Prepared For: Federated Indians of Graton Rancheria

Prepared By: David Zweig, P.E., AVD Management LLC, dzweig@avdmanagementllc.com

Date: December 12, 2024

The following comments are on water resources issues in Final EIS for the Koi Nation of Northern California Shilo Resort and Casino Project Final EIS, November 2024 (Final EIS). Comments were submitted to the BIA on the Draft EIS in a letter dated August 26, 2024 from Shartsis Friese LLP on behalf of the Federated Indians of Graton Rancheria (FIGR). The letter included comments on water resources issues that pointed out various deficiencies in the Draft EIS analysis. As described below, many of these deficiencies were either not addressed at all or inadequately addressed in the Final EIS. For clarity and convenience, the comment numbering system used in the Final EIS has been utilized in the comments below.

Comments T8-6 and T8-7: Groundwater

As pointed out in the August 26, 2024 comment letter, there is a shortage of groundwater to support projected municipal, agricultural, and casino demands. Both the Draft and Final EISs point to the Town of Windsor to fix this problem, even though the Town is not responsible and has not agreed to provide water for the casino. Lacking a Town fix, the Final EIS states:

> ***"In the event that the Town of Windsor does not implement a mitigation associated with the operation of the two new municipal wells, the Tribe would implement its own program …".***

The Final EIS then refers to Responses to Comments A5-8 and A9-82 regarding the Tribe's mitigation. These responses, however, offer no additional assurances that groundwater impacts would be adequately addressed. In fact, the Final EIS removes (rather than adds or refines) mitigation for groundwater impacts. Response to Comment A5-8 primarily deals with impacts to creek habitat from groundwater drawdown. This impact is dismissed as "not likely" and no additional modeling or mitigation is provided.

Response to Comment A9-82 acknowledges that adverse groundwater impacts "may occur" due to pumping by both the Town and the casino, and refers to updated mitigation in the Final EIS to address this impact. As with the Draft EIS, the stated mitigation in the Final EIS places the burden of groundwater mitigation on the Town, with the Koi Nation paying its fair share of the mitigation, even though no agreement with the Town exists for this mitigation. The Final EIS states:

> ***"… a meeting shall be convened between BIA, Sonoma County and the Town of Windsor to discuss and agree to thresholds for the mitigation actions, appropriate changes in groundwater pumping and management procedures, parties responsible for implementation and cost sharing."***

Without an agreement in place between the parties, convening a meeting between three governmental agencies (excluding the Koi Nation) to "discuss and agree" on mitigation is improper deferral of mitigation and would almost certainly be ineffective in addressing real impacts.

Response to Comment T8-6 states:

> ***"However interconnection to the Tribe's water system may be hampered by jurisdictional issues and thus the option of connection to the casino's water system has been removed from the Final EIS and Revised GRIA (Final EIS Appendix D-4)."***

In reviewing the mitigation in Section 4 of the Draft vs Final EIS, it is noted that connecting a neighboring property that has been impacted to an alternative water system has only been slightly modified to not specifically call out the casino water system as an option. Instead, the revised mitigation measure reads:

> ***"the Tribe may, at its sole discretion, elect to connect the claimant to an alternative potable water source at the Tribe's expense."***

Given that the Koi Nation would only own and operate its own water system, it is unclear and speculative that Koi could, at its sole discretion, connect a private impacted party to another water system, even if such a system with adequate capacity was identified. This flaw in logic makes the mitigation for groundwater impacts to neighboring property owners completely ineffective.

Comment T8-9: Wastewater treatment and disposal

The Response to Comments and Final EIS continues to provide a series of options for wastewater treatment and disposal, all of which rely upon a future NPDES permit, which has not yet been applied for, to determine if such options are feasible.

The Response to Comment states that use of recycled water would not create a hazard because:

> ***"Any treatment implemented to produce recycled water will comply with federal requirements for the production and use of recycled water."***

This response is disingenuous given that there are no federal requirements for recycled water production or use. "EPA does not require or restrict any type of reuse." (see https://www.epa.gov/waterreuse/basic-information-about-water-reuse).

Comment T8-10: Hazardous materials at WWTP

The comment submitted points out that the Draft EIS provided no information or analysis of the large quantities of hazardous chemicals that must be used in the wastewater treatment process. Specifically, the following Draft EIS deficiencies were pointed out:

1. There is no disclosure of the quantities of hazardous chemicals that would be used in the WWTP treatment process (other than to say the quantities would be "small" and "limited"),
2. no identification of potential impacts,

3. and no measures identified to prevent impacts to humans and the natural environment.

The Final EIS does not address these omissions. The response in the Final EIS refers the reader to A8-65. Response to Comment A8-65 in turn only provides generic citations to various regulations of federal agencies such as OSHA and DOT, and states that a SWPPP will be prepared to prevent chemical spills. The actual comment identified in the Final EIS as T8-10 is not addressed. No information is provided that identified the types and quantities of hazardous chemicals that are inherent to the proposed wastewater treatment process. The response is unresponsive to the comment.

Comment T8-88: Indirect effects of pipelines connections to neighboring land owners

This comment pointed out that even though it is specified in the Draft EIS that impacted neighboring land owners could be connected to other water systems if their wells are impacted by the casino, no impacts or mitigation is called out for the construction or operation of these pipelines. In response, the Final EIS refers the reader to Response to Comments A5-8 and A9-82. Response to Comment A5-8 has no information regarding the indirect effects of water pipelines, and refers to Response to Comment A9-82. Response to Comment A9-82 also has no information or reference to the indirect impacts of the proposed pipeline construction. This element of comment T8-88 has therefore not been addressed in any way.

Comment T8-89: Acquisition of additional property for turf grass irrigation

This comment pointed out that although the acquisition of additional property for turf irrigation using recycled water is identified as an option for treated effluent disposal, such properties have not been described or shown in a figure, and the impacts nor mitigation for these acquisitions and future uses are not disclosed or evaluated. The Response to Comment T8-89 refers the reader to Response to Comment A9-16 **"…** regarding the consideration of various scenarios for treated wastewater discharge and reuse …". Response to Comment A9-16 in turn simply repeats the inadequate language already presented in the Draft EIS, including the statement that "The indirect effects of off-site recycled water use under this scenario were described in Draft EIS Section 3.15.1". Draft EIS Section 3.15.1, titled "Indirect Effects of Off-Site Traffic Mitigation and Off-Site Irrigation" makes no mention of property acquisition and does not show or describe any potential acquisition areas. Draft EIS Section 3.15.1 says:

> *As described in **Section 2.1.4**, recycled water from the on-site wastewater treatment plant could be used for off-site irrigation on land adjacent to or in proximity to the Project Site subject to federal, State, and local regulations. Recycled water irrigation would involve the construction of a buried pipeline connecting the on-site wastewater treatment plant to the off-site use area. The pipeline is assumed to be in areas currently disturbed by agricultural uses or within developed right-of-way.*

No proposed pipeline routes or potential irrigation properties are shown, and only generic measures and references to CEQA and other state regulations are provided to address impacts. Draft EIS Section 2.1.4 is cross-referenced in the response however that section also provides no meaningful information to address this issue.

Appendix 2

LLG

4542 Ruffner Street
Suite 100
San Diego, CA 92111
858.300.8800 T
www.llgengineers.com

Pasadena
Irvine
San Diego

December 23, 2024

Mr. Skip Spaulding
Shartsis Friese LLP
425 Market Street, 11th Floor
San Francisco, CA 94105

Subject: **Shiloh Resort & Casino, Traffic Report Review (2nd Round)**

Dear Mr. Spaulding:

Linscott, Law & Greenspan, Engineers (LLG) has reviewed the updated Traffic Impact Analysis (TIA) report prepared for the project by TJKM dated November 4, 2024 and the responses to our comments on the April 17, 2024 version. The following pages contain further comments from LLG.

Overall, the final EIS traffic impact analysis remains wholly deficient. The analysis fails to utilize standard accepted trip generation rates which results in a severe underreporting of the number of trips that will be added to the street system. This underreporting results in transportation impacts not being properly disclosed, significance determinations not being based on the correct data, and the overall transportation conclusions being unsupported by the data. In addition, among other deficiencies, the study does not analyze intersections and roadways which will absolutely be impacted by project traffic and fails to accurately calculate trip rates for events, thereby greatly understating traffic during events. These fatal data and analytical problems prevent the traffic calculations from serving as the basis on any conclusions regarding traffic and associated impacts.

Response to Comment T8-91 / A9-37: The applicant's response to comments T8-91 / A9 – 37 (Casino Trip Generation) is patently false. The reason given for not following the standard of practice and using the Institute of Transportation Engineers (ITE) trip rates is because the ITE rates are based on sites in Las Vegas. However, the ITE description specifically states the rates are **not** based on Las Vegas type casinos (see ***Attachment A***) and instead are based on actual counts at casinos in South Dakota, California, Massachusetts, and several other states. Using data from a 9-year-old Wilson Rancheria study that had its rates based on still other older casino traffic studies (Thunder Valley & Cache Creek) is flawed and substantially understates the trips that will be added to County and Caltrans Roadways. Potential impacts are therefore not being properly disclosed.

David S. Shender, PE
John A. Boarman, PE
Richard E. Barretto, PE
Keil D. Maberry, PE
KC Yellapu, PE
Dave Roseman, PE
Shankar Ramakrishnan, PE

An LGZWB Company Founded 1966

Response to Comment T8-92: The applicant's response to comment T8-92, which states that only three cumulative projects were included in the analysis, does not fully address the issue of accounting for the correct amount of traffic added to the roadways. There are over 30 cumulative projects that are approved, under construction, or under review. The annual growth rate of 2.189, combined with the addition of only three mentioned Cumulative projects, does not adequately account for cumulative traffic. There are hundreds of new housing units under construction at multiple sites along Shiloh Road near the Koi parcel, most of which are not included in the current traffic study. A growth factor uniformly adds background traffic and does **not** account for specific projects that will add large amounts of traffic to specific roads. The TIA should include the calculations in the appendices, along with a total for the more than 30 other reasonably foreseeable cumulative projects listed in the Town of Windsor Community Development Department Major Project List. ***Attachment B*** contains Town of Windsor Community Development Department Major Project List.

Response to Comment T8-95: The applicant's response to comment T8-95, that Casino Entrance 1 does not account for vehicles making an inbound westbound left-turn or an outbound northbound right-turn under Alternatives A and B when it should, does not provide a sufficient explanation to demonstrate that these movements are not worth considering in the analysis. While Alternative C does provide one public access driveway on Shiloh Road to serve vehicles from the east, it is likely that some vehicles would still use Casino Entrance 1 under Alternative A and B, even though Casino Entrance 2, which is further east, is also accessible. Under Alternatives A and B, vehicles would likely prefer to use Casino Entrance 1 for temporary passenger loading and unloading, as it also connects to a loop road that leads to the main parking lot.

Response to Comment T8-96: The response to why zero trips were assumed to use Lakewood Drive and Windsor River Road is flawed. A simple review of the existing counts shows that vehicles heavily use Lakewood Drive and Windsor River Road. According to Figure 7, over 1,000 vehicles travel on both Lakewood Drive and Windsor River Road today during typical commuter peak periods showing they are roadways serving numerous residential homes, and Casino trips will surely use these roads. Casino trips should be assumed to utilize Lakewood Drive. They would make a southbound left-turn instead of an eastbound through movement toward the Casino, and this would result in increased delays, which should be included in the operational calculations presented in the TIA report.

Response to Comment T8-97: The applicant's response to comment T8-97 regarding the study area's omission of Airport Boulevard and Fulton Road as potential routes for Casino trips coming from the south, as well as the exclusion of the Old Redwood Highway/Alden Lane and Old Redwood Highway/Hembree Lane signalized intersections, does not justify the reason that the number of trips potentially using these routes would be negligible.

The regional distribution to the Project site justifies including routes that traverse on Airport Boulevard and Fulton Road. As a regional attraction, Casino trips using the US Route 101 freeway from the south may will to use that route due to its shorter distance and comparable travel time. Additionally, some vehicles traveling from areas west of the US Route 101 freeway, such as Monroe, may choose not to use the freeway and instead remain on public roadways, utilizing the mentioned route. ***Attachment C*** contains Google map aerial images of these mentioned routes.

According to Figure 9, over 100 vehicles are traversing on Old Redwood Highway during the PM peak hour and Saturday midday peak hour between the analyzed Old Redwood Highway / Lakewood Drive and Shiloh Road / Old Redwood Highway intersections. Between these intersections are the Old Redwood Highway / Alden Lane and Old Redwood Highway / Hembree Lane signalized intersections, which should be included in the study area due to the amount of Casino trips using this route. Every signalized intersection where over 100 peak hour trips are added must be analyzed.

Response to Comment T8-101: The event center trip generation calculations remain flawed. None of the information provided in the response was included in the original traffic study which made it impossible to understand where the very important trips generation numbers were coming from. Now that the assumptions have been provided, it is clear the calculations provide a low, under-reported amount of trips. First, the analysis does not assume a sold out show which surely is the goal of the applicant. Second, it assumes 25% of the attendees will be staying at the hotel and therefore not driving and they provide no backup data to support that assumption. That assumption equates to 700 event people (1/4 of the 2,800 seats) staying at the hotel and assuming 2 people per hotel room, would equate to 300 of the 400 hotel rooms being event attendees. This is way higher than will actually occur as the hotel serves the casino as well and a large portion of the hotel guests will be Casino attendees **not** attending the event. Third, the study assumes only 15% of the attendees will arrive between 5-6PM for a 7PM show. There is no data provided for this or any of the other assumptions. Rather, the author simply states that is what another traffic study from 9 years ago assumed. No excerpts from the other study are provided, making it impossible to verify any of the work.

Even with all of the flawed and unsubstantiated assumptions, the math is wrong and understates the trips. The response states the assumed attendance is 2,380, 75% of the attendees would drive to the event and the vehicle occupancy would be 2.2. They use this data to conclude an event center trip generation of 1,023 ADT. This is incorrect. 2380 * 75% / 2.2 = 811 inbound vehicles which equates to 1,622 ADT.

Response to Comment T8-103 (#13 only): See "*Response to Comment T8-96*."

Response to Comment T8-106: The response is flawed. There is no evidence provided in the report that shows the feasibility of the recommended mitigation, nor is there any information provided as to the timings of when the improvements will be implemented. As written, all of the impacts will occur without any assurance that the mitigation will be implemented.

Response to Comment T8-108: Stating a four-lane road can handle 49,000 ADT is incorrect. The standard of practice is 40,000 at LOS E.

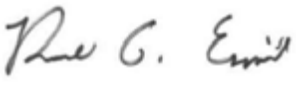
Response to Comment T8-120: See "*Response to Comment T8-91*" and "*Response to Comment T8-92*."

New comment from November 4, 2024 TIA report review: Figures 7, 11, 14, 17, 21, 23, 25, 27, 29, 31 and 33 are missing peak hour volumes, making it impossible to provide an adequate review of the report.

Please let us know if you have any questions. Thank you.

Sincerely,

Linscott, Law & Greenspan, Engineers



John Boarman, P.E.
Principal

Renald Espiritu
Transportation Engineer III

cc: File

ATTACHMENT
Attachment A: ITE Trip Generation Manual, 11th Edition, Casino trip rates (land use code 473)
Attachment B: Town of Windsor Community Development Department Major Project List
Attachment C: Google maps provided route

ATTACHMENT A

Land Use: 473
Casino

Description

A casino is a facility that exists for the primary purpose of deriving revenue from gaming operations. The games conducted at these facilities include but are not limited to table games, electronic slot machines, video poker and lottery games, and electronic table games.

All study sites are free-standing and isolated from other complementary or competitive development. Most of the casinos in the land use are physically connected to a hotel. A small number of video lottery establishments are also included in this land use. These facilities have less than 5,000 square feet gross floor area and are not connected to a hotel.

This land use does not include facilities located on a resort-corridor facility such as the "Strip" in Las Vegas, Nevada. Resort-corridor facilities experience significant non-vehicle trip sharing due to pedestrian walking trips or public transportation services resulting from the synergy created by the close proximity of the hotel/casinos. It is anticipated the resort-corridor casinos would exhibit trip generation characteristics distinct from those included in this land use.

Bingo hall (Land Use 470) is a related use.

Additional Data

The reported trips generated by a casino include all trips entering and exiting the overall site. For the free-standing casino/hotels, the assumption is that the vast majority of site-generated trips are directly related to the casino.

The sites were surveyed in the 1990s, 2000s, and the 2010s in Illinois, Iowa, Maryland, Massachusetts, Missouri, Nevada, Pennsylvania, Rhode Island, and South Dakota.

Source Numbers

359, 898, 1035, 1075, 1084

ATTACHMENT B


Legend
Approved Projects
Project Site
Under Construction Projects
Under Review Projects
Eastside Rd
Windsor River Rd
Shiloh Rd
Pleasant Ave
Chalk Hill Rd
Google Earth
N
1 mi

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Shell Station - Commercial	31
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The Mews at Pool Creek - Residential	38
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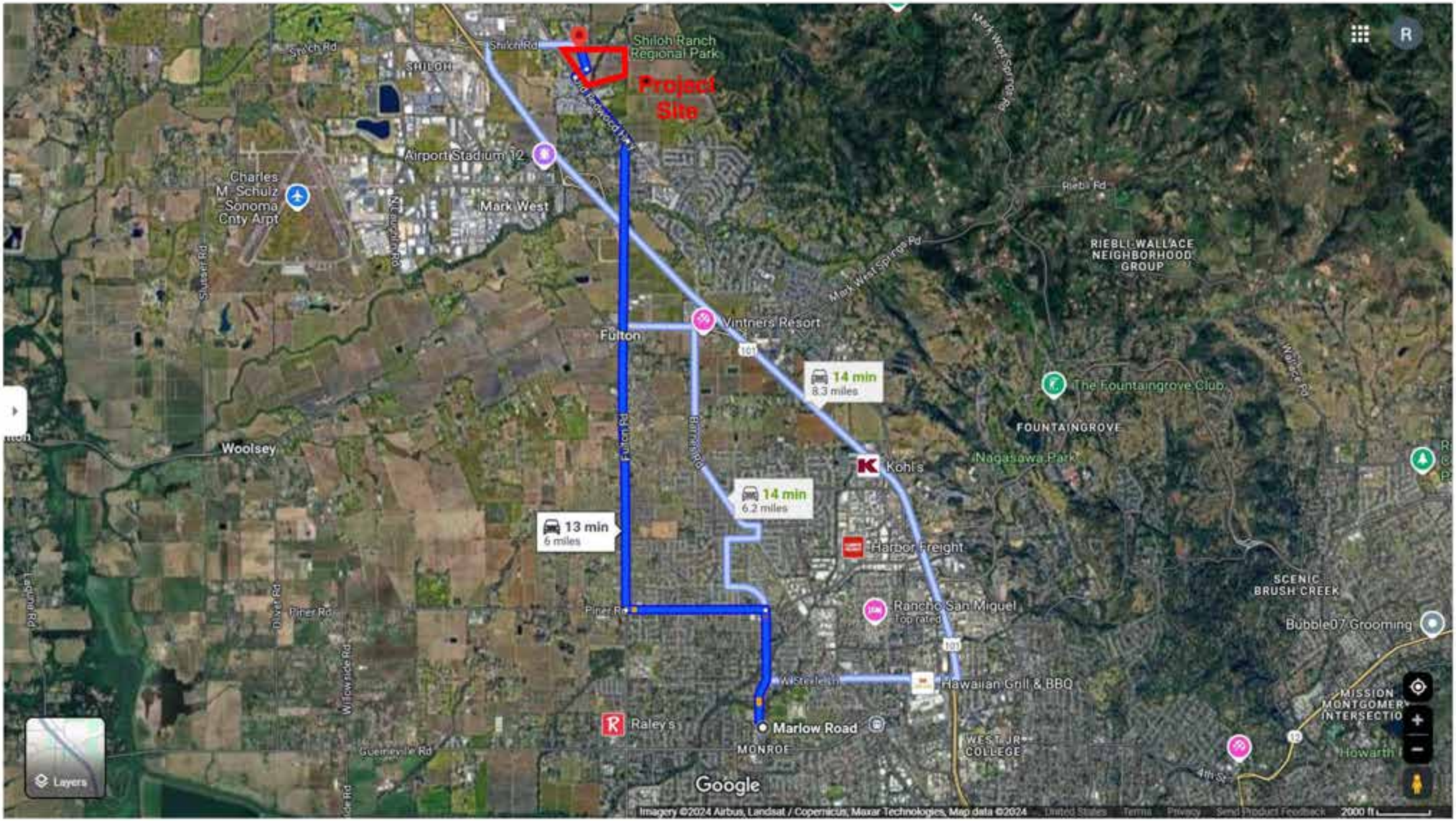
BoDean Company - Commerical	40
Windsor Hotel - Commercial	41

ATTACHMENT C


Walmart
Panda Express
KFC
Mark Windsor
Shiloh Rd
Shiloh Ranch Regional Park
Project Site
6 min
4.5 miles
SHILOH
6 min
3.8 miles
Old Redwood Hwy
Fulton Rd
Daryl Reese Law Group
Airport Stadium 12
Carl's Jr
Airport Blvd
Subway
Mark West
United Site Services
Kendall-Jackson Wine Estate & Gardens
Wikiup Tennis & Swim Club
Pacific Coast Air Museum
Layers
Google
Imagery ©2024 Airbus, Maxar Technologies, Map data ©2024
1000 ft


Shiloh Ranch Regional Park
Project Site
Shiloh Rd
SHILOH
Airport Stadium 12
Charles M Schulz Sonoma Cnty Arpt
Mark West
Fulton
Vintners Resort
Mark West Springs Rd
Riebli Rd
RIEBLI-WALLACE NEIGHBORHOOD GROUP
Wallace Rd
The Fountaingrove Club
FOUNTAINGROVE
Nagasawa Park
Woolsey
Fulton Rd
Barnett Rd
Kohl's
14 min
8.3 miles
14 min
6.2 miles
13 min
6 miles
Harbor Freight
Piner Rd
Rancho San Miguel
Top rated
SCENIC BRUSH CREEK
Bubble07 Grooming
Hawaiian Grill & BBQ
Raley's
Marlow Road
MONROE
WEST JR COLLEGE
MISSION MONTGOMERY INTERSECTIO
Howarth
4th St
Guerneville Rd
Wilfowside Rd
Piner Rd
Layers
Google
Imagery ©2024 Airbus, Landsat / Copernicus, Maxar Technologies, Map data ©2024
2000 ft

Appendix 3

FINAL EIS REVIEW FOR A PROPOSED CASINO COMPLEX AT WINDSOR, CALIFORNIA

Prepared For:

SHARTSIS FRIESE LLP

Prepared By:

tss consultants

December 20, 2024
Final Report

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INTRODUCTION

TSS conducted a result of a critical review of the Master Responses (MR) to comments generated by the Applicant[1] in response to comments made on the Shilo Resort and Casino Project Draft Environmental Impact Statement (DEIS) document[2]. The core document that has been reviewed is entitled: Response to Comments-Final Environmental Impact Statement Koi Nation of Northern California Shiloh Resort and Casino Project, dated November 2024. TSS review addresses material in Section 3-Response to Comments, Subsection 3.1 Master Response to Comments and all pertinent comments in Appendix P, Part 1. The MR to comments that have been addressed in this review are those that pertain to the work previously conducted by TSS Consultants; specifically, wildfire, and wildfire evacuation[3]. The pagination (page, paragraph, and line numbers) refers to the location of the material being addressed in a version of the "Response to Comments" that has been downloaded from the BIA website and stored in a .pdf[4] format. The Review Item number is part of a continuous list of comments; thus, the reason the initial item is referred to as Review Item 7.

With regard to two issues that have a dominating level of importance in the proposed Project's setting, i.e. the potential impacts associated with wildfire hazard and risk conditions and wildfire-related evacuations, it is TSS' opinion that their treatment in this Koi Nation Shiloh Casino and Resort EIS process does not meet the "Hard Look" standards set out in NEPA statutes and guidelines. With respect to the BIA's basic policies and practices pertinent to wildfire issues it is stated very clearly in their document "Fuels Management Program - Supplement to the Interagency Prescribed Fire Planning and Implementation Procedures Reference Guide" of 2008:

> "*We are committed to work with regions, tribes, agencies and those living in fire-prone ecosystems in a collaborative working environment using sound social, economic and ecological management principles and effective communication.*"

In order to comply with the policies and practices described in the set of USDI/BIA guidance documents, a much more rigorous wildfire impact analysis needs to be completed. This analysis needs to address three scenarios of hazards and risks: 1) those within the project footprint (addressed minimally in the Losch effort), 2) wildfire behavior and movement on lands adjacent to the project site that can bring wildfire **to** the project site; and 3) risk to surrounding communities and the natural resource base from wildfires that **come from** ignition points within the project's footprint. This is the type of assessment referred to, herein, as an "*in situ*" analysis. The analysis also needs to 1) complete in-field examinations to establish current setting conditions that pertain to the issues at hand and 2) base the analysis on industry-standard fire behavior modeling.

A comprehensive examination of the core FEIS document and its supporting appendices indicated a continuing absence of an analysis of a traffic impact scenario specific to those precipitated by a wildfire

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[1] Applicant: Koi Nation Shiloh Resort and Casino
[2] DEIS: Draft Environmental Impact Statement
[3] Wildfire Risk Assessment and Draft EIS Review for a Proposed Casino Complex at Windsor, California, August 2024.
[4] .pdf: Portable Document Format

event. Relying heavily on the results of a "desktop" modeling approach that 1) employs results of other models as inputs and 2) did not included field verification, the results were for evacuation time requirements; with no consideration given to wildfire-related evacuation traffic volume increases. The approach employed in this EIS process did not establish baseline conditions within the established study area relative to vehicular type mix and volume that typify conditions in such an evacuation, nor any assessment of road/intersection vulnerability to loss of function if involved in a wildfire event.

Purpose

The purpose of this report is to provide the results of a review of responses to comments made on the Koi Nation Shiloh Casino and Resort Proposal (Action) Draft Environmental Impact Study (DEIS). This comment assessment focuses on DEIS comments prepared by TSS Consultants, whose scope was comprised of commenting on the treatment given, within the DEIS, to wildfire and wildfire-related evacuation issues. In this second effort TSS was tasked with determining whether the responses addressing the DEIS comments were prepared in a manner that was adequate to the task.

Structure of the Report

TSS addressed three categories of comments as described below:

- Category 1: Those pertinent to the contents of Table ES-1 (starting on Page ES-4 of the Executive Summary for the proposed Final Environmental Impact Study (FEIS);
- Category 2: Master Responses designed to generally address comments with common themes (found in Section 3.1.1: Master Responses to Comments, starting on Page 3-1 in Appendix P to the FEIS), and;
- Category 3: Individual comments (found in Section 3.2 in Appendix P, starting on Page 3-112).

The TSS response review comments are titled as "Review Items" and are individually, and sequentially, numbered across the three categories of responses. The Items comprising the Table ES-1 review were structured as a single section for impacts within the scope of TSS original comments. The review process assessed the "Mitigation Measure" (MM) descriptions and then, employing a "Professional Judgment" approach, generated a concluding opinion stating whether the significance conclusion was properly supported (to NEPA standards of performance) and correct, given the situation. The review of the MR were addressed using a three-subsection response for each Item as described below:

- "Summary of Comments (Verbatim)" – A presentation of the exact wording of the Applicant's response;
- "Review of Master Responses" – TSS' observations regarding the elements in the "Summary of Comment (Verbatim)" subsection, and;
- Result and Conclusions Drawn from the Review of the Master Response – Results of a professional judgement-based assessment of the responsiveness of the statements in the MR to the details in the comments.

A total of 52 Review Items were prepared and distributed, as listed below, among the three categories:

- Category 1: Items 1 through 7;
- Category 2: Items 8 through 12, and;
- Category 3: Items 13 through 52

General Difficulties Encountered in Reviewing the Applicant's Responses

Aggregating Large Blocks of Complex Information in a "Nested" Format

An example: In several instances throughout Applicant's responses, reference is made to the information in Section 3-12. Hazardous Materials and Hazards as being a response to specific comments. This seventeen-page section addresses a myriad number of different subjects and a minimum of fifteen references to "nested" document and regulatory code sections. Also included is a list of fifteen statutes, policy documents, organizations standards and practices, and planning documents. Having to switch back and forth amongst all the information locations made it very difficult to prepare cohesive review comments.

Use of Deflective Language

Language can be used in a comment/response process that forms statements that appear to be a response to a comment, but upon further critical analysis is really not.

The Applicant's summary of the comment received, and replied to using this Master Response, is reproduced, verbatim, below:

> *"Comments were received which stated that wildfire evacuation is a concern in Sonoma County. Comments describe heavy traffic congestion during previous wildfire evacuations, including the Kincade, Tubbs, and Glass fires. Comments were concerned that the Proposed Project would make traffic congestion worse during a wildfire evacuation. Comments stated that the increase in evacuation time from the Proposed Project is unacceptable. Comments expressed concern about future No Notice Scenarios like the Tubbs Fire in 2017"* (FEIS Appendix P-1, Page 3-15, Para 1)."

The opening statement in the Response is reproduced below (Section 3.1.10, Master Response 10: Wildfire Evacuation (FEIS Appendix P-1, Page 3-15, Para 2)):

> *"The Draft EIS discussed the existing wildfire setting and the potential impact of the Proposed Project on wildfire evacuation in Section 3.12 Hazardous Materials and Hazards. The Proposed Project's contribution to cumulative wildfire hazards and evacuation plans was discussed in Section 3.14.11."*

What is important here is the use of the term "discussed". This term is not an action-indicative term; it means literally to talk about and does not indicate the taking of specific action. In general, when comparing statements like this to the comments a reasonable conclusion would be that it is truly non-responsive to any of the comments prepared. This specific example of a deflective structure is repeated throughout the FEIS.

Utilizing a "Piecemealing" Approach in Defining the Project

A ploy that is often used to minimize the findings of impact significance is to breakdown an action, or project, into parts and then subjecting each to its own, separate, impact analysis. The influence of this "parting out" approach on the finding of significance process is more strongly felt when assessing indirect and cumulative effects; less so with addressing direct effects. It was noted that a "parting out" approach was commonly used throughout the Applicant's EIS process. However, the version of the approach used in this case did make the breakdown into groups with a common action theme; the basis here was temporal separation and where the point of separation was made with respect to when the FEIS-based Record of Decision was released. Examples of this approach include the following:

- "The Tribe shall make good faith efforts to assist with implementation of the opening year improvements prior to opening day" (FEIS Executive Summary Table ES-1. Page ES-4 and ES-19);
- "Prior to opening day, the Tribe shall engage a qualified arborist and/or biologist to develop a riparian corridor wildfire management plan to be implemented annually during operations". (FEIS Executive Summary Table ES-1. Page ES-26), and;
- "The Tribe proposes to enter into a contract with the Sonoma County Fire District (SCFD) to be the primary provider of fire protection and emergency medical services (EMS). A Letter of Intent between the Tribe and SCFD that specifies the intention of the Tribe and SCFD to enter into a Memorandum of Understanding for the provision of fire response and emergency medical services to the Project Site is included as Appendix O."

All three of these examples propose actions that could, reasonably, precipitate significant changes in conditions, or features, that comprise the Project's setting. However, if they are designed and implemented in the time periods indicated, the actions will take place after the ROD has been issued and would not have the cover of a NEPA compliant impact analysis.

General Lack of Empirical Evidence Supporting Statements in the Responses

- No regional wind analyses as related to direction of wildfire advance;
- No wildfire behavior modeling using industry standard fuel models as related to predicting wildfire hazard and risk (per CAL FIRE definitions);
- No empirical data collected, or generated through the use of standard models, that describes the wildfire hazard and risk elements for 1) fires that start, and are kept within, the boundaries of the Project footprint, 2) fires that start within the boundaries of the Project footprint and escape to surrounding areas, and 3) fires that start at locations outside the boundaries of the Project footprint and move into it;
- No description of the mix of vehicles that typify the traffic in a wildfire evacuation scenario in contrast to the baseline conditions;
- No empirical data related to the baseline volume of traffic (number of trips/measure of timing) in contrast to expected volume during a wildfire-related evacuation.

Heavy Reliance on Results of Modeling Approaches as Empirical Evidence

This situation was most prevalent in the Traffic/Circulation subject area. The typical procedure was to utilize the result of other traffic modeling efforts to provide inputs into the models used by the traffic consultants. In addition, the primary dependent variable generated by the traffic consultants hired by the Koi group was time to evacuate; a result that was not directly related to the real problem of lack of capacity to handle evacuation needs.

Lack of In Situ Analyses

Any revisions to the FEIS did not include any type of regional in situ analyses for the Wildfire Behavior or Evacuation subject areas.

Quality of the Wildfire Consultants That Contributed to Appendix N

The primary consultant, Vern Losch, did not indicate the he has kept up with what are industry standard analyses procedures. We cannot know if the very superficial analysis he completed was dictated by the Koi Tribe or just his lack of current experience with wildfire behavior issues.

SUMMARY AND CONCLUSIONS

Listed below are conclusions generated as a result of this investigation.

1. In the process of reviewing all the documents involved in the DEIS-to-FEIS there were no notable changes in the information content or data collection/analysis procedures. Much of the narrative space was dedicated to a strident protection of the Applicant's position with respect to the quality of the work produced;
2. The Applicant continued to utilize a "BMP as Mitigations" approach in an effort to bolster their decision regarding significance of impacts;
3. The deferral of identifying subsequent planning and operational activities to a post-ROD was a convenient way to hide the lack of details that needed to be included in the NEPA process;
4. The traffic consultants i) relied too heavily on the results of models using inputs generated by other models, and ii) were most likely not advised of, or allowed to address in their scope of work, the complications and analysis requirements associated with evacuations where wildfire is the primary risk factor;
5. The wildfire treatment in the EIS reflected an author who is i) not current with wildfire threat analyses in California, or ii) one who was constrained by his client from doing anything but a superficial look. Everything associated with, or based on (e.g. use by CAS Safety Consultants in their evacuation study), should be taken with "grains of salt";
6. The extreme "Project-centric" approach employed in the EIS process hindered, significantly, the processes of assessing the project's impacts on the communities, land use, and natural resource base in surrounding;
7. The quality of the illustrations, with respect to showing the level of detail required to properly, (within the NEPA context), assess the effect created by implementing the actions, remains unchanged.

REVIEW ITEMS

Section 1 – Mitigation Measures

Comparative Analysis

1. Koi Nation DEIS[5], **May 2024**. Table ES-1: Summary of Impacts and Mitigation Measures. pp. ES-4 to ES-29 (stored downloaded .pdf version pp. 16 to 38), and,
2. Koi Nation FEIS[6], **November 2024**. Table ES-1: Summary of Impacts and Mitigation Measures. pp. ES-4 to ES-51 (downloaded .pdf version, pp. 16 to 63)

Review Item 1. Abstract

Page 3[7]

Statement in FEIS "Abstract" is unchanged with respect to identifying the significance and result of implementing mitigating actions in the subject areas of wildfire hazards and wildfire-related evacuations.

> *"The EIS identifies potentially significant impacts resulting from the Proposed Action associated with the following issues: groundwater resources, biological resources, cultural resources, public services, traffic noise, traffic circulation, wildfire hazards, and wildfire evacuation. All potentially significant impacts would be minimized or avoided with recommended mitigation measures."*

Review Item 2. Section 3.4 Air Quality

Pages 17 and 18

This section is completely silent with regard to air pollutants that are generated during a wildfire incident. The first subsection, Construction Emissions, does correctly list the criteria pollutants that need to be considered and that standard construction-related BMPs[8], should they be correctly and consistently implemented, can act to bring generation of the pollutants to below regulatory thresholds. However, there is no detail regarding the specific mitigating actions comprising the BMPs that would be implemented during either the construction or operational phases.

Wildfire incidents have the potential for generating the full range of criteria pollutants (actually adding generation of larger diameter, $PM_{2.5}$ particulate matter) in levels that exceed air quality standards. The

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[5] DEIS: Draft Environmental Impact Statement – Koi Nation of Northern California Shiloh Resort and Casino Project, May, 2024.

[6] FEIS: Final Environmental Impact Statement – Koi Nation of Northern California Shiloh Resort and Casino Project, November, 2024.

[7] Pagination is for downloaded .pdf version of FEIS

[8] BMP: Best Management Practice. These are publicly described practices typically found in regulatory code prepared, or endorsed, by legally responsible agencies or other organizations. The development, and implementation, of these practices can also come under the purview of individuals, or organizations, capable of exercising professional judgment.

subject project is located in a mixed land use setting that includes not only wildland fuel types but also single-, and multiple-family residential, commercial development and light and heavy industrial, uses. All of these land uses have fuels elements that are subject to combustion during a wildfire event and the complexity of these elements is what assures the generation of 1) the full range of pollutant types and 2) amounts that will exceed regulatory thresholds. Unfortunately, the concept of implementing BMPs prior to the start of a wildfire event, are most certainly impossible when an incident is actually developing, so this is problematic.

With regard to the generation of hazardous air pollutants there is no mention of an *in situ* analysis that would examine pollutant dispersal patterns. Without identification and assessment of potential receptors (many fronting directly on the project parcel) the conclusion of "No mitigation required" and a finding of a "Less Than Significant" impact is supported.

If the impacts on air quality associated with a wildfire event had been considered it most certainly would have to have been given the designation of Significant and Unavoidable.

Review Item 3: Section 3.8 Transportation/Circulation Subsection: Project Traffic

Pages 31 to 35

The narrative portion of this subsection has been significantly expanded in comparison to the original sub-section in the DEIS. However, a bottom-line assessment indicates the actions called for are remote and speculative and provide no support for the decision to move the traffic impacts from "Significant" to "Less Than Significant". This aspect is clearly indicated by the opening statement in the "Project Traffic" subsection:

> *"While the timing for the off-site roadway improvements is not within the jurisdiction or of the ability of the Tribe or BIA to control, the Tribe shall make good faith efforts to assist with implementation of the opening year improvements prior to opening day"*

If the Tribe's "good faith effort" is unsuccessful, will it delay the opening day until it is?

Examination of the specific actions being proposed for the subject intersections do not indicate the ability to increase traffic volume to accommodate the daily operational needs for the Resort and, most certainly, not for the extreme traffic conditions typically associated with an evacuation.

Furthermore, there continues to be no discussion, designation of impact significance, or identification of mitigating actions, that address the traffic pattern and volume levels within the characteristics of a wildfire evacuation scenario. Shiloh Road is a principle east-west route and connects large areas of wildland conditions to the east with the suburban and urban development to the west along Highway 101. Along the section of Shiloh Road fronting on the proposed project there are intersections with nine private driveways, Old Redwood Highway, and four named streets: Caporale Court, East Shiloh Road, and Mathilde and Gridley Drives (providing exit from the 78-unit residential on the north frontage of Shiloh Road). Under conditions characterizing a wildland fire-related evacuation the traffic on Shiloh Road will

be extraordinarily different in nature (mix of vehicle types and flow patterns) and volumes than that depicted in this DEIS. Given the wildfire conditions in this area, as demonstrated in the last decade, not to consider these wildfire-related effects must be considered a fatal flaw with respect to meeting the requirements of NEPA.

Review Item 4 - Section 3.10. Public Services Subsection: Fire Protection and Emergency Medical Services, Construction and Operation

Page 37

There have been no changes made to this section in the FEIS. There is no distinction made in describing the hazards and risks associated with structural involvement and wildfire. As before, there has been no baseline established regarding the levels of wildfire hazard (WHL[9]) and risk (RL[10]) and no specification of industry standard mitigating actions designed to reduce the ignition likelihood, ability to spread, potential pathways of spread, and resistance to control. With regard to the public services that could be involved in wildfire incident responses and/or evacuations there is no evidentiary support for moving the significance determination from a "Potentially Significant" designation to that of a "Less Than Significant".

Review Item 5 - Section 3.12. Hazardous Materials and Hazards Subsection: Construction Wildfire Risk

Page 38

Use of the general application of "BMPs" provides no means of support for the "Less Than Significant" finding. Furthermore, there is complete silence with regard to the WHLs and RLs of wildfire ignition likelihood, ability to spread, potential pathways of spread, and resistance to control.

Review Item 5a - Section 3.12. Hazardous Materials and Hazards Subsection: Operations Wildfire Risks

Page 38

A section evaluating wildfire hazards and risks to the proposed facility, and elements of the setting in areas around the project site is completely absent.

Review Item 6 - Section 3.12. Hazardous Materials and Hazards Subsection: Evacuation Impacts Due to Wildfire

Pages 38 to 44

[9] WHL: Wildfire Hazard Level where the term "hazard" is an indication of the likelihood that a wildfire will occur at any subject location (per California's Office of the State Fire Marshall, Fire Hazard Severity Zone mapping program)
[10] RL: "Risk" is the potential damage a fire can inflict on the features/conditions in the subject area under existing conditions, accounting for any modifications such as fuel reduction projects, defensible space, and ignition resistant building construction.

Mitigation Measure A:

Pages 38 to 40

The opening sentence negates the ability to consider the proposed actions summarized in this subsection as a mitigation, as defined in the performance standards that would be required to be met in order to assure compliance with NEPA:

> *"Prior to opening day, the Tribe shall engage a qualified arborist and/or biologist to develop a riparian corridor wildfire management plan to be implemented annually during operation."*

The second sentence, as reproduced below, raises additional questions relative to the veracity of the claims that sufficient mitigation will be achieved.

> *"The goal of the plan shall be to reduce fire hazards on and adjacent to the on-site riparian corridor. At a minimum the plan shall include the following procedures and best management practices that shall be overseen by a qualified arborist and/or biologist:"*

With regard to the reduction of fire hazard "*on and adjacent to the on-site riparian corridor*" no maps have been provided showing 1) the boundaries of the "on" and "adjacent to" areas in which the treatments are to be implemented, 2) current ground conditions within the full treatment area, or 3) where the specifically identified treatments are to be implemented. Without knowing the "where", "what" and "how much" aspects of the treatments it is not possible to step through an impact significance designation process; leaving the findings of a "Potentially Significant" to "Less Than Significant" transition un-supported.

Furthermore, proposing the use of BMPs to make this significance transition has been done, at least at the level of this Executive Summary level, without adequate support of empirical, or substantial evidence. Industry-standard BMPs are generally sourced in official regulatory code or repeated successful implementation by recognized individuals, or organizations, capable of exerting professional judgment. They are generated through a process that considers actions that will 1) produce desired results, and 2) operate within the array of constraints placed by bodies of official policy and/or regulatory code. When citing the use of BMPs as a means to mitigating specific situations there is typically a citation link that establishes the credibility of the specifically proposed actions. No such narrative is found in the DEIS-to-FEIS response.

In addressing the specific actions listed in the response, again, the level of generality employed defeats the ability to assess the effects that could result from their implementation. Much of the management action-constraining activity is geared toward addressing impacts on individual plant or animal species and special plant communities. Unfortunately, the bulleted response deals with more general categories of ground conditions, or vegetation, (e.g. weeds, riparian vegetation, climbing vines, live flammable ground cover and shrubs, etc.).

Comments to this effect clearly pass the NEPA/CEQ threshold (40 C.F.R, Chapter V, Subchapter A, § 1503.4 Response to comments) into being considered as substantive for 2 of the 3 standard criteria. Substantive comments do one or more of the following shown below:

- Question, with reasonable basis, the accuracy of information in the EIS or EA;
- Question, with reasonable basis, the adequacy of, methodology or, or assumptions used, for the environmental analysis, or;
- Present new information relevant to the analysis.

Of the 18 bulleted conditions only one provides a measure of BMP credibility to the use of a BMP *in lieu* of a Mitigation Measure; reading *"Vegetation removal shall either be conducted outside the bird nesting season (February 1 to August 15) or a field survey for bird nests by a qualified biologist shall occur prior to starting work and implementing appropriate avoidance buffers".*

Mitigation Measure B:

Pages 40 to 43

Again, the Applicant puts forward supposedly mitigating actions that are too remote and speculative to be evaluated for potentially adverse impacts in the NEPA process. Making reference to taking actions in the future (where the future here is defined as after the ROD[11] for the FEIS is issued) cannot be considered as a valid proffer of mitigation. "Coordinating with emergency evacuation and traffic experts" and to "develop a project-specific evacuation plan" carry no potential for mitigating any adverse effect from implementing the project as defined. All fifteen of the bulleted items involve coordination, planning, information dispersal, training, or purely procedural aspects; none address the potential loss of service that the current traffic system could experience given the high volume contribution to daily traffic that would be contributed if the Project was to be implemented.

Mitigation Measure C:

Page 43

These are purely training and procedural; no relationship to evacuation impacts.

Mitigation Measure D:

Pages 43 to 44

Once again, coordination with governmental entities and improvement of early detection don't have any relationship to the physical constraints placed on evacuation success by the current road system's physical confirmation.

[11] ROD: Record of Decision

Review Item 7 - Section 3.14. Cumulative Effects: Transportation/Circulation

Pages 54 to 59

The same arguments based on the "Remote and Speculative" nature of the proposed mitigation actions applies here as in previous situations.

Section 2 – Master Responses

Review Item 8a – Master Response 2: NEPA Hard Look Standard and Completeness of Draft EIS

Page 586, Para 3, Lines 1 thru 19 and Page 587, Paras 1 & 2

Summary of Comments (verbatim)

"Some comments received were expressions of opinion that the Draft EIS was incomplete or inaccurate without citation of factual evidence or comments on substantive environmental issues. Other comments stated that the Draft EIS omitted or overlooked important facts, and that analysis of certain issues was not rigorous enough to meet the NEPA "hard look" standard. Some comments stated that more detail or design-level detail of the project alternatives or related infrastructure improvements was necessary to meet the NEPA "hard look" standard. Specifically, some comments requested that proposed water and wastewater facilities within the proposed "treatment area" be shown to ensure that adequate space is available. Some comments stated that the EIS relied heavily on cursory references to mitigation measures to conclude impacts would be less than significant without sufficient explanation. Some comments state that a supplemental EIS should be prepared or the Draft EIS should be recirculated. Some comments stated that the EIS process timeline was "rushed" and therefore lacked sufficient detail."

Review of Master Responses

NEPA Hard Look and Completeness of Draft EIS

The response focuses initially on the legal mandates and authorities associated with NEPA's "Hard Look" standard and that agencies are required to "take a hard look at the environmental consequences of proposed federal actions, based on consideration of all relevant evidence, and that decisions are supported by adequate facts". It was stated in the DEIS that it was, "completed in accordance with and to satisfy the requirements set out in the National Environmental Policy Act (NEPA) (42 USC §4321 et seq.); the CEQ Guidelines for Implementing NEPA (40 CFR Parts 1500-1508); and the BIA NEPA guidebook (59 Indian Affairs Manual 3-H)." With regard to the lack of an industry standard wildfire hazard and risk assessment and consideration of a wildfire-related evacuation scenario this declaration of absolute compliance with NEPA requirements needs to be brought into question. Furthermore, the Response declared that "The scope of issues addressed within the Draft EIS was informed by a thorough scoping process that involved multiple opportunities for public and agency input (refer to Master Response 1 for a description of the public/agency engagement opportunities in the NEPA process)"; if the process was so "thorough" why did the Applicant not include results from a "Hard Look" of two very important situations to the citizens of Sonoma County, i.e. the need to mitigate impacts resulting from wildfire incidents and provide for more efficient and successful wildfire-related evacuations, in the preparation

of the DEIS? A review of the submitted technical work and communications of the experts retained to address the wildfire and evacuation subjects did not reveal the use of industry standard models of wildfire behavior or a traffic model under conditions of evacuation from a wildfire event.

With respect to the technical support for the analyses and decisions taken in this NEPA analysis there are two principal impact subject areas that have not been subjected to the "Hard Look" performance standard: Wildfire hazards and risks and wildfire evacuation.

Wildfire is a regional phenomenon and current prevailing best management practices in California requires an analysis that includes the subject project area footprint and a modeling of Wildfire Hazard (WHL), and Risk (RL), levels in areas that are within, and are reasonably adjacent to the project area. Current federal program and procedural materials have as a goal protection of the public at large from the risks associated with wildfire. In this specific project situation this public at large is notably present in the areas surrounding the project area (rural residential development, rural residential closely aligned with agricultural enterprises, commercial facilities, and light industry) and have not been given consideration in the technical materials presented or the analysis procedures applied.

The presentation of the traffic studies has remained un-changed in the FEIS; the reliance is still primarily on the re-direction of existing traffic rather than assessing, and identifying action plans to augment capacities. Most importantly the traffic information presented in the FEIS lacks completely a scenario modeling traffic behavior under the requirements of an evacuation required as a result of the presence of an on-going wildfire event. A NEPA-compliant "Hard Look" impact assessment would require establishing an appropriately-sized study area, completing a survey of the road system in the full study area with regard to 1) current levels of service, 2) intersection distribution within the full study area and their corresponding levels of service, and 3) their vulnerability to loss of service if involved in a wildfire event. The results of this study could then be used to predict the potential adverse effects that could result from adding the Project traffic volume into evacuation flows that would be considered typical for an average day.

Review Item 8b – Master Response 2, Requirement to Recirculate the EIS

Page 587, Paras 3 & 4

In the event that an EIS is found to be deficient during the various review process one remedy is for the BIA to require the applicant to fix the identified problems and recirculate the revised DEIS. Under NEPA, an EIS must be recirculated if substantial changes are made to the proposed project after the draft EIS is released, resulting in significant new or altered environmental impacts that were not adequately addressed in the initial EIS; this is typically done through a "Supplemental EIS" which requires a new round of public comment and analysis. This is something to consider given the weaknesses noted in the Shiloh document.

Review Item 8c – Master Response 2, Level of Design Detail Required for NEPA Analysis.

Page 587, Para 5 and Page 588, Paras 1 & 2

It is interesting that this response cites guidelines for timing of the preparation of the EIS; but does not address the quality of the information in the comments, themselves. The Applicant's response, supported by the interpretation of pertinent regulations, then continues on to emphasize the position that the EIS document "relies on" concept-level submissions. This deferral of providing detail is also opening the door to considerations of "piecemealing", an approach that should be dis-allowed in NEPA.

Review Item 9 – Master Response 3: Expressions of Opinion and Non-Substantive Comments

Page 589, Para 1, Lines 1 &2

Summary of Comments (Verbatim)

"Some of the comments received were expressions of opinion either for or against the Proposed Action or Proposed Project. Other comments summarized the alternatives and/or findings of the Draft EIS. Additional comments did not raise any substantive environmental issues. Comments generally stated opinions regarding the Draft EIS analysis and conclusions (e.g., greater effects from increased crime, traffic, noise) without supporting information."

Review of Master Responses

This MR begins by describing the responsibility the Lead Agency has in addressing "substantive" comments: *"As set forth in 40 CFR §1503.4(a), the lead agency "shall consider substantive comments [emphasis added] timely submitted during the public comment period. The agency shall respond to individual comments or groups of comments."*

It then continues with listing the criteria used in determining what is, or is not, substantive:
"Comments are generally considered "substantive" if they: 1) relate to inadequacies or inaccuracies in the analysis or methodologies used; 2) identify new impacts or recommend reasonable new alternatives or mitigation measures; 3) involve substantive disagreements on interpretations of significance and scientific or technical conclusions."

The MR then proceeds to their responsibility for responding to comments that they consider to be non-substantial. It is basically a restatement of the NEPA standard that non-substantial comment need not be addressed, either with a narrative response or changes in the document. This criterion is further explained in a closing statement in the MR: *"Additionally, responses are not provided to comments that do not further the purpose of the NEPA process to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment" (40 CFR §1500.1(c))."*

Results and Conclusion from Review of the Master Response

This response is completely about how substantive comments are distinguished, in law and regulations, from those that are considered non-substantive. However, it actually says nothing about what they did with the substantive comments TSS submitted. We know they are substantive as the TSS personnel who prepared the comments are fully capable of conducting NEPA-compliant impact studies as a result of their academic qualifications, certifications, length and depth of experience in the subject (both technical and regulatory elements). Furthermore, these were substantive comments addressing impacts that could be felt in subject areas of critical importance in the general project setting: Perils associated with uncontrolled wildfire and the difficulty of moving out of the danger area within a reasonable length of time.

Review Item 10 – Section 3.1.6. Master Response 6: Best Management Practices

Page 593, Para 6, Line 3

Summary of Comments (Verbatim)

"Comments were received questioning how best management practices (BMPs) would be enforced and monitored. Comments were received questioning how BMPs are different than mitigation. Comments stated that the EIS conclusions of less-than-significant effects rely too heavily on BMPs which are described as "voluntary" and thus cannot be guaranteed to be implemented. Comments requested a discussion of BMP effectiveness. Comments stated generally that BMPs are vague and lack detail."

Master Response Review

The first third of the response addresses the similarities and differences that distinguish BMPs from Mitigation Measures. In the second paragraph of the MR it was stated that "The Tribal Council has committed to enforcing the implementation of the BMPs identified in the Final EIS through the adoption of Tribal Resolution 24.09.30, which is provided as Appendix S to the Final EIS". The response moves on to explain how BMPs are "integral elements of project design, and therefore serve as an underlying assumption within environmental analysis of the EIS" and, again, reference is made to the Koi Tribe's endorsement resolution. The role of BMPs in the process is further described as being "voluntary" or required based on the language of statutes or regulatory code, and a series of examples is supplied. Based on the assumption that BMPs would be integrated into the full project spectrum of action (even including them as requirements for the building contracting process) it is stated that "Comments that BMPs would not be completed are speculative".

Lastly, the MR closes the MR with, "Statements that the BMPs in general are inadequate or vague are not considered substantive comments (see Master Response 3); however, substantive comments on specific BMPs are discussed in Section 3.2, Response to Representative Comments, below."

Results and Conclusion from Review of the Master Response

In an EIS situation the precise distinction between what separates a BMP from a MM is not really germane; it is, bottom line, what change in a project's setting will result from implementing the actions

regardless what they are called. It must be decided whether this change could be adverse, and what would be its relative significance. Case in point, prescribed fire is an industry standard approach to fuels reduction and can, in the right situation be considered a BMP. However, the industry has many instances where the controlled prescribe fire escapes control and causes significant levels of damage. This type un-intended and adverse result is exemplified by the 2022 escape of a US Forest Service managed prescribed burn that resulted in the Calf Canyon/Hermits Peak Fire that burned over 342,471 acres, destroyed a significant number of structures, and injured 3 individuals.

After establishing the fully integrated role of BMPs in project design and implementation the Koi Tribe Council's resolution becomes really pivotal in the process. Regardless of the mis-statement of the location of the supporting documents, the fact that there is no evidence available to support exactly what they were specifically committing to implement. Without knowing the content of this list actions which could have the potential for making adverse changes in the project's setting remain undefined and not available for the "Hard Look" required in the NEPA process. The MR also indicates that the Tribe will put back the identification, and implementation, of BMPs into the initial stages of construction: "As stated in Draft EIS Section 2.1.10, where applicable, these measures would be incorporated into any design or construction contracts." The reasonable conclusion here is that they want to define potentially setting-changing actions until a point after the impact analysis process has been completed.

The primary conclusion from a review of the MR is that, of the five comment types received this MR substantially addressed only one: How BMPs are different than mitigation. Furthermore, although there are some instances where specific setting-changing actions are listed out, in general the FEIS does not provide adequate information to assess potential impacts, and more specifically in the areas of wildfire incidents and evacuations. This conclusion is exemplified by the lack of availability of the BMPs that the Koi Tribe committed to implement. Lastly, the closing conclusion in the MR; "Statements that the BMPs in general are inadequate or vague are not considered substantive comments (see Master Response 3)" defies logic, especially in regard to the wildfire and evacuation subject areas. It is clear in the FEIS that there is not, 1) the preparation of an industry-standard wildfire behavior and fuels model, and 2) there has been no modeling of traffic in a scenario where there is an evacuation due to wildfire presence. Comments to this effect clearly pass the threshold into being considered as substantive for 2 of the 3 principal criteria used in the CEQ Guidelines (40 CFR § 1503.4).

Review Item 11 – Section 3.1.10. Master Response 10: Wildfire Evacuation

Pages 599 to 600

Summary of Comments (Verbatim)

"Comments were received which stated that wildfire evacuation is a concern in Sonoma County. Comments describe heavy traffic congestion during previous wildfire evacuations, including the Kincade, Tubbs, and Glass fires. Comments were concerned that the Proposed Project would make traffic congestion worse during a wildfire evacuation. Comments stated that the increase in evacuation time from the Proposed Project is unacceptable. Comments expressed concern about future No Notice Scenarios like the Tubbs Fire in 2017."

Master Response Review

The MR referred to information in two FEIS Sections:

- A 17-page Section 3.12 addressing Hazardous Materials and Hazards, and,
- A 1-page Section 3.14.11 addressing Cumulative Effects: Hazardous Materials and Hazards.

Within the FEIS Section 3.12 information was provided on the regulatory setting, environmental setting, and impacts. The regulatory setting subsection is comprised of Table 3.12-1 that lists fifteen (15) statutes, code sections, policy documents, and planning documents. From this group seven (7) pieces of work applied to Wildfire hazard and risk and wildfire-related evacuations within the project environment:

- Town of Windsor Riparian Corridor Wildfire Fuel Management Plan
- Town of Windsor General Plan
- Sonoma County Emergency Operations Plan;
- Sonoma County Multijurisdictional Hazard Mitigation Plan;
- Sonoma County General Plan;
- California Building Code, and;
- National Fire Protection Association Codes and Standards

The environmental setting sub-section described current conditions for hazardous material and wildfire. The hazardous materials information was not included in this response review process as the subject materials were not part of TSS' tasking scope. The wildfire sub-section presented information on:

- CAL FIRE's Fire Hazard Severity Zone (FHSZ) materials;
- Regional wildfire history;
- County Wildfire Hazard Mitigation Strategies, and;
- On-site wildfire risk.

The material presented in the CAL FIRE subsection included a description of the FHSZ classification system and a series of maps that showed the result of the FHSZ process for the general area in which the project is sited. This subsection also presents similar information on the County Wildfire Risk Index (WRI).

This fire history sub-section describes in narrative and map form recent fires of sufficient size to have regional impacts. In the sub-section on county wildfire mitigation strategies response jurisdictions and planning and strategic guidance documents are addressed. It has been determined by CAL FIRE that the proposed site is in a Local Area Response category and has a high hazard rating. Moreover, there are discussion on improvements made in the wildfire alerting procedures and processes primarily due to experiences with the Tubbs and Kincade fires.

Lastly, the on-site subsection presented a very brief, four-sentence, narrative on the risks posed by wildfire within the footprint of the proposed project.

Results and Conclusion from Review of the Master Response

Review of the provisions in the seven planning and policy documents showed them to generally lack tactical elements. As such, the information does not inform the process of analyzing impacts of actions

required to mitigate the current risks of damage from wildfires or difficulties in evacuating people from ongoing, or potential wildfire zones.

Review Item 12 – Section 3.1.11. Master Response 11: Wildfire Evacuation Analysis Assumptions and Methodology

Page 601, Para 1, Lines 1 through 10

Summary of Comments (Verbatim)

"Comments asserted that there were flaws in the assumptions and methodology used to analyze wildfire evacuation impacts. Primary concerns included that:
- *Specific projects were not considered in the evacuation modeling including: future development in the project site/Windsor area, the Lytton Rancheria housing development in Windsor, new residential development at or near the intersection of Shiloh Road/ORH (e.g., Shiloh Terrace).*
- *The analysis did not consider traffic coming from the mountainous areas to the east (e.g., Shiloh Estates, Mayacamas area), which would add to traffic congestion along Shiloh Road.*
- *The analysis did not consider the effect of erratic driving behavior (i.e., panic) on evacuation times.*
- *The analysis did not consider historical data on evacuation times for other wildfire incidents in the region."*

Master Response Review

The MR opens with references to FEIS Section 3.12.3, which includes a discussion of the Fehr and Peers' Evacuation Travel Time Assessment (ETTA), and the full report of this effort included as Appendix N-2 in the FEIS. The MR response listed the locations to be built out up to the 2040 projection period.

Results and Conclusion from Review of the Master Response

The opening "Summary of Comments" section left out comments addressing the lack of, 1) an *in situ* analysis that would establish baseline conditions for the roadway/intersection system, and 2) a wildfire evacuation scenario comprised of comparative traffic models for typical baseline traffic and modeling for the added traffic during a wildfire-related evacuation. The ETTA assumptions were based on information from two historical fires, the Tubbs Fire and Kincade Fire, and the schedule for which the evacuation warning(s) and order(s) were issued. To reflect worst-case conditions, the ETTA assumed that the evacuation would occur at the same time as the peak hour of afternoon commute travel on the Friday before Labor Day.

Lastly, the ETTA assumed a 15% reduction in roadway capacity to account for inefficiencies during emergency events such as, the presence of debris, lowered visibility due to smoke, erratic/panicked driving, and other hazards. In conclusion the MR stated that the assumptions and methodology used to analyze wildfire evacuation impacts were sufficient.

A thorough review of the Fehr and Peers report showed no actual field measurements of traffic nature or volumes keyed to the road segments and intersections that would be involved in an evacuation

process. The evacuation time requirements appeared to be based entirely on published information inputted into a traffic modeling routine. Furthermore, although conversations with local fire and law enforcement personnel were cited there did not seem to be consideration given to 1) potential wildfire hazard and risk levels within the study area or 2) the particular vulnerability of road segments, or intersections, to loss of function if involved in a wildfire incident.

Given the apparent reliance on results from computer modeling, the lack of field data collection, and lack of consideration for wildfire behavior effects, TSS does not concur that the assumptions and methodology used in the analysis were sufficient.

Section 3 – Individual Comments

Review Item 13- FIGR Individual Comment T8-1

FIGR Comment

A seven-page, comprehensive summary of the issues addressed in the following review material. A comprehensive point-by-point was not expected.

Applicant's Response (verbatim)

"The introductory comments providing background for FIGR and summarizing the intentions and contents of the letter are noted. Regarding the letter submitted by Chairman Greg Sarris see Responses to Comment Letter T-6. Please refer to Master Response 2 regarding general statements that the Draft EIS is deficient, that the Draft EIS needs to be recirculated, and that a "hard look" at environmental consequences is required by NEPA. Regarding the range of alternatives considered, consideration of an off-site alternative, and consideration of an alternative in Lake County, see Master Response 5. During the 25 CFR Part 292 rule making process, the Department of the Interior clarified that "Newly acquired lands with significant historical and cultural connections may or may not include those that are close to aboriginal homelands," (see Federal Register, Volume 73, page 29361 (May 20, 2008)). Regarding whether the circumstances of the Tribe warrant a "restored lands" exception, please refer to Master Response 4. It should be noted that issuance of a restored lands determination is not a major federal action subject to NEPA; rather, the Proposed Action that is the subject of the EIS and under consideration by the BIA is whether to acquire the property in trust for gaming purposes under the IGRA exception of "the restoration of lands for an Indian tribe that is restored to Federal recognition" (25 USC § 2719 (b)(1)(B)(iii)).The comment includes a summary of the concerns raised within the letter and attachments on various issues. The summary does not raise any new substantive environmental issues beyond those presented later in the letter and attachments. Responses to these specific concerns are provided below."

Evaluation of Applicant's Response

The Applicant's response is comprised of an acknowledgement of the comprehensive comments made and deflection to other comment-related materials. No real issues associated with TSS' scoped areas of work.

Review Item 14. FIGR Comment T8-3

FIGR Comment (verbatim)
A. Incomplete Description of the Proposed Koi Project

Section 2.1 of the Draft EIS provides the project description (designated "Alternative A - Proposed Project") for the Koi Project. Although this description has some helpful information regarding the Project, it has critical information "gaps" on important environmental effects of the Project. These deficiencies will be discussed in greater detail in later sections, but are summarized here as follows:

- Key information essential to evaluating wildfire hazards and environmental effects is missing from the Koi Project description. As described in the enclosed expert wildfire risk report (Appendix 1), and contrary to common practice in EIS documents, there is no specific information on (1) the exact identification or
  physical layout of fire facilities (on-site storage ponds, fire hydrants, etc.) for fighting fires; (2) industry-standard site plans; (3) a specification of "specific individual actions required to implement the project and comprehensive illustrative materials (e.g., tables, charts, site plans, etc.)" relating to wildfire risks; and (4) any evacuation plans, riparian management plans, or agreements with the Sonoma County Fire District commonly expected in a project description for a NEPA EIS in California areas prone to wildfires.
- FIGR's expert consultants in both the water/wastewater and biological resource subject areas identified the lack of important project location, facilities and discharge structure information relating to the Koi Project's planned discharge of wastewater into Pruitt Creek as a key deficiency in the project description.
  According to the wastewater expert: "Section 2 of the Draft EIS fails to adequately describe important water and wastewater components of the Proposed Project, and as a consequence, the Draft EIS in later sections fails to evaluate the water resources, biological, cultural, aesthetic, land use, noise, hazardous materials, and odor impacts of these components." (Appendix 2, at p. 3.) The biological resources peer review report expresses similar concerns. (Appendix 5.)
- The biological resources report also states that Section 2.1.8 of the Draft EIS (p. 2-14) is not clear regarding the potential for utility extensions and upgrades necessary to implement Alternative A to require off-site ground disturbance, with potential impacts to biological resources. The Project description is inadequate without these Project elements because it prevents a full assessment of potential impacts and the identification of adequate mitigation measures.

These serious Koi Project description inadequacies undermine not only the analyses of the presence of significant impacts, but also impair the ability to compare alternatives across these environmental parameters.

Applicant's Response (verbatim)
"As noted by the commenter, this comment provides a summary of issues raised within later portions of the comment letter. Responses to these specific concerns are provided below. Regarding general concerns about the design level of detail of project elements see Master Response 2."

Evaluation of Applicant's Response

The Applicant's response is comprised of an acknowledgement of the comprehensive comments made and deflection to other comment-related materials. The Applicant's response offered no additional issues associated with TSS' scoped areas of work.

Review Item 15. FIGR Comment T8-34

FIGR Comment (verbatim)

Providing law enforcement, fire response, and medical emergency services to a project of this size will inevitably impact these entities and their ability to serve other members of Sonoma County. Per the Draft EIS, "it is anticipated that the increased concentration of people due to [the Project] would lead to an increase in the number of service calls to local law enforcement." Draft EIS, Section 3.10.3.2 at p. 3-99. The Draft EIS also acknowledges that "during construction, construction vehicles and equipment, such as welders, torches, and grinders, may accidentally spark and ignite vegetation or building materials" and that the operation of the Project would increase demand for fire protection and emergency services. Id. at pp. 3-99 - 3-100. Nevertheless, the Draft EIS concludes that the impact on these public services will be less than significant. Id., ES-5, Table ES-1 at p. ES-19.

The Draft EIS claims that a handful of proposed mitigation measures and "best management practices" will alleviate any adverse impacts caused by the Project. Such mitigation measures include Koi Nation entering into future service agreements with Sonoma County Sheriff's Office ("SCSO") and Sonoma County Fire District ("SCFD"). However, the mere fact that a hypothetical service agreement may at some future time be in place does not mean that the increased demand for SCSO and SCFD services will not negatively impact these services. It is also important to note that as of the date of this letter, there are no service agreements in place to ensure that the law enforcement, fire response, or medical emergency services would be provided to the Project. Draft EIS, Section 3.10.3.2 at pp. 3-99 to 3-100.

Applicant's Response (verbatim)

"Draft EIS Section 3.10 acknowledges that the project alternatives would result in increased demands for law enforcement, fire protection, and EMS, thus impacting these services. The service agreements with the Sonoma County Sheriff's Office (SCSO) and the SCFD as part of the mitigation in Draft EIS Section 4 would be tailored to meet the needs of the selected project alternative and would include provisions to support the increased service demand. By negotiating these agreements in good faith, the Tribe would ensure that the necessary resources are in place to serve the selected alternative, thus reducing the impact to law enforcement, fire protection, and EMS services. These agreements would be negotiated and executed before the selected alternative becomes operational. If, for whatever reason, the Tribe is unable to enter into a service agreement for law enforcement and/or fire protection and EMS the Draft EIS includes contingency mitigation measures that would require the Tribe to establish, equip, and staff a public safety building for such services on the Project Site. This contingency plan ensures that adequate resources would be available to address the public safety needs of the project before it is operational, even in the absence of external service agreements, further ensuring that impacts on public services remain less than significant."

Evaluation of Applicant's Response

The primary action described in the Applicant's response is to deflect the issues to the time when the Sonoma County Fire Department (SCFD) and Sheriff's Office can enter into formal Memorandums of Understanding (MOUs). The response makes the truly unsupportable claim that *"By negotiating these agreements in good faith, the Tribe would ensure that the necessary resources are in place to serve the selected alternative, thus reducing the impact to law enforcement, fire protection, and EMS services."* The truth of the matter is that "*negotiating*", even "*in good faith*", cannot "assure" anything. These types of assurances can only be provided by the existence of officially recognized agreements. Furthermore, <u>when</u> these agreements will be in place is set by the nebulous statement *"before the selected alternative becomes operational"*. These actions will take place after the ROD has been registered and any actions associated with their implementation would not have been subjected to proper NEPA review. Additionally, TSS questions the meaning of the phrase "*as part of the mitigation*" in the second sentence, and reiterates that the effectiveness of the mitigations described in Section 4 have not been supported with appropriate levels of action description details. The alternative offered by the Applicant, should the MOU effort fail to produce positive results, is, in reality, an unreasonable possibility to consider. Some of the most important operational aspects that would need to be addressed include, but is not limited to:

- The facility would need to offer services in four categories of complex response types: Structure fire response, wildfire emergency response, mitigation planning, and implementation, and medical response;
- Staff would need to be hired (with credible qualifications and experience) to deliver services in the four response categories on a 24-hour/7-days basis;
- Mobile equipment would need to be purchased, and maintained, appropriate to the response categories;
- Operational facilities, including emergency water storage and delivery infrastructure, vehicle garaging and maintenance facilities, and administrative space, would need to be constructed and maintained, and;
- Staff would need to be provided appropriate on-going training.

<u>Review Item 16. FIGR Comment T8-35</u>

FIGR Comment (verbatim)

SECTION 3.12 - HAZARDS, WILDFIRE AND EVACUATION IMPACTS

The Draft EIS inexplicably pays very little attention to wildfire risks and public safety evacuation issues, which it only joins to the hazardous material discussion in this section. This should have been one of the most prominent issues in the Draft EIS. Instead, it is only an afterthought. FIGR engaged the wildfire consulting firm of TSS Consultants to review the adequacy of the Draft EIS analysis on these issues and they issued a report that is enclosed as Appendix 1 ("TSS Review"). The TSS Review begins with the observation that the Koi Project area has an "elevated vulnerability" to wildfire impacts. It points out that "[o]ver the last 10 years the Windsor area has experienced four significant wildfires impacting over 213,190 acres: Tubbs, Kincade, Glass, and Walbridge. The western edge of the Tubbs and Kincade fires burned to within 0.6 miles of the Project site. Appendix 1 at p. 3. This aligns closely with a guidance document from the California Attorney General, which states that "[m]ore acres of California have burned in the past decade than in the previous 90 years and eight of the State's ten largest fires since 1932 have occurred in the last decade." Best Practices for Analyzing and Mitigating Wildfire Impacts of

Development Projects Under the California Environmental Quality Act, Office of Attorney General) at p. 2. Clearly, wildfire hazards and impacts are critical subjects for analysis in environmental review documents for California projects.

A. Wildfire Hazards

The Draft EIS acknowledges that the Project is in a designated high fire risk area and concedes that the construction of the Project could increase the risks of wildfires. Draft EIS, ES-5, Table ES-1 at p. ES-20; see Section 3.12.2 at Figure 3.12-2. Yet, it somehow reached the implausible conclusion that wildfire hazards and impacts are not significant. However, the Draft EIS reaches this conclusion without providing a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. 350 Montana, 50 F. 4th at 1272 (citing Barnes, 655 F.3d at 1136, 1141; see also Killgore, 51 F.4th at 989-90 ("while... federal agencies have substantial discretion to define the scope of NEPA review, an agency may not disregard its statutory obligation to take a 'hard look' at the environmental consequences of a proposed action, including its cumulative impacts, where appropriate.") (citing Blue Mountains Biodiversity Project, 161 F.3d at 1212,1214-15). In fact, throughout the 278-page Draft EIS, only one paragraph was dedicated to discussing this issue. In this paragraph, the Draft EIS concludes that the "construction of [the Project] would not increase wildfire risk onsite or in the surrounding area" because the implementation of best management practices, which includes "the prevention of fuel being spilled and putting spark arresters on equipment having the potential to create sparks," would "reduce the probability of igniting a fire during construction." Draft EIS, Section 3.12.3.2 at p. 3-127. The Draft EIS seemingly suggests that there is little on-site wildfire risk because the Project Site is "relatively flat with very little change in slope or topography and Pruitt Creek and associated riparian area intersecting through the middle of the property. There is very limited flammable vegetation on the Project Site due to the planted rows of grapevines." Draft EIS, Section 3.12.2 at p. 3-123. This focus on the Koi Site and lack of consideration of the surrounding areas renders the Draft EIS inadequate.

In contrast to the wholly insufficient wildfire analysis in the Draft EIR, TSS conducted a robust investigation. TSS conducted a site visit in which it identified key Koi Project area and site features "capable of producing dangerous wildfire behavior (the vineyard and riparian formations, the unfortunate alignment of the Pruitt Creek gallery with the prevailing winds, and the potentially long delays to vacate the site...." Id. at p. 16. TSS is also very critical of the Koi Project description information, which lacked any information regarding water storage ponds or tanks, fire hydrant locations, or other fire suppression features that are particularly important on this site because it will not be served with municipal water. Id. In addition, no industry-standard wildfire hazard and risk assessment was prepared, much less a wildfire emergency evacuation plan. Id. at 17. In sum, TSS concludes that these failures "render the wildfire analysis in the DEIS simplistic, analytically deficient, and completely inadequate for assessing the actual risk or making any determination that these risks are less than significant. In fact, based on the DEIS record, it must be determined that these risks are very significant and no effective mitigation has been identified to take them to less than significant levels." A complete reading of Appendix 1 provides many details supporting these conclusions. This is a very strong indictment of a very poor Draft EIS wildfire risk analysis.

Applicant's Response (verbatim)

"The direct, indirect, and cumulative effects of the Proposed Project on wildfire hazards, and their impact significance determinations, are discussed throughout the Draft EIS. The direct effects of the Proposed Project on Wildfire Hazards are discussed in Section 3.12.3. The Indirect Effects of the implementation of the on-Site Riparian Corridor Wildfire Management Plan Mitigation are discussed in Section 3.15.2. The Proposed Project Cumulative Effects on wildfire hazards are discussed in Section 3.14.11. Appendix N also includes wildfire evacuation memorandums including a Fire and Emergency Response Memorandum (N-1), ETTA (N-2), Evacuation Recommendations Memorandum (N-3), and Evacuation Mitigation Plan (N-4). Table 2.1-3 provides specific Wildfire Hazard Protective Measures and Best Management Practices to be implemented during construction and operation. Wildfire Hazard Mitigation Measures which would be implemented during construction and operation of the Proposed Project are provided in Draft EIS Section 4.

The current design of the Proposed Project was completed at a planning level and the specific location of fire hydrants and other fire suppression features is not known at this time. Please see Master Response 2 for a discussion of level of design detail required for NEPA analysis. However, as discussed in Draft EIS Section 2.1.9, final design and construction of the Proposed Project would conform to applicable requirements of the Tribe's Building and Safety Code of 2023, which are consistent with the CBC and California Public Safety Code, including building, electrical, energy, mechanical, plumbing, fire protection, and safety standards. As discussed in Response to Comment A8-67, the elements of the Tribe's Building and Safety Code that are consistent with the CBC wildfire measures include CBC Chapter 7A regarding building materials, systems, and/or assemblies used in the exterior design and construction of new buildings located within a Wildland-Urban Interface Fire Area; as well as CBC Section 703A.7 that incorporates State Fire Marshal standards for exterior wildfire exposure protection. More specific comments from FIGR's independent peer reviewer TSS consultants, are addressed in Response to Comments T8-48 through T8-84, below."

Evaluation of Applicant's Response

Again, the Applicant's response uses the term "discussed" several times in its opening sentences. This term only indicates that there has been a process of consideration but it cannot be construed to indicate that specific actions have been defined and there is a commitment that they be implemented. The Applicant's response also relates that Appendix N presents technical reports related to wildfire and wildfire-related evacuation. Review of these materials indicate, 1) a very superfluous analysis of wildfire risks that focus primarily on the project site with no analyses conducted within the greater setting in which the proposed Project is to be located, and 2) a completely modeled-based analysis of traffic that resulted in evacuation time requirements as the dependent variable; no conclusion, or suggested remedies for the primary constraint: traffic volume limitations. The wildfire mitigation measures identified are slated for plans that are to be prepared prior to the opening date of the resort and are to be implemented only within the project's footprint.

The opening sentence of the second paragraph states that the location of critical elements of fire suppression infrastructure have not yet been defined. These elements are typically placed, and described, on engineer-stamped site maps that, then, become the basis for evaluating the implementation actions and their associated impacts for use in the NEPA assessment process.

Review Item 17. FIGR Comment T8-36

FIGR Comment (verbatim)

Given these clear and present wildfire risks, evacuation issues cannot be dismissed as insignificant in Sonoma County. However, that is exactly what the Draft EIS does. The Draft EIS is outcome-oriented and, as a result, fails to substantively examine evacuation risks and propose adequate mitigation measures.

Despite proposing a casino/resort facility that has over 5,000 parking spots, the Draft EIS concludes a mass evacuation of the Project "would not significantly inhibit local emergency response to or evacuation from wildfire or conflict with a local wildfire management plan." Draft EIS, Section 3.12.3.2 at p. 3-132. This conclusion defies logic.

The Draft EIS states that without the Koi Project, it would take an estimated four to six hours to evacuate the Town of Windsor. With the Project, the evacuation time could increase to six to eight hours. *Id*., Section 3.14.11, Table 3.14-5 at p. 3-162. The underlying analysis does not consider that the mountainous areas (residences/properties such as Shiloh Estates and Mayacama) east of the Town, located in the Wildland-Urban Interface (WUI) area, have only two evacuation routes to US 101 (through Pleasant Avenue and Shiloh Road) and has a high structure to exit ratio and could compound the issues at the intersection of Shiloh and ORH. Further, there is no consideration given to how panic and general human error would affect the time needed for a mass evacuation.

Additionally, there is a willful ignorance of recent history. The area surrounding the Project Site is no stranger to wildfire evacuations, and any mass evacuation study should considerhow long it has taken for mass evacuations to be completed during those wildfire events. The law requires the Draft EIS to give a "hard look" at the Project's foreseeable environmental impacts. K*illgore,* 51 F. 4th at 989-90. The "hard look" "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made," *Metcalf*, 214 F.3d at 1142, and must include a "discussion of adverse impacts that does not improperly minimize negative side effects." *Earth Island Inst.*, 442 F.3d at 1159, abrogated on other grounds by *Winter*, 555 U.S. 7. The Draft EIS does not do any of this for wildfire hazards and public safety and thus is inadequate.

The only mitigation measure related to evacuations offered in the Draft EIS is the stated intention to "develop a project-specific evacuation plan" prior to occupancy. This mitigation measure is legally insufficient under NEPA because there is no way to ensure that this mitigation measure will adequately reduce the impact or impairment of evacuation plans. *See Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 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"); see also *National Parks & Conservation Ass'n*, 241 F.3d 722 (finding that the National Park Service erred in making a finding of no significant impact despite the National Park Service's proposed mitigation measures where there was no information about practical effects of increased traffic in park, air and water quality, and resident animal population, and it was unknown whether mitigation measures would work); *Klamath-Siskiyou Wildlands Ctr*, 373 F.Supp.2d at 1085 (concluding that simply describing mitigation measures without further discussion regarding their efficacy is insufficient).

Applicant's Response (Verbatim)

"Please refer to Master Responses 10 and 11 regarding the wildfire evacuation analysis and the associated assumptions and methodology. As described therein, an ETTA (Draft EIS Appendix N-2) was conducted based on circumstances similar to what occurred during the Tubbs Fire in 2017, referred to as the "No Notice Scenario", and the Kincade Fire in 2019, referred to as the "With Notice Scenario", under both 2028 No Project and 2028 Plus Project conditions. In addition, the ETTA modeled a No Notice Scenario and With Notice Scenario under both 2040 No Project and 2040 Plus Project conditions. Therefore, the Draft EIS took a hard look in consideration of the history of wildfires in the area. Please refer to Master Response 2 regarding the hard-look standard. Please refer to Response to Comment A9-47 regarding the effectiveness of mitigation measures associated with wildfire evacuation."

Evaluation of Applicant's Response

This extremely brief response to the multifaceted FIGR comment is comprised of a suggestion that the reader access additional information found in 1) Master Responses 2, 10, and 11, DEIS Appendix N-2 and a response to individual comment A9-47. Master Response 2 further directs the reader to access additional information in four subject areas:

- NEPA Hard Look Standard and Completeness of Draft EIS;
- Requirement to Recirculate the EIS;
- Level of Design Detail Required for NEPA Analysis, and;
- NEPA Process was "Rushed."

In the "NEPA Hard Look" subsection further references were made to 1) the federal Administrative Act, 2) NEPA statute, 3) CEQ NEPA Guidelines, 4) BIA NEPA guidebook, and 5) Master Response 1 of this DEIS commenting process. In the "Requirement to Recirculate" subsection reference is made to a single section in the CEQ Guidelines. In the "Level of Detail" subsection reference was made to a single section in the CEQ Guidelines, and Appendix -2 of the FEIS. Lastly, the NEPA Process was "Rushed"" subsection references were made to the Master Response 1, three sections of the CEQ NEPA regulations, and the BIA Handbook. Outside of the five (5) specific CEQ Guidelines referenced no other locations within the documents cited were provided; leaving the reader who wanted a full understanding to plough through hundreds of pages of material.

The extremely onerous structure notwithstanding, the content of the response itself, and the cited other references, are not significantly responsive to the points made in the FIGR comment. For example, in the opening section of the cited Master Response 10, "Response" subsection, it is stated that:

> *"The Draft EIS **discussed** the existing wildfire setting and the potential impact of the Proposed Project on wildfire evacuation in Section 3.12 Hazardous Materials and Hazards. The Proposed Project's contribution to cumulative wildfire hazards and evacuation plans was **discussed** in Section 3.14.11."*

The basis for preparing this Master Response is again provided by the material in Section 3.12.3 that refers specifically to the ETTA study. The narrative in this section is deficient in providing an understanding of the working model employed and the inputs that were used to drive the model. Furthermore, a

determination of impact significance contradiction is again present. Table 3-12-2 showed "No Project/With Project" evacuation time results to be a 29% increase for the "No Notice Scenario" and a 54% increase for the "With Notice Scenario". These figures completely contradict any findings that the Project's effect on wildfire evacuation is anything less than "Significant/Un-avoidable".

While it has the appearance of a properly cited indication of the application of proper analysis and development of mitigations, it is not. The use of the word "discussed" completely negates any indication of actions over, and above, talking about it, and furthermore, one would have to pour through the entire sections as no specific locations where these discussions occurred was included in the process.

The use of the ETTA process and conclusions Appendix N-2 actually contradicts the Applicant's findings of "Less Than Significant" for the scenarios where the Project's evacuation related traffic volume combines with the baseline conditions, embodied in the statement located at the end of Paragraph 3, Page 3 of Appendix N-2:

> *"This scenario (sic. "No Notice" Scenario (Tubbs Fire-inspired)) has a theoretical maximum background utilization of the study area's roadway network, with limited remaining capacity to accommodate the Project's evacuation demand,"*

The content of the Applicant's response to DEIS Comment A9-47 (from Sonoma County) is without merit and is non-responsive to the FIGR comment. This conclusion is supported by the fact that its mitigative potential relies on 1) the not yet prepared "Project-Specific Evacuation Plan", 2) baseline setting characteristics that don't address the constraints on traffic volume (roads and intersections), nature of the vehicle type mix, vulnerability of the road segments and intersections to loss of function if involved in a wildfire incident, 3) the true nature and volume of the Project's traffic contribution.

<u>Review Item 18. FIGR Comment T8-37</u>

FIGR Comment (verbatim)

C. Other Wildfire Concerns

In addition to the above, the Draft EIS also fails to adequate address other wildfire-related concerns. First, despite acknowledging the significant fire risks of Sonoma County and the increased risk during construction, the Draft EIS fails to adequately address response measures for fire incidents at the Project Site. Draft EIS, Section 3.10.3.2 at p. 3-99. Per the Draft EIS, the closest SCFD fire station is Station 1, which is less than two miles northwest of the Project Site. Id. at p. 3-100. While the Project Site is within the jurisdiction of SCFD, the SCFD has not agreed to provide any particular level of service to the Project Site. Although there is a Letter of Intent between Koi Nation and SCFD (See Draft EIS, Appendix A at p. 145), this letter does not guarantee that the SCFD would actually respond to fire incidents at the Project Site. Nevertheless, the Draft EIS concludes that potential impacts to fire protection plans is less than significant. Id., Section 3.10.3.2 at p. 3-100. NEPA prohibits reliance on assumptions such as this one. See e.g., Environmental Def. Ctr., 36 F.4th at 874 (agreeing with plaintiff "that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts."); City of Los Angeles, 63 F. 4th 835 (finding that the FAA

did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not operate simultaneously).

The speculative nature of whether the SCFD will actually serve the Project Site is underscored by the fact that the Draft EIS contemplates that "[i]f [Koi Nation] does not enter into a service agreement with a fire district/department, [Koi Nation] will establish, equip, and staff a fire department and station on the Project Site, within the 'treatment area' designated in the eastern portion of the Project Site." Draft EIS, Section 3.10.3.2 at p. 3-100. Other than stating that Koi Nation would establish an on-site fire department, there is no discussion in the Draft EIS of the feasibility and environmental impacts associated with this proposal. This is insufficient under NEPA. Northwest Indian Cemetery Protective Ass'n., 795 F.2d at 697, rev'd on other grounds, 485 U.S. 439 ("[a] mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA"). The purpose of NEPA is to ensure informed agency action. Citizens for Better Forestry v.US. Dept. of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003). However, the Draft EIS completely misses the mark here.

Applicant's Response (Verbatim)

"Draft EIS Section 3.10.3.2 acknowledged the wildfire risks in Sonoma County and outlined specific fire response measures for both the construction and operational phases of the project alternatives. The Draft EIS included a detailed mitigation strategy, which involved entering into a service agreement with the SCFD to ensure the Project Site would be adequately supported by fire protection services. Additionally, the Letter of Intent between the Tribe and SCFD attached as Draft EIS Appendix O demonstrated a clear commitment from both parties to negotiate a formal agreement for fire protection services. This shows that negotiations are already underway, providing further assurance that the project alternatives would have the necessary fire protection resources in place and would not rely on speculative assumptions. However, if for whatever reason the service agreement with SCFD is not finalized, the Tribe would be required establish, equip, and staff an on-site fire department as part of the public safety building specified in Draft EIS Section 4. This ensures that fire protection needs would be fully met, regardless of SCFD's direct involvement, distinguishing this analysis from the speculative assumptions found insufficient in court cases cited in the comment, such as Environmental Defense Center v. BOEM and City of Los Angeles v. FAA. Unlike the cases where agencies relied on unsupported assumptions, the Draft EIS provided a clear, actionable plan through its mitigation measures. The analysis ensured that fire protection services would be available, either through the formal service agreement or through the on-site public safety building. This contingency would not be speculative but a concrete option that would be implemented if necessary, complying with NEPA's requirement to take a "hard look" at potential impacts. Please refer to Master Response 2 regarding NEPA hard look standard. As the public safety building would be developed on the Project Site, within the development footprint of the project alternatives, the physical environmental impacts of the public safety building are within the scope of the analysis contained throughout the EIS.

In summary, the Draft EIS fully meets NEPA's requirements by providing specific mitigation measures that ensure fire protection services are addressed, whether through SCFD or on-site resources. This comprehensive approach avoids the unsupported assumptions criticized in the referenced court cases and ensures that fire risks would be managed effectively."

Evaluation of Applicant's Response

The bottom line is there is no MOU in place between the tribe and the SCFD. Right now the FEIS does not have the type of infrastructure details it needs to assure the ability to enter onto the property safely and successfully. With respect to wildfire response the FEIS contains no information as to the capacity of emergency water storage or delivery system, or road system layout and specifications, that they would need prior to entering into an MOU agreement. Furthermore, if they cannot enter into an agreement with an outside emergency services provider the Tribe would have to assemble a staff of personnel, provide them proper training, provide them with a capable infrastructure, and equip them to respond to both fire in complex publicly-utilized structures and wildland settings. Not a reasonable task.

With respect to the fire-related mitigation measures a close review of the actions in the supporting materials is focused uniquely on the structural elements of the facility and no indication of considering how to mitigate against either keeping wildfire moving toward the Project site from an off-site location, from entering into Project site, or keeping a wildfire that ignites within the Project boundary and exhibits a reasonable likelihood of escaping to the surround communities.

The whole response exhibits too narrow a focus and reticence to fully prepare empirical support for adopting benign significance levels.

Review Item 19. FIGR Comment T8-44

FIGR Comment (verbatim)

It is astonishing that the Draft EIS is completely silent on cumulative impacts related to wildfire hazards and evacuation plans. No section of the Draft EIS covers this cumulative impact analysis. Just as in other subject areas, it is essential to determine whether the Koi Project, in conjunction with the many other area development projects, will have a cumulatively significant impact of increasing wildfire hazards or adversely impacting evacuation times and associated issues for this area. The Draft EIS's failure to analyze this important cumulative impact issue represents yet another major inadequacy in the Draft EIS.

Applicant's Response (verbatim)

"The Draft EIS evacuation analysis was conducted for both opening year and cumulative year scenarios. Draft EIS Section 3.14.11 Hazardous Materials and Hazards discusses the Proposed Project's contribution to cumulative wildfire hazards and evacuation plans on pp. 3-161 and 3-162. Technical detail for this analysis is provided in Draft EIS Appendix N, which includes a Fire and Emergency Response Memorandum (Appendix N-1), an ETTA (Appendix N-2), an Evacuation Recommendations Memorandum (Appendix N-3), and an Evacuation Mitigation Plan (Appendix N-4). Please also refer to Master Response 10: Wildfire Evacuation."

Evaluation of Applicant's Response

Review of the four works comprising Appendix N show them to have the ability to generate, through their ETTA analysis, robust evacuation time figures. However, this result *per se*, does not contribute to an increase in the ability to handle larger volumes of the type of vehicle traffic that typifies wildfire-related evacuations. Furthermore, none of the works in Appendix N base their conclusions or recommendations

on traffic characteristics other than evacuation time or make clear presentations on the additive effect from implementing the project.

Review Item 20. FIGR Comment T8-45

FIGR Comment (verbatim)
Section 4 of the Draft EIS is essentially a compendium of the mitigation measures identified elsewhere in this document. Rather than repeating earlier portions of this letter that explain how many of these mitigation measures are inadequate, insufficient or unenforceable, FIGR incorporates in full herein its discussions of mitigation measures in all other portions of this letter and the Chairman Sarris Letter.

However, a few critical issues that impair the identification and potentially block the imposition of mitigation measures across the board must be discussed. First, in what may be an effort to avoid the imposition of mitigation measures, the Draft EIS purports to identify what should be mitigation measures as "Protective Measures and Best Management Practices" ("BMPs") (see Draft EIS< Section 2.1.10 and Table 2.1-3). According to the Draft EIS, these BMPs will voluntarily be incorporated into the Koi Project by the Koi Nation. However, this representation begs two important questions. What enforcement authority, if any, is present for BIA to compel the Koi Nation to actually implement these BMPs once it becomes the sovereign over the Koi Site? Second, who will monitor and implement these BMPs? No enforcement authority is discussed or confirmed to be available. Accordingly, these BMPs, which may never be implemented, must be viewed as phantom mitigation.

Applicant's Response (verbatim)
"The distinction between BMPs and mitigation as well as enforcement of BMPs is discussed in Master Response 6. Regarding the enforcement of mitigation measures, see Master Response 7."

Evaluation of Applicant's Response
To view the FIGR evaluation and conclusion regarding Master Response 6 please go the Section 2 of this report.

Review Item 21. FIGR Comment T8-46

FIGR Comment (verbatim)
Second, as mentioned in several portions of this letter, there are many claimed BMPs and/or mitigation measures which are no more than a promise to formulate a plan or seek a permit in the future, which constitutes improper future deferral of mitigation in violation of NEPA. Thus, for example, two mitigation measures would require the Koi Nation, "prior to opening day," to develop a "riparian corridor wildfire management plan" and, "prior to occupancy," to develop a "project-specific evacuation plan." By failing to analyze the very serious wildfire risks now or to closely analyze the evacuation risks (as FIGR's wildfire consultant explains in detail), all of which are important for determining the severity and potential mitigation of risks, as well for effectively using the wildfire parameter to choose among alternatives, this improper future deferral essentially eliminates the Koi Project's huge wildfire risk parameter at the Koi Site as a NEPA decisional tool.

Applicable case law rejects this approach. See South Fork Band Council of Western Shoshone at 726 ("BLM argues that the off-site impacts need not be evaluated because the Goldstrike facility operates pursuant to a state permit under the Clean Air Act. This argument also is without merit. A non-NEPA document...cannot satisfy a federal agency's obligations under NEPA."); see also Northern Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1084 (9th Cir. 2011) (Agencies may not avoid gathering the information needed to assess a proposed project's environmental impact by committing to "mitigation measures" that take the form of information gathering efforts to be taken after the project commences).

Applicant's Response (verbatim)

"Please refer to Master Response 2 regarding the completeness of the EIS and the hard look standard. The regional wildfire risk and history of wildfires are discussed in Draft EIS Section 3.12.2 and Draft EIS Appendix N-1. As stated therein, the Project Site is primarily designated as 3 (high) wildfire risk according to the County Wildfire Risk Index and several fires have occurred in the area, including the Tubbs Fire and Kincade Fire. Please refer to Master Responses 10 and 11 for a discussion of wildfire and evacuation impacts, including discussion of technical reports prepared for the Proposed Project and analysis methodology. Please also refer to Response to Comment A8-67 regarding the fire resiliency measures included as design features, BMPs, or mitigation intended to reduce the potential for fire to spread on the Project Site as recommended in Draft EIS Appendix N-1. Please also refer to Response to Comment A9-47 regarding the effectiveness of mitigation measures associated with wildfire evacuation. As described therein, technical analysis was prepared by qualified individuals (see Draft EIS Appendix N) based on the regional wildfire risk and history of wildfires in the area and the potential for impacts associated with wildfire are analyzed. Thus, the wildfire risk in the area was considered in the analysis within the Draft EIS. The mitigation measures noted in by the commenter include numerous requirements of what would need to be included in the respective plans once they are prepared to ensure that the implementation of the plans would reduce potential impacts; therefore, there is no improper deferral as alleged by the commenter."

Evaluation of Applicant's Response

If the on-project conditions have been described as basically non-, or of low flammability, why has the Project area been included in a County Wildfire Risk Index of "High"?

To view the FIGR evaluation and conclusions regarding Master Responses 2, 10 and 11, please go to Section 2 of this report.

Review Item 22. FIGR Comment T8-47

FIGR Comment (verbatim)

CONCLUSION

FIGR requests that the BIA withdraw this Draft EIS and the proposed Federal General Conformity Determination. The Draft EIS is riddled with major errors, fails to use "best available science," and is notable for its significantly flawed analyses of environmental impacts and its identification of phantom and/or ineffective mitigation measures. It is a textbook example of an EIS that fails to comply with NEPA and associated case law.

The Draft EIS does not evaluate any alternative project sites, including within Lake County (where the Koi Nation's ancestral territory is located), which constitutes a patent failure to rigorously and objectively evaluate a reasonable range of alternatives. The required NHPA Section 106 consultations with FIGR and other tribes have been "insufficient, inadequate and unreasonable." The important transportation and air quality analyses are critically undermined by a fatally flawed traffic study that grossly underestimates the trips this project would generate. The conclusions of "no significant impact" or "less than significant impact" in many key impact areas (including biological resources, land use, and wastewater discharges to a creek hosting federally protected salmonids) are wholly unsupported. And the Draft EIS conclusion that wildfire hazards are not significant in this community (which has suffered two major wildfires with large evacuations in the last seven years) lacks any credibility.

If the Koi Nation decides to continue pursuing this project on Shiloh Road, an area to which it has no valid ancestral or modern ties, and the BIA entertains this project, a new legally-compliant Draft EIS must be prepared and recirculated for public comment. The gulf between the Draft EIS and an acceptable Final EIS is so great that it cannot be bridged merely with a response to comments section, unenforceable mitigation measures, and creative reinterpretations of the flawed studies that fail to support BIA's conclusions of no significant impact. The new Draft EIS must include alternative off-site locations and it must correct the many inadequacies and the misleading information contained in the current document so that the robust evaluation of alternatives by BIA and the public envisioned by NEPA can occur.

Applicant's Response (verbatim)
"Please refer to Response to Comment T8-1. The comment includes a summary of the concerns raised within the letter and does not raise any new substantive environmental issues beyond those presented earlier in the letter and attachments."

Evaluation of Applicant's Response
No response necessary.

Review Item 23. FIGR Comment T8-48

FIGR Comment (verbatim)
CONCLUSION
FIGR requests that the BIA withdraw this Draft EIS and the proposed Federal General Conformity Determination. The Draft EIS is riddled with major errors, fails to use "best available science," and is notable for its significantly flawed analyses of environmental impacts and its identification of phantom and/or ineffective mitigation measures. It is a textbook example of an EIS that fails to comply with NEPA and associated case law.

The Draft EIS does not evaluate any alternative project sites, including within Lake County (where the Koi Nation's ancestral territory is located), which constitutes a patent failure to rigorously and objectively evaluate a reasonable range of alternatives. The required NHPA Section 106 consultations with FIGR and other tribes have been "insufficient, inadequate and unreasonable." The important transportation and air quality analyses are critically undermined by a fatally flawed traffic study that grossly underestimates

the trips this project would generate. The conclusions of "no significant impact" or "less than significant impact" in many key impact areas (including biological resources, land use, and wastewater discharges to a creek hosting federally protected salmonids) are wholly unsupported. And the Draft EIS conclusion that wildfire hazards are not significant in this community (which has suffered two major wildfires with large evacuations in the last seven years) lacks any credibility.

If the Koi Nation decides to continue pursuing this project on Shiloh Road, an area to which it has no valid ancestral or modern ties, and the BIA entertains this project, a new legally-compliant Draft EIS must be prepared and recirculated for public comment. The gulf between the Draft EIS and an acceptable Final EIS is so great that it cannot be bridged merely with a response to comments section, unenforceable mitigation measures, and creative reinterpretations of the flawed studies that fail to support BIA's conclusions of no significant impact. The new Draft EIS must include alternative off-site locations and it must correct the many inadequacies and the misleading information contained in the current document so that the robust evaluation of alternatives by BIA and the public envisioned by NEPA can occur.

Applicant's Response (verbatim)

"Please refer to Master Response 2 regarding the completeness of the EIS and the hard look standard. The regional wildfire risk and history of wildfires are discussed in Draft EIS Section 3.12.2 and Draft EIS Appendix N-1. As stated therein, the Project Site is primarily designated as 3 (high) wildfire risk according to the County Wildfire Risk Index and several fires have occurred in the area, including the Tubbs Fire and Kincade Fire. Although, "wind influences" was not specifically noted in the Draft EIS, the potential for wildfires to occur in the region are disclosed and the potential for impacts associated with wildfire are analyzed. While TSS assumes that vineyards present a wildfire risk, they are largely recognized in the region as serving as a fire break as noted in the Town of Windsor's Comment Letter (see Town Comment A8-67) and other literature.38 The fact that Pruitt Creek contains vegetation that could intensify a wildfire is acknowledged in Draft EIS Section 3.12.2 and mitigation is included in Draft EIS Section 4 regarding a riparian corridor wildfire management plan to reduce fire hazards on and adjacent to Pruitt Creek. The documents reviewed by TSS and the methodology and results of the site visit are noted."

Evaluation of Applicant's Response

The Applicant's response is truly not responsive to the points made in by the FIGR. It is also primarily composed of arguments that have been put forward throughout the EIS and nothing new has been raised. A detailed response is not needed here.

Review Item 24. FIGR Comment T8-49

FIGR Comment (verbatim)

Evacuation

During the site visit close attention was paid to the three access/egress (A/E) points shown in the concept maps in the DEIS. The location designated as "A/E 2" (refer to Figure 2 in the full version of the site visit report (presented in Attachment B) represents the highest concern and constitute a significant and fatal flaw in the project design and determination of impact significance. This A/E location for the Project is directly opposite an A/E point for a suburban housing development with about 100 single-family homes. This is an intersection where, under normal conditions, the use competition between the Project and the

homeowners may not be a significant issue. However, the same competition in an emergency evacuation use scenario could create harms that are much more significant and un-mitigatable.

Shiloh Road has a lower service level designation than the Old Redwood Highway to the west end and the Faught Road system on the east. However, as observed there was moderate-to-periodically heavy volume of traffic, using Shiloh Road as a "cross-over". As of this point in the review process, a thorough discussion of current traffic patterns and volumes for Shiloh Road, and how it will function under a wildfire-related emergency evacuation, has not been addressed in the DEIS. Looking at the "A/E 2" situation the core question would be how long would it take to get all of the involved people (Project and housing development) out of harm's way? And, when it comes down to it, there may not be a traffic engineering solution to the shorter time requirements typical of an emergency evacuation scenario; other solutions need to be identified and explored in EIS process.

Conclusions from the Site Visit
The combination of on-site vegetation types capable of producing dangerous wildfire behavior, the alignment of the Pruitt Creek riparian features with the prevailing winds, and the relatively long delays to vacate the project site opens up a realistic potential for creating significant levels of harm to the Project's occupants. Given the locations of the three A/E points it does not appear an appropriate in situ analysis has been completed that addresses traffic in an emergency wildfire evacuation scenario.

Applicant's Response (verbatim)
"Evacuation analysis was conducted and addressed in Draft EIS Section 3.12 and in Appendix N-2, and traffic to/from the Project Site was included in the evacuation travel time modeling exercise. Please refer to Master Response 11 regarding the wildfire evacuation analysis assumptions and methodology. Please also refer to Master Response 10 regarding wildfire-related emergency evacuation analysis and associated mitigation. Please also refer to Response to Comment T8-58 for more detail regarding the ETTA."

Evaluation of Applicant's Response
To view the FIGR evaluation and conclusions regarding Master Responses 10 and 11, please go to Section 2 of this report. The Applicant's response is truly not responsive to the very specific points made by the FIGR. It is also primarily composed of arguments that have been put forward throughout the EIS and nothing new has been raised. A detailed response is not needed here.

Review Item 25. FIGR Comment T8-50

FIGR Comment (verbatim)
Industry-Standard Practices
The most critical pathway to preparing a compliant EIS document includes the (1) the involvement of qualified individuals, (2) collection of empirical data pertinent to the subject(s) being assessed, (3) use of industry-standard analysis procedures that employ performance standards thresholds, and (4) decision models that use empirical evidence as inputs, and produce findings and conclusions that are consistent, and comparable to, the performance standards.

Both the phenomena of wildfire and evacuation involve movement over a landscape with the patterns of the movement and the intensity of its ability to make changes in the landscapes features as it moves from one location to another being dependent on the elements of the setting present. In order to properly gather empirical data for these mobile phenomena an in situ analysis needs to be completed. Such an analysis in this project situation would have to be comprised of the following elements to provide adequate empirical evidence support for a NEPA compliant wildfire-related impact assessment:

- Identify a reasonably-sized, and configured, assessment area and locate its boundaries on a suitable mapping base;
- Locate the proposed project's footprint on the mapping base within the full assessment area;
- Identify features, or environmental phenomena {in the aggregate referred to as "ground condition categories" {GCC)), that have direct influence over wildfire behavior. An industry standard set of these features, or phenomena, include terrain slope percentage, terrain aspect, soil types, wind direction and velocities of three wind types {prevailing, diurnal, and extraordinary), vegetation type {cross-walked to industry-standard fuel models), and land use;
- Prepare a map of the distributions of the presence, or zone of influence, of each GCC;
- Identify the attributes of each GCC selected for inclusion in the analysis {these attributes must align with the performance standards in order to achieve a NEPA-compliant impact assessment)
- Conduct a multi-variable analysis to predict, for both the project footprint and the full assessment area, the hazard {likelihood that wildfire could be present) and risk {how damaging the wildfire could be) levels, and;
- Determine the types and intensities of effect/impacts for two different scenarios: (1) should wildfire encounter the project area, and (2) should a fire ignite within the project footprint and move into the full assessment area.

Regardless of the subject being analyzed, these industry-standard procedures employ similar data collection procedures, use of empirical data wherever possible, use of professional judgment when empirical data is lacking, decision models compliant with accepted standards of performance, and similar reporting bases, formats, and terminology. In both the areas of wildfire and emergency wildfire related evacuation, assessing the results of an in situ analysis is a core process. This DEIS is inadequate because it fails to present any evidence that these analyses were conducted.

Applicant's Response (verbatim)

"Please refer to Master Responses 10 and 11 for a discussion of wildfire and evacuation impacts, including discussion of technical reports prepared for the Proposed Project and analysis methodology. Please also refer to Response to Comment A8-67 regarding the fire resiliency measures included as design features, BMPs, or mitigation intended to reduce the potential for fire to spread on the Project Site as recommended in Draft EIS Appendix N-1. Please also refer to Response to Comment A9-47 regarding the effectiveness of mitigation measures associated with wildfire evacuation. As described therein, technical analysis was prepared by qualified individuals (see Draft EIS Appendix N) based on the regional wildfire risk and history of wildfires in the area and the potential for impacts associated with wildfire are analyzed."

Evaluation of Applicant's Response

To view the FIGR evaluation and conclusions regarding Master Responses 10 and 11, please go to Section 2 of this report. The Applicant's response is truly not responsive to the very specific points made by the FIGR. The content of this response has already been "asked and answered" in several other location in these comment review materials and nothing new has been raised. A detailed response is not needed here.

Review Item 26. FIGR Comment T8-51

FIGR Comment (verbatim)

Empirical evidence {EE) is typically defined as information obtained through observation and documentation of certain behavior and patterns or through an experiment. In this assessment EE fills three primary roles:

- It provides factual data in the project description that enables reviewers (1) a better understanding of the nature, and intensity, of any potential adverse effects or impacts on the sensitive resources addressed in the EIS, and (2) information upon which, allows identification of the need for mitigating actions;
- It provides links between the DEIS document and the various technical reports of studies completed in support of the preparation of the DEIS, and;
- Fully supports the decision models involved in determining whether an effect/impact is adverse or not and the level of significance of the effect or impact.

An example of the first role is provided by the situation in this DEIS pertaining to emergency water that would be needed for fire suppression (focusing on wildfire). The DEIS does describe the location of the 1,000,000-gallon capacity of water, and mentions that it is to be available for emergency fire suppression. However, what is completely lacking is empirical evidence describing:

- The proportional allocation of emergency water for within-in structure sprinkler systems versus that for wild land fire suppression;
- "Stamped" (Professional Engineer approved) site maps of the emergency water distribution system within the facility showing piping locations and a hydrant system map, and;
- Associated tables presenting specifications for the hydrant system (location, type, flow ranges, etc.) and the piping system (volume and pressure).

Applicant's Response (verbatim)

"Please refer to Response to Comment T8-35 for discussion of building code compliance related to fire protection. Planning and development of a fire suppression system would be conducted upon selection of a project alternative and design of those facilities. Please also see Master Response 2 regarding the level of design detail required for NEPA Analysis."

Evaluation of Applicant's Response

The Applicant's response heads directly into the subject area refer to as "piecemealing". Deferral of providing this information removes the ability of the SCFD to fully assess whether they can enter into a MOU for service provision and make this a "remote and speculative" remedy.

Review Item 27. FIGR Comment T8-52

FIGR Comment (verbatim)

The traffic impact analysis report (delivered by Fehr and Peers) used predictive models normalized to the entirety of Sonoma County, did not have results of an in situ analysis and was not well connected to effects on, or from, the Project. No analysis was conducted for a wildfire-related emergency evacuation scenario; a major issue given the wildfire history within the region.

Without clear statements of the empirical evidence used in support of determining the significant levels of the effects/impacts, as was the case throughout this DEIS, it was not possible to determine the accuracy of the conclusions.

Applicant's Response (verbatim)

"Evacuation analysis was conducted and addressed in Draft EIS Section 3.12 and in Appendix N, and traffic to/from the Project Site was included in the evacuation travel time modeling exercise. Please refer to Master Response 11 regarding the wildfire evacuation analysis assumptions and methodology. Please also refer to Master Response 10 regarding wildfire-related emergency evacuation analysis and associated mitigation.

Evaluation of Applicant's Response

Again, where specifically in the FEIS Section 3.12 can description of, and conclusions from, the analysis be found? Appendix N is broken down into four (4) separate reports; to which one is the Applicant's comment referring? Please refer to TSS' evaluation of the Applicant's Master Responses 10 and 11, in Section 2 of this report.

Review Item 28. FIGR Comment T8-53

FIGR Comment (verbatim)

TSS identified several inadequacies in the processes and/or analyses typically associated with conducting a NEPA-compliant environmental effects/impacts study. Identification of these inadequacies were based on the professional qualifications of the authors: Tad Mason, California Registered Professional Forester and Steven Daus, Ph.D. and retired California Registered Professional Forester. Both Mr. Mason and Dr. Daus qualify, (1) to use professional judgment where appropriate, and (2) to serve as expert witnesses based on their academic training, certification, and experience. Biographic information, appropriate to this review, can be found in Attachment C.

The general types of inadequacies that were identified in the review process include but are not limited to:

- Absence of figures that provide a level of informational specificity that permit an assessment of the compliance with performance standards;
- Absence of analyses that characterize industry standard effect/impact studies;
- Including level of significance determinations that are unsupported by an analysis of empirical data, and;

- Recommending mitigations that are, in the professional judgment of the authors, not reasonably implementable and/or not adequate to bring impacts to a more desirable "less than significant" level.

Overall Framing Comments

After a thorough review of the DEIS, the associated documents, (see Attachment A for complete list), two overall, or baseline, comments emerged relative to the adequacy of the DEIS in the wildfire and emergency evacuation subject areas:

- Lack of adequate levels of empirical data to support a compliant assessment of effects/impacts that could result from implementation of the project as proposed, and;
- Mostly pertinent in the wildfire subject area, the influences of overlapping jurisdictions could result in significant constraints on the ability to implement fuels reduction management.

Applicant's Response (verbatim)

"Please refer to Master Response 2 for a discussion of the adequacy of analysis within the Draft EIS. Please refer to Master Responses 10 and 11 for a discussion of wildfire and evacuation impacts and the supporting analysis assumptions and methodology. Please refer to Master Response 7 for a discussion of the development of mitigation measures by qualified experts. Responses to the specific comments on these issues are provided below."

Evaluation of Applicant's Response

Please refer to TSS' evaluation of the Applicant's Master Responses 2, 7, 10, and 11, located in Section 2 of this report.

Review Item 29. FIGR Comment T8-54

FIGR Comment (verbatim)

The generation of empirical data pertinent to a specific Project situation is typically provided through the conduct of an in situ analysis that is tailored to the Project's specific information needs. This type of analysis starts with establishing a reasonably-sized study area and then identifying, for the conditions within the defined study area (1) the effects on, or impacts to, the Project, based on its location within the operational setting, and (2) effects on, or impacts to, any, or all, of the elements of the operational setting within the study area, as a result of implementing the Project. However, the approach employed in the preparation of the DEIS was to obtain information by (1) using traffic flow figures modeled at the Sonoma County level and (2) and then augmenting this information using direct observations (primarily traffic volume figures) at very localized sites (in this case the set of intersections studied). The results from this effort did not provide empirical data regarding a wildfire-related emergency evacuation scenario specific to the Applicant's project.

In the wildfire subject area this type deficiency could hinder the ability of potential service providers to assess the situation in which they would be providing services. For example, without a more factual presentation of the emergency water delivery system within the Project's footprint (e.g., flow volumes and pressures, hydrant locations) Sonoma County Fire Department (SCFD) cannot properly assess the means by which they would respond to either a structure, or wild land, type of incident.

Applicant's Response (verbatim)

"The comment is vague regarding what specific information in the Draft EIS wildfire analyses should be added or changed. A reasonable study area, the baseline conditions for the analyses, and the impacts of Proposed Project operations have all been disclosed in the Draft EIS. Empirical data related to wildfire-related emergency evacuation scenarios has been incorporated from both the Tubbs and Kincade fires in Sonoma County as well as data from actual traffic counts for the study area intersections. Data from recent traffic counts has been modeled to provide an assessment of future year scenarios which would reflect project opening (2028) and cumulative year (2040) conditions. The comment does not provide examples of alternative analyses or federal standards/requirements. In fact, with respect to wildfire evacuation, the ETTA analysis conducted represents the best available science prepared by former Sonoma County fire and law enforcement officials (experienced service providers) and transportation engineers with direct experience in Sonoma County. Further, the commenter provides no alternative criteria required by federal law or NEPA to conduct such analyses."

Evaluation of Applicant's Response

First of all, it is not our responsibility to inform the Applicant what they should be providing; this must fall on the shoulders of the experts they retained to do the analysis. TSS would sure like to know where in the FEIS there are any descriptions, discussions, or disclosures that pertain to defining 1) a reasonable study area, 2) baseline conditions for the analysis, 3) identifying the impacts resulting from implementing the Proposed Project, and 4) determination of their significance. This statement is simply an untruth as it applies to conducting industry standard analyses of wildfire behavior or wildfire-related evacuations. Review of FEIS Appendices N-2 (Fehr and Peers) and N-4 (CAS Safety Consulting) shows that neither report provides, 1) a map of their study area, 2) names of the model(s) used in their analysis, 3) although describing evacuation time as the primary dependent variable, do not provide any information on the independent variables they used as inputs to the model(s), 4) descriptions of the effects attributable to the addition traffic from the Proposed Project, or 5) determination of the significance of the effect and resulting impacts. We do take exception to the two response statements below:

Comment #1: *"The comment does not provide examples of alternative analyses or federal standards/requirements.*

Comment #2: *In fact, with respect to wildfire evacuation, the ETTA analysis conducted represents the best available science prepared by former Sonoma County fire and law enforcement officials (experienced service providers) and transportation engineers with direct experience in Sonoma County."*

Again, it is not a reviewer's responsibility to correct technical aspects that were prepared by claimed experts; they should already know what industry-standard alternatives are available and the degree to which they comply with NEPA requirements. With respect to Comment #2, the second sentence this is a blatant mis-statement. The wildfire portion of the evacuation analysis process is completely lacking information inputs and analysis procedures that typify industry standard assessments in California, i.e. basically determining the levels of wildfire hazard and risk within a project study site, itself, and in a reasonable area in proximity to the project.

Review Item 30. FIGR Comment T8-55

FIGR Comment (verbatim)

In this Project situation there are, in effect, four categories of regulatory entities: Sovereign Koi Nation, Bureau of Indian Affairs (BIA), State of California, and Sonoma County. Especially in the wildfire subject area, this number of responsible parties can lead to (1) overlapping mandates and responsibilities with respect to managing the resources associated with the Project area and surrounding lands, and (2) mandate conflicts.

A very clear example is provided by the defining of appropriate management actions for the riparian gallery formation along Pruitt Creek. In its position shown in the set of conceptual site plans, coupled with ground observation of its current wildfire fuels condition, this feature presents a clear and present ability to result in significant levels of harm to occupants of the Project facility. In general, the sovereign nation status of the Koi tribe means that the normally applicable land use regulatory regimes of Sonoma County and the State, implemented through a County issuance of a Conditional Use Permit (CUP) and enforcement of defensible space regulations, are not applicable. Furthermore, should the Tribe desire to implement a truly adequate level of wildfire fuels reduction management their efforts may be significantly constrained by requirements to comply with provisions of the federal Clean Water Act (jurisdictional Wetlands) and Endangered Species Act (listed species and communities), Acts. These issues may make it extremely difficult to address and mitigate for this kind of site in this location.

Application Response (Verbatim)

"Wildfire Hazard Mitigation measures related to vegetation management are provided in Section 4 of the Draft EIS and include the preparation of a riparian corridor management plan to address weed abatement and fuel load reduction outside the creek channel, removal of dead or dying vegetation and trees, pruning, removal of live flammable groundcover, firebreaks, and other measures to address wildfire hazards. While local land use policies do not apply to lands taken into federal trust, these measures are consistent with the California Fire Code, Sonoma County Municipal Code, and the Sonoma County Fire District Weed Abatement Measures, which all identify similar maintenance of defensible space around buildings and abatement hazardous vegetation and combustible materials. The adoption of standard policies and procedures widely used across the region adequately addresses the effectiveness of Wildfire mitigation measures and BMPs included in the Draft EIS. Should the need arise to implement brush management within Pruitt Creek, permits can be obtained from regulatory agencies to accommodate this activity. However, the current mitigation measures are deemed to be adequate. Please refer to Master Response 8 for a discussion of potential land use conflicts with local jurisdictions."

Evaluation of Applicant's Response

This response starts with a general statement about Wildfire Hazard Mitigation that includes the type of fuels to be removed and the preparation of a riparian corridor management plan (to be prepared at an undefined, but later, date. The response continues with the statement below:

"The adoption of standard policies and procedures widely used across the region adequately addresses the effectiveness of Wildfire mitigation measures and BMPs included in the Draft EIS."

It was, for the reviewer, difficult to 1) decipher the meaning of this statement and 2) to understand how it relates to "overlapping mandates and responsibilities with respect to managing the resources associated with the "Project area and surrounding lands". The reviewer would like to have seen a list of what constituted "standard policies and procedures" and those individuals or organizations, across the region, who have designated these actions suitable as mitigations within the NEPA framework. Once again, the Applicant has shown a completely "project-centric" approach; choosing not to even consider the importance to the safety of their patrons, much less those in the communities in the surrounding areas, in light of the demonstrated possibility of being involved in a catastrophic wildfire event. The Applicant's response merely covered "old ground" and was non-responsive to the FIGR's comments.

Review Item 31. FIGR Comment T8-56

FIGR Comment (verbatim)

Inadequacies of a General Nature

1. Information Content of Figures Used Throughout the DEIS - The entire set of figures included in the DEIS were actually of a type that would be considered a presentation of concepts rather than the provision of empirical data in support of making effect/impact significance determinations. T8-56

2. Absence of "stamped" (i.e. prepared by a qualified professional) site plans - Throughout the DEIS document {body and addenda) there is a complete absence of detailed site plans typically found in facility-related projects undergoing impact studies. These industry-standard site plans contain details that permit regulators to make decisions regarding the levels of compliance with their respective standards of performance and the need for mitigation.

Application Response (Verbatim)

"Wildfire Hazard Mitigation measures related to vegetation management are provided in Section 4 of the Draft EIS and include the preparation of a riparian corridor management plan to address weed abatement and fuel load reduction outside the creek channel, removal of dead or dying vegetation and trees, pruning, removal of live flammable groundcover, firebreaks, and other measures to address wildfire hazards. While local land use policies do not apply to lands taken into federal trust, these measures are consistent with the California Fire Code, Sonoma County Municipal Code, and the Sonoma County Fire District Weed Abatement Measures, which all identify similar maintenance of defensible space around buildings and abatement hazardous vegetation and combustible materials. The adoption of standard policies and procedures widely used across the region adequately addresses the effectiveness of Wildfire mitigation measures and BMPs included in the Draft EIS. Should the need arise to implement brush management within Pruitt Creek, permits can be obtained from regulatory agencies to accommodate this activity. However, the current mitigation measures are deemed to be adequate. Please refer to Master Response 8 for a discussion of potential land use conflicts with local jurisdictions."

Evaluation of Applicant's Response

The Applicant's response does not specify that the riparian area is Pruitt Creek, however it will be so assumed. The riparian corridor management plan remains a remote and speculative remedy and cannot be considered as a mitigation measure in determining impact significance. Furthermore, the ability to implement effective and efficient vegetation management, for the purposes of minimizing risk of damage from wildfire, will be significantly constrained due to the presence of wetland conditions, potential

presence of listed special status botanical and wildlife species, specialized habitats, and potential presence of cultural resources. Without being able to describe what mitigation actions could ultimately be implemented it is not reasonable to declare that "the current mitigation measures are deemed to be adequate".

Review Item 32. FIGR Comment T8-57

FIGR Comment (verbatim)
Inadequacies of a General Nature
Absence of in situ analyses - With the exception of the studies of typical traffic conditions, no analyses were delivered that related the on-site conditions to the more regional setting conditions. These analyses address both, (1) the potential direct, indirect, and cumulative effects/impacts that implementing the project, at its designated location, can have on setting conditions in reasonably adjacent areas, and (2) what effects ground conditions, and or phenomena, in reasonably adjacent areas can have on the proposed facility and its occupants.

Applicant's Response (verbatim)
"Please refer to Response to Comment T8-35 for a discussion of direct, indirect, and cumulative wildfire impacts. The baseline environmental setting related to wildfire hazards is provided in Section 3.12.2 of the Draft EIS."

Evaluation of Applicant's Response
The Applicant's response addresses wildfire setting whereas subject of the FIGR comment is traffic as it relates to evacuation.

Review Item 33. FIGR Comment T8-58

FIGR Comment (verbatim)
Inadequacies of a General Nature
Absence of a Wildfire-Related Emergency Evacuation (WREE) scenario in the impact analyses. Prior to accepting the results of the current traffic analysis an industry-standard in situ analysis needs to be completed that addresses volumes and directions of traffic flows that are under conditions of a WREE. Without this detailed analysis, there is no factual basis on which to conclude that wildfire risks will be less than significant.

Applicant's Response (verbatim)
"The methodology for the ETTA was detailed in Draft EIS Appendix N-2. As described therein, Evacuation demand was modeled using the EVAC+ tool developed by Fehr & Peers. The EVAC+ tool uses socioeconomic data from the U.S. Census and other data from the Sonoma County Transportation Authority (SCTA) travel demand model such as number of households, population, vehicle ownership, and employment to forecast the number of vehicles that would be generated during an evacuation event. The number of visitor evacuation trips was estimated according to a Sonoma County tourism report in 2023. The background traffic demand and EVAC+ evacuation demand was input into a dynamic traffic assignment (DTA) model, which uses the SCTA travel demand model network capacities to route the travel demand between origin points (Project site, residential areas, etc.) to evacuation gateways at the

boundary of the study area (e.g., US 101 just north of Santa Rosa). The ETTA was conducted based on circumstances similar to what occurred during the Tubbs Fire in 2017, referred to as the "No Notice Scenario", and the Kincade Fire in 2019, referred to as the "With Notice Scenario", under both 2028 No Project and 2028 Plus Project conditions. In addition, the ETTA modeled a No Notice Scenario and With Notice Scenario under both 2040 No Project and 2040 Plus Project conditions. Therefore, the ETTA provides a detailed analysis of evacuation times for the study area based on actual wildfire and history in the study area. The commenter does not explain how this detailed analysis is not sufficient. Please refer to Master Response 11 regarding the wildfire evacuation analysis assumptions and methodology, Master Response 10 regarding wildfire-related emergency evacuation analysis and associated mitigation, and Master Response 2 regarding the NEPA hard look standard."

Evaluation of Applicant's Response

The Fehr and Peers work (FEIS Appendix N-2) relied on results generated by a computer-based model that used data from publicly accessible traffic databases. There were no indications of in-field collection of original data or site visits for the purposes of verifying inputs to the model or results from it. The model output (dependent variable) was evacuation travel time (ETTA) that, unfortunately did not have a direct correspondence to the root problem, a relatively low traffic volume capacity. In fact, in one of the two traffic scenarios examined (named as the "No Notice" Scenario) the concluding statement was, *"This scenario has a theoretical maximum background utilization of the study area's roadway network, with limited remaining capacity to accommodate the Project's evacuation demand".* Furthermore, the assumptions used "in the development of background and evacuation traffic demand" did not include considerations of current actual level of service, condition of the roads, mix of vehicle types (baseline v. evacuation traffic), or road segment vulnerability to loss of function due to involvement in a wildfire event.

This response concludes with, *"Therefore, the ETTA provides a detailed analysis of evacuation times for the study area based on actual wildfire and history in the study area."* A question that immediately comes to mind is: What does *"a detailed analysis of evacuation times"* actually mean in a situation where lack of capacity is the problem?. A second question is: what the heck does *"based on actual wildfire and history in the study area."* mean?

For FIGR's evaluation of the Applicant's Master Responses 2, 10, and 11, please see Section 2 of this report.

<u>Review Item 34. FIGR Comment T8-59</u>

FIGR Comment (verbatim)

Inadequacies of a General Nature

Sequencing in tasking - Typically, a DEIS contains, as part of the project description, a level of detail that supports a robust analysis of the potential effects, or impacts, should the project be implemented. In order to do this successfully, a significant effort needs to be put into the preparation of a project description prior to the preparation of a DEIS. The effort must involve expert input to describe the project in terms of the specific individual actions required to T8-59 implement the project and comprehensive, illustrative materials {e.g., tables, charts, site plans, etc.). In contrast, this DEIS appears to be out of proper

sequencing by proposing to leave some critical planning activities (e.g., riparian management plan, evacuation plan, and entering into agreements with SCFD for emergency services) to an unspecified future point in time where the subsequent planning effort has to deal with an "as built" situation (already in place roads, property ingress/egress points, structures, infrastructures, etc.). This deferral of wildfire analyses and mitigation measures impairs the ability to assess wildfire and evacuation risks in the DEIS and significantly limits the ability of the Applicant to make changes needed to the Project.

Applicant's Response (verbatim)
"Please refer to Response to Comment T8-46 regarding the alleged deferral of analysis and mitigation regarding wildfire risk and Response to Comment T8-79 regarding the timing for the project-specific evacuation plan."

Evaluation of Applicant's Response
For FIGR's evaluation of the Applicant's Individual Responses T8-46 and T8-79, please see Section 3 of this report.

Review Item 35. FIGR Comment T8-60

FIGR Comment (verbatim)
Inadequacies Demonstrated in Specific Content Areas
Wildfire Reference: Executive Summary, Table ES-1 Section 3.3 Groundwater (2) - No information is presented to determine whether recharge rates are sufficient to provide water needed for fire suppression, (either structure fire or wildfire). Specific to wildfire issues the finding of a "Less than Significant" (LS) effect lacks any factual or scientific support.

Applicant's Response (verbatim)
"Water supply for fire flow was included in water supply assumptions for the Proposed Project (see Draft EIS Section 2.1.3 and Appendix D-1 Water and Wastewater Feasibility Study) and thus groundwater demands encompass those needed for fire suppression, including wildfires. As discussed in Section 3.3.3, It is expected that groundwater is available within the Project Site and can reliably produce up to 400 gallons per minute (576,000 gpd) based on existing Project Site wells and the investigations conducted by the Town to develop a potable water source at Esposti Park. The Proposed Project is not anticipated to negatively impact recharge and in fact may result in increased recharge as discussed in Response to Comments A9-77 and A9-78."

Evaluation of Applicant's Response
A thorough review of FEIS Section 2.1.3 mentions a fire flow requirement estimated to be 2,000 gallons per minute for a four hour period. However, this availability was discussed within the context of structural requirements; no mention was of availability for wildfire response needs. This omission could result in a significantly elevated level of risk from wildfire should an incident occur. In addition, a similar review of the technical report in Appendix D-1 revealed no mention of water availability for the purposes of fire suppression; structural or wildfire. Comments A9-77 and A9-78 address subjects not in TSS' Scope of Work.

Review Item 36. FIGR Comment T8-61

FIGR Comment (verbatim)

Inadequacies Demonstrated in Specific Content Areas

Wildfire

Reference: Executive Summary, Table ES-1 Section 3.5 Biological Resources, Mitigation Measures (MM) A through C-The conditioning statement in MM A that "Alterations to riparia vegetation shall be avoided to the maximum extent possible", basically precludes the ability to manage this feature in a way that will significantly reduce the ability to cause harm if it should be involved in a wildfire event. As noted, there are no plans for vegetation management within the riparian area {Pruitt Creek), which eliminates the opportunity to reduce hazardous fuels. The finding that the level of effect significance can be taken from "Potential Significance" {PS) to "Less than Significant" {LS) is not supported by information presented in the DEIS.

Reference: Executive Summary, Table ES-1 Section 3.10 Public Services Fire Protection and Emergency Medical Services (1) and (2), Page ES-19 - The absence in the DEIS of an analysis of the wildfire behavior-related hazard and risk levels associated with the riparian gallery formation and the vineyards create an analytical gap with the LS and PS-to-LS effects findings.

Reference: Executive Summary, Table ES-1 Section 3.12 Construction Wildfire Risk, Page ES-20 - No consideration was given in the DEIS to the wildfire situation when the project goes into its operational phase. Two features, the riparian gallery formation and vineyards, have the potential for producing harmful wildfire behaviors and no assurances or mitigation measures are identified that ensure that there would be appropriate wildfire response services available. The finding of LS effect levels has not been properly supported in the DEIS.

Applicant's Response (verbatim)

"Please refer to Master Response 7 for a discussion of the development of mitigation measures by qualified experts. Please refer to Response to Comment T8-48 regarding the regional wildfire risk and history of wildfires, including the wildfire risk of Pruitt Creek. Mitigation measures proposed for Wildfire Hazards within Draft EIS Section 4 would adequately mitigate wildfire impacts with respect to brush management within Pruitt Creek. The impacts of specific wildfire behavior on the operation of the Proposed Project would be addressed through compliance with relevant building codes. Please refer to Response to Comment A8-67 and Response to Comment T8-35 for discussion of building code compliance related to fire protection. Please refer to Response to Comment T5-9 for a discussion of fire protection service availability for the project site".

Evaluation of Applicant's Response

Mr. Losch's work focused on defining the wildfire history, and programmatic designations of levels of wildfire hazard, and elements of the projects setting. It did not address wildfire behavior in either on-, or off-project locations using an industry-standard wildfire behavior prediction model. It is unfortunate to accept but Mr. Losch's work did not rise to a quality reflective of an "expert" in the current wildfire analysis arena. Again, the Applicant's response includes the same endorsement of their proposed

mitigation effort that includes general references to the use of Mitigation Measures and Best Management Practices and deferral of defining operational details to a post-ROD time.

Review Item 37. FIGR Comment T8-62

FIGR Comment (verbatim)

Reference: DEIS Section 4 (Mitigation Measures-Public Services and Utilities), Item B, Page 4- 10 - The timing statement "Prior to operation" could mean any time from project inception to completion of construction. This deferral of specific wildfire response information and risk analyses within the DEIS impairs the ability to determine now whether these mitigations will reduce risks to lower levels. With only the conceptual figures available, the SCFD will not have site details essential for scoping out the services the Applicant needs, or that are reasonably possible to deliver. "Stamped" site plans need to be put into the SCFD's hands so that they can compare what is being proposed to what is required in regulatory codes (access, emergency water system, construction design and materials used, etc.).

Reference: DEIS Section 3.3.3.2, Alternative A-Proposed Project, Page 3-20 - There is information cited from standard reports prepared by professional hydrologists, but none relates to (1) sufficiency of water required for suppression of wildfire, (2) sources (holding tank(s), surface ponds, hydrant system, etc.) that is/are dedicated to emergency needs, or (3) a detailed description of the hydrant system supported by site maps and system specifications. The lack of this information completely forestalls the ability of service providers (fire departments, medical emergency responders, law enforcement agencies, regulators mandated to have responsibility for wildfire issues, insurance companies, etc.) to accurately evaluate and mitigate the risks involved. These major omissions also create a critical data gap that eliminates the ability to make less than significant impact findings.

Applicant's Response (verbatim)

"The referenced mitigation measure (Public Services and Utilities Mitigation Measure B) states that "Prior to operation, the Tribe shall make good faith efforts to enter into a service agreement with the SCFD to compensate SCFD for quantifiable direct and indirect costs incurred in conjunction with providing fire protection and emergency medical services to the Project Site. The agreement shall address any required conditions and standards for emergency access and fire protection systems." However, if for whatever reason the service agreement with SCFD is not finalized, the Tribe would be required establish, equip, and staff an on-site fire department as part of the public safety building (Public Services and Utilities Mitigation Measure C). The applicable standards for construction of the fire suppression system are Tribe's Building and Safety Code of 2023, which is consistent with the CBC and California Public Safety Code, including building, electrical, energy, mechanical, plumbing, fire protection, and safety standards. See Response to Comment T8-35 for additional discussion of building code compliance related to fire protection. Planning and development of a fire suppression system would be conducted upon selection of a project alternative and design of those facilities.

Regarding the level of design detail for on-site fire infrastructure, please refer to Master Response 2 and Response to Comment A8-68. The level of detail of the Project description and associated site planning included within the EIS is sufficient to determine the extent of environmental impacts as required by NEPA. Water supply for fire flow was included in water supply assumptions for the Proposed Project (see Draft

EIS Section 2.1.3 and Appendix D-1 Water and Wastewater Feasibility Study). The comment does not provide an alternative standard or requirement specific to wildfires that would differ from the included fire flow assumptions and proposed consistency with the California Building Code (including the California Fire Code) standards."

Evaluation of Applicant's Response

As discussed previously the current status of the MOU agreement with the SCFD keeps it in a "remote and speculative" category and cannot be used as a remedy. Furthermore, the alternative of the Koi Tribe developing it's own emergency response capability may not be, in the end, feasible. The best alternative, relative to this issue, is to pull application and work with the SCFD to find out precisely what they would need to get an MOU in place and then revise the EIS for resubmittal.

The comment *"The level of detail of the Project description and associated site planning included within the EIS is sufficient to determine the extent of environmental impacts as required by NEPA"* is not supportable, especially when one reads the next statement; *"Water supply for fire flow was included in water supply assumptions for the Proposed Project (see Draft EIS Section 2.1.3 and Appendix D-1 Water and Wastewater Feasibility Study)".* There is, actually, no evidence in either location that water for wildland fire suppression has been considered in any of the supply requirements considerations. Again, without information to this level of detail it would not be feasibly possible to identify effects generated from implementing system augmentations to provide water for wildfire suppression.

Review Item 38. FIGR Comment T8-63

FIGR Comment (verbatim)

Reference: Section VII (Hazards and Hazardous Materials), Item d) of the DEIS Appendix A : Off-Reservation Environmental Impact Analysis Checklist, Page 5 - There is no empirical evidence presented in the DEIS, or indication that an analysis has been completed, demonstrating that the mitigation measures detailed in Section 3.12 will actually result in significant changes in fuels conditions, and their associated risks, due to limitations imposed on management actions by protective provisions of the Endangered Species (direct impacts and wildlife habitat modification), and Clean Water (Jurisdictional Wetlands) Acts.

Applicant's Response (verbatim)

"The commenter references the Off-Reservation Environmental Impact Analysis Checklist, which was not included with the Draft EIS; however, mitigation related to wildfire is included in Draft EIS Section 4. Please refer to Master Response 2 for a discussion of the adequacy of analysis within the Draft EIS. Please refer to Response to Comment T5-9 for a discussion of fire protection service availability for the project site. Please refer to Response to Comment T8-55 for a discussion of wildfire hazard mitigation measures related to vegetation management."

Evaluation of Applicant's Response

Perhaps the Applicant needs to consider preparing a supplemental document with this checklist as an additional appendix. The checklist would bring a more "prescribed" process into use and would generate results more relatable to the NEPA process. As previously discussed, it is the position of the reviewer that

the content regarding wildfire mitigation in the EIS, 1) has shown no significant changes in the DEIS-to-FEIS process, 2) is too generally described to determine how, or to what intensity, they could affect the Project area and the more general setting in which the project is located, 3) is still basically silent on wildfire hazards and risks in the Project's more general setting; information that would have been generated if an in situ analysis had been completed, and 4) relegates the mitigation efforts to a post-ROD time period, 5) and remains silent on the specific regulatory (e.g. working in a federally recognized wetland) and operational (removing large woody debris using only using hand tools) constraints that would reasonably be encountered in getting them implemented.

Review Item 39. FIGR Comment T8-64

FIGR Comment (verbatim)

Reference: Section XIII (Public Services), Item i) of the DEIS Appendix A: Off-Reservation Environmental Impact Analysis Checklist, Page 11-With regard to the preparation of the Riparian Wildfire Protection Plan, and entering into a service agreement with Sonoma County Fire Department (SCFD), there is a significant potential for there to be regulatory agency mandate conflict that will hamper achieving the fuels reduction objectives. In this case the entry of a Notice of Intent with SCFD is not a sufficient mitigation measure in itself. The details of what the eventual MOU must provide must be specified in the document to provide assurances that this measure will be effective.

Applicant's Response (verbatim)

"Please note that the referenced section, "Section XIII (Public Services), Item i) of the DEIS Appendix A: Off-Reservation Environmental Impact Analysis Checklist, Page 11," does not exist in the Draft EIS. Please refer to Response to Comment T8-55 regarding the potential for jurisdictional conflicts to hamper the implementation of the riparian corridor wildfire management plan. Public services and utilities mitigation measure B states that the service agreement with the SCFD must include provisions to compensate SCFD for quantifiable direct and indirect costs incurred in conjunction with providing fire protection and emergency medical services to the Project Site; address any required conditions and standards for emergency access and fire protection systems; and requiring the Tribe to meet with SCFD at least once a year, if requested, to discuss ways to improve the provision of fire and emergency medical services to the project. Therefore, while the specific details of the eventual service agreement between the Tribe and SCFD would be negotiated based on the unique needs of the alternative selected and SCFD specifications/input, the mitigation measure in Draft EIS Section 4 includes performance measures and timing to ensure that the measure would be affected. The Letter of Intent between the Tribe and SCFD included as Draft EIS Appendix O specifies the intention of the Tribe and SCFD to enter into a Memorandum of Understanding for the provision of fire response and emergency medical services to the Project Site, consistent with the mitigation. The commenter is correct that the Letter of Intent does not meet the requirements of the mitigation, but it was not intended to satisfy the mitigation. The service agreement is required prior to the start of operation. Additionally, if for whatever reason an agreement cannot be reached with SCFD, there is mitigation that would require the Tribe to establish, equip, and staff a public safety building for such services on the Project Site. This further ensures that fire protection services would be provided to the Project Site either through agreement or through a new facility operated by the Tribe. It is also important to note that NEPA case law, such as Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), supports the principle that mitigation measures do not need to be

fully developed in an EIS. The Supreme Court ruled that while mitigation measures must be discussed and reasonably identified, they do not need to be fully detailed before an EIS is finalized as long as there is a commitment to implementation"

Evaluation of Applicant's Response

The Applicant's response cited just one case in 1989; anything more recent? Furthermore, their response uses highly interpretable language so it is difficult to discern what standards are being applied here. Lastly, the Applicant's response doesn't say anything about whether the BIA will actually accept such an "in process" measure as a NEPA-compliant mitigation.

Review Item 40. FIGR Comment T8-67

FIGR Comment (verbatim)

Reference: DEIS Section 4 (Mitigation Measures-Biological Resources), Page 4-5-There are no "stamped" site plans showing these areas and the figures provided are simply too conceptual in terms of conducting an effects/impacts analysis.

Applicant's Response (verbatim)

"Regarding general concerns about the design level of detail of project elements see Master Response 2."

Evaluation of Applicant's Response

Please review FIGR of Master Response 2 in Section 2 of this report.

Review Item 41. FIGR Comment T8-68

FIGR Comment (verbatim)

Reference: DEIS Section 4 {Mitigation Measures-Public Services and Utilities), Item C, Page 4- 10 - For the facility proposed, establishing an independent on-site emergency unit could be unreasonably complex and difficult to facilitate. The emergency response facility would need to be equipped and staffed to address three task areas: (1) wild land fire, (2) commercial structure fire, and (3) medical emergencies. Entering into a service delivery agreement with SCFD would be the most desirable but it would require adhering to an appropriate delivery of empirical data that is not supported within the current DEIS.

Applicant's Response (verbatim)

"The commenter does not specify the "empirical data" that is absent to support the agreement for fire services. The DEIS provided a comprehensive evaluation of the project alternatives' emergency service needs, potential impacts, and subsequent mitigation measures to reduce the potential impacts that included data from numerous sources. Therefore, no clarifications to the Final EIS are warranted."

Evaluation of Applicant's Response

The SCFD will need to have hard information (empirical data) about the situation they would be sending their personnel and equipment into. They will be doing a job that is inherently dangerous and they need to know that the supply of water for fire control is sufficient and that the components of the infrastructure are appropriate to 1) keep them safe, and 2) support getting the job done. Furthermore,

none of the content in the EIS process (core FEIS document and supporting appendices) make it clear that the services required will be comprised of three distinctly different types of responses (multi-storied commercial structural, wildland fire, and medical services). These are important distinctions, and if not properly considered right from the start could be 1) sources of elevated risk to the responders and 2) errors that reduce the potential for successful operations.

In this situation, the conclusion that: "no clarifications to the Final EIS are warranted" is sufficiently supported.

Review Item 42. FIGR Comment T8-69

FIGR Comment (verbatim)
Reference: DEIS Section 4 (Mitigation Measures-Hazardous Materials and Hazard, Wildfire Hazards), Item A, Page 4-16-The "Prior to opening day" is an unreasonable specification; the transition treatment in the riparian corridor (removing relatively large volumes and sizes of vegetative material that is required to accomplish a significant mitigation of wildfire behavior potential) needs to be completed prior to the construction of the immediately adjacent structures. Historic wildfire incidents (e.g., 2007 Angora Fire) confirm the potential for riparian T8-69 areas (like Pruitt Creek) to act as chimneys to accelerate wildfire spread.

Reference: DEIS Section 4 (Mitigation Measures-Hazardous Materials and Hazard, Wildfire Hazards), Item A, Page 4-16- Confining the work in the transition phase to employing manual labor and hand tools will not allow the removal of the required vegetative materials needed to accomplish hazardous fuels reduction objectives.

Applicant's Response (verbatim)
"As discussed in Draft EIS Section 3.12.3.2, a significant ignition risk requiring mitigation was not identified. Therefore, the wildfire risk abatement mitigation included in Draft EIS Section 4 is not required to be completed prior to construction. Hazardous Materials and Hazards – Wildfire Hazards Mitigation Measure A has been revised in Final EIS Section 4 to clarify the timing of completion and implementation of the riparian corridor wildfire management plan.

This comment suggests that hand tools would be insufficient to complete vegetation management activities within the riparian corridor; however, there is no reason supporting this opinion. The use of hand tools was selected to be minimally invasive to the riparian corridor to allow for wildfire management activities without causing unnecessary impacts from the use of heavy machinery."

Evaluation of Applicant's Response
There were risks of fire ignition identified in DEIS Section 3.12.3.2 that had to do with operation of equipment creating sparks, or fire itself. The following sentence is non-sensical. Regardless of the revision in the FEIS, the post-ROD timing of preparing this plan does not comply with NEPA requirements.

Regarding the use of hand tools only; removal of larger diameter trees, especially those within the "fall zone" of structures cannot be done safely. Furthermore, any removal of stumps, or large diameter bole materials will require the use medium-to-heavy mechanized equipment.

Review Item 43. FIGR Comment T8-71

FIGR Comment (verbatim)
Reference: DEIS Section 3.3.3.2, Page 3-20 - Neither the DEIS nor HydroScience's report provide a breakdown of water supply infrastructure to be used for fire suppression. In addition, there are no "Stamped" site plans that show the emergency water distribution system or hydrant locations. Lastly, no flow volume and pressure requirements (typically set by the local fire authorities) are addressed. These are significant omissions that prevent a determination of whether the proposed well system will provide sufficient recharge rates for both wildfire and structure-related fire suppression.

Applicant's Response (verbatim)
"The description of the proposed water supply infrastructure is provided in Draft EIS Appendix D-1 and summarized in Draft EIS Section 2.1.3. As described therein, fire flow requirements for Alternative A are anticipated to be 2,000 gallons per minute for 4 hours assuming the use of automatic fire sprinklers consistent with applicable requirements of the Tribe's Building and Safety Code of 2023, which are consistent with the California Building Code. Please refer to Master Response 2 for additional discussion about the level of design detail required during the NEPA process."

Evaluation of Applicant's Response
There was, again an error in identifying Section 3.3.3.2 as the source location for the narrative. Once again, the Applicant's focus rests completely on the structural and does not describe any consideration regarding the volumes of water needed to bring a wildfire under control or the infrastructure needed to deliver the water.

Please review FIGR's evaluation of Master Response 2 in Section 2 of this report.

Review Item 44. FIGR Comment T8-72

FIGR Comment (verbatim)
Reference: DEIS Section 3.3.3.2, Page 3-48 - No discussions were included in the DEIS regarding potential harms to on-site occupants, or the general public, resulting from wildfire behavior. The BIA policy makes no distinction between the requirement to protect lives, health, and welfare of Sovereign Nation people versus guest and customers who will be on the Project site. Given (1) the recent wildfire history in the immediate Project area, (2) the risks of dangerous wildfire behaviors being generated should the riparian gallery formation and acreages of vineyards become involved, and (3) the current level of uncertainty regarding emergency wildfire response, the failure of the DEIS drafters to prepare an industry-standard wildfire hazard and risk assessment for inclusion in the DEIS nullifies its less than significant effect/impact determination due to the lack of important empirical data.

Reference: DEIS Section 3.3.3.2, Page 3-48- Significant surface occupation by vineyards is part of the Applicant's proposal but its role as a fuel bed in a wildfire is not given adequate consideration. A vineyard,

under normal-to-extreme fire weather conditions, can generate fire behavior similar to that of a natural brush field. This occupied surface area needs to be given greater consideration when assessing the level of harm that involvement in a wildfire event could produce.

Reference: DEIS Section 3.3.3.2, Page 3-48 - Conditions within the riparian gallery formation (RGF) along Pruitt Creek were observed during a field visit from several off-property locations. Field observations confirm that this feature, because of its fuel bed conditions and immediate proximity to structures that comprise the facility, has significant potential for resulting in harm to the occupants in the facility. This feature is, however, problematic from the standpoint of (1) implementing fuel reduction management that could result in significant harm production and (2) its protection under the federal Endangered Species Act and Clean Water Act. The project description and development of impact mitigations reflected the need to meet federal regulations and resulted in a management approach that will not significantly reduce wildfire behavior potential.

Applicant's Response (verbatim)
"Draft EIS Section 3.3.3.2 does not include an analysis of wildfire, rather it is assumed that the commenter meant to reference Draft EIS Section 3.12.3. Please refer to Response to Comment A8-67 regarding fire resiliency measures intended to reduce the potential for fire to spread on the Project Site as recommended in Draft EIS Appendix N-1. The safety of on-site occupants related to wildfire hazards would be addressed by complying with building codes related to fire and life safety, BMPs associated with fire resiliency, and implementation of mitigation in Draft EIS Section 4, including implementation of an emergency evacuation plan. The Proposed Project would conform to applicable requirements of the Tribe's Building and Safety Code of 2023, which are consistent with the CBC and California Public Safety Code, including building, electrical, energy, mechanical, plumbing, fire protection, and safety standards.

Please refer to Master Response 2 for a discussion of the adequacy of EIS analysis. Please refer to Response to Comment T8-55 for a discussion of wildfire hazard mitigation measures related to vegetation and fuels management."

Evaluation of Applicant's Response
There was an error in identifying Section 3.3.3.2 as the source location for the narrative. However, in general the Applicant's response did not address the specific points in the FIGR comments. Once again, the Applicant's focus rests completely on risks sourced from within the boundaries of the Project area and completely ignores the risk of catastrophic wildfire moving into the Project from an off-site location.

Please review FIGR's evaluation of Master Response 2 in Section 2 of this report and the indicated Individual Comment, A8-67 that can be found in the Response to Comments Appendix P, Part 1 in the FEIS.

Review Item 45. FIGR Comment T8-72

FIGR Comment (verbatim)
Reference: Section XV (Transportation/Traffic), Items a), b), and d) of the DEIS Appendix A: Off-Reservation Environmental Impact Analysis Checklist, Page 12 - The DEIS document (body and addenda)

reflect a complete absence of consideration of traffic effect/impacts if a wildfire emergency evacuation scenario occurs. The TJKM traffic study shows expected occupancy (staff and guests) at 5,606 individuals on weekdays and 7,900 individuals on weekends. Even considering the mitigation measures (e.g., adding turn lanes, restriping pavement) described in Section 3.12 (actions that don't significantly augment traffic volume capacity), the Less Than Significant with implemented Mitigations (LS/M) finding cannot be justified when the additional 5,606, or 7,900, individuals need to exit the area in vehicles during a wildfire evacuation.

Applicant's Response (verbatim)

"The commenter references the Off-Reservation Environmental Impact Analysis Checklist, which was not included as an appendix to the Draft EIS. However, the comment indirectly relates to the analysis presented in Draft EIS Section 3.8 Transportation and Circulation, and Draft EIS Section 3.12 Hazardous Materials and Hazards, and is therefore addressed herein. The mitigation measures described in Draft EIS Section 3.8 Transportation and Circulation and in Draft EIS Section 3.14 Cumulative Effects do not include mitigation measures addressing wildfire evacuation conditions. Instead, mitigation measures addressing evacuation impacts due to wildfire are included in Draft EIS Section 3.12 Hazardous Materials and Hazards and in Draft EIS Section 3.14 Cumulative Effects. Unlike the impact analysis provided for transportation and circulation, which relies on a level of service performance metric for intersection operations, the impact analysis for wildfire evacuation is based on a travel time metric that considers delay incurred bottleneck locations such as intersections. This methodology is further detailed in the ETTA (Draft EIS Appendix N-2). The Draft EIS correctly states that the mitigation measures proposed to address transportation, and circulation impacts at study area intersections would reduce impacts to a less-than-significant level because intersections would operate at acceptable levels of service. The Draft EIS does not assert that study intersections would operate within acceptable level of service standards in the event of a wildfire evacuation either with or without the Proposed Project. Please refer to Master Response 10 regarding wildfire-related emergency evacuation analysis and associated mitigation."

Evaluation of Applicant's Response

This response is more descriptive of the process employed. However, the two concluding statements, presented below, are worthy of note:

"The Draft EIS correctly states that the mitigation measures proposed to address transportation, and circulation impacts at study area intersections would reduce impacts to a less-than-significant level because intersections would operate at acceptable levels of service. The Draft EIS does not assert that study intersections would operate within acceptable level of service standards in the event of a wildfire evacuation either with or without the Proposed Project."

Given the cosmetic actions, i.e. lack of actions leading to an increase of capacity, taken at the intersections the "Less-Than-Significant" finding is not defensible. Then there is the concluding statement "seals the deal"; that the EIS "does not assert" the transportation system would resist loss of function in the event of an involvement in a wildfire event. The Applicant is basically saying "We didn't do an appropriate assessment ("Hard Look") and therefore cannot make any claims.

Please review FIGR's evaluation of Master Response 10 in Section 2 of this report.

Review Item 46. FIGR Comment T8-74

FIGR Comment (verbatim)

Reference: Executive Summary, Table ES-1 Section 3.8 Transportation/Circulation, Both 7 Construction and Project traffic subsections, Pages ES-16 and 17 – In the DEIS no consideration was given to the special traffic requirements when a wildfire-related emergency evacuation scenario is underway. Not considered were (1) the extraordinary volumes and mix of vehicle types that would characterize the traffic, and (2) the need to have people, and their portable effects, clear the area of potential harm in as short a time period as possible. Without consideration of the needs in this special scenario the taking of the "Significant" (S) level designation to one of LS is not reasonably supportable.

Applicant's Response (verbatim)

"Please refer to Master Response 8 regarding land use conflicts. As explained therein, local County and Town land use designations, including the Shiloh Road Vision Plan, would not apply to the Project Site if acquired into federal trust. As stated in Draft EIS Section 3.9.1, while the Project Site is not within the boundaries of the Shiloh Road Vision Plan, it is adjacent to it. The Vision Plan encompasses properties to the north and south of Shiloh Road that are west of Old Redwood Highway, excluding the Project Site. Proposed land use types that are nearest to the Project Site include high-density mixed-use development. The Proposed Project would not inhibit the implementation of the Vision Plan and would align with several key components. Consistent with the Vision Plan's emphasis on walking and bicycling, BMPs identified in Draft EIS Table 2.1-3 include the construction of pedestrian facilities on the Project Site, supporting the "pedestrian-oriented corridor" referenced by the comment. Further, the project alternatives would not significantly affect existing local bicycle and pedestrian facilities. Additionally, Alternative A incorporates elements consistent with the Shiloh Road Village Design Guidelines that reflect the agrarian and winery style envisioned for the community, including the green roof, decorative rock wall, vineyard buffers, the use of natural materials and colors for the buildings. These elements are further detailed in Draft EIS Sections 2 and 3.13. Please refer to Response to Comment A1-3 regarding the conversion of agricultural land."

Evaluation of Applicant's Response

There has been an error as this response has no relationship to the FIGR comment. As well, Master Response 8 has no applicability to the FIGR comment.

Review Item 47. FIGR Comment T8-75

FIGR Comment (verbatim)

Reference: Executive Summary, Table ES-1 Section 3.12 Evacuation Impacts, Page ES-20 – The mitigation measures listed in this section did not take into consideration the most basic need when in a wildfire-related evacuation scenario: An increased physical capacity to clear the evacuation area in reasonably short periods of time. In this particular situation the PS-to-LS findings are not justifiable by the information presented in the DEIS.

Applicant's Response (verbatim)

"The ETTA (Draft EIS Appendix N-2) addressed the potential bottlenecks on US 101 and Old Redwood Highway, as well as other locations. In addition, one of the proposed wildfire hazards mitigation measures identified in Draft EIS Section 4 is to install adaptive signal control (ASC) systems with remote access and override at key intersections along potential evacuation routes, which allows adjustments to intersection signal timings and can significantly extend maximum green times (e.g., queue flush phases for congested movements). This would provide additional capacity for key evacuation traffic routes. In addition, as part of the cumulative mitigation for traffic impacts, the Proposed Project is required to pay fair share towards the widening of Shiloh Road to two lanes per direction, which would also increase roadway capacity for evacuation for evacuation purposes in the cumulative year (2040) and beyond."

Evaluation of Applicant's Response

There are two significant difficulties with the Applicant's response. The first is associated with the installation and use of the adaptive signal control system. While opening the intersection in one direction for a longer period of time does result in a greater volume of traffic in that direction. However, the action simultaneously reduces the time available for the cross traffic. This is the very kind of action, in terms of description detail, that needs to be subjected to a "Hard Look" in order to determine what the effects produced would be. The second is using remote and speculative future actions as mitigations; an action that is not within the performance standards of NEPA.

Review Item 48. FIGR Comment T8-76

FIGR Comment (verbatim)

Reference, Executive Summary, Table ES-1 Section 314. Transportation/Circulation. Page ES-25 - No consideration was given in the DEIS to the wildfire related evacuation scenario when evaluating cumulative effects on traffic patterns or flows. Without this information the findings of a S-to-LS changes are not justifiable.

Applicant's Response (verbatim)

"Please see Response to Comment T8-74 for distinction between performance measures and mitigation measures needed to address transportation and circulation impacts vs. those needed to address wildfire evacuation."

Evaluation of Applicant's Response

The Applicant's response is not responsive to FIGR's comments. Please review FIGR's evaluation of Individual Comment T8-74 in Section (3) of this report.

Review Item 49. FIGR Comment T8-77

FIGR Comment (verbatim)

Reference: DEIS Section 4 (Mitigation Measures-Transportation and Circulation), Page 4-11- Given the high level of uncertainty expressed in this section, i.e. that the actual funding and implementation of the mitigations is out of the Tribe's control, the actions described cannot be reasonably considered as viable mitigations.

Applicant's Response (verbatim)
"Regarding the reasonableness of traffic mitigation, see Master Response 7 and Response to Comment A8-34."

Evaluation of Applicant's Response
The Applicant's response is not responsive to FIGR's comments. Please review FIGR's evaluation of Master Response 7 in Section 2 of this report and Individual Comment A8-34 in FEIS Appendix P, Part 1.

Review Item 50. FIGR Comment T8-78

FIGR Comment (verbatim)
Reference: DEIS Section 4 (Mitigation Measures-Transportation and Circulation), Page 4-11- For the intersections addressed, the proposed mitigating actions will not result in a significantly increased volume capacity and will, therefore, not be a mitigating factor in a wildfire evacuation scenario.

Applicant's Response (verbatim)
"Please see Response to Comment T8-74 for distinction between performance measures and mitigation measures needed to address transportation and circulation impacts versus those needed to address wildfire evacuation.

Please also see Response to Comment T8-75 regarding required mitigation measures that would increase capacity in key evacuation traffic routes."

Evaluation of Applicant's Response
The reference to the Applicant's response to T8-74 here is meaningless as this response has no relationship to the FIGR comment; it addresses land use issues and makes no mention of wildfire or wildfire-related evacuation. TSS found significant deficiencies with the Applicant's response to Comment T8-75. Below is shown the reviewer's comments on the Applicant's response:

"There are two significant difficulties with the Applicant's response. The first is associated with the installation and use of the adaptive signal control system. While opening the intersection in one direction for a longer period of time does result in a greater volume of traffic in that direction. However, the action simultaneously reduces the time available for the cross traffic. This is the very kind of action, in terms of description detail, that needs to be subjected to a "Hard Look" in order to determine what the effects produced would be. The second is using remote and speculative future actions as mitigations; an action that is not within the performance standards of NEPA."

Review Item 51. FIGR Comment T8-79

FIGR Comment (verbatim)
To be consistent with the "Prior to occupancy" specification, this emergency evacuation plan would have to "work around" the as built situation. The completion of the Project's infrastructure will set the nature and volume of traffic flow and circulation, both within the parcel boundaries and at the exit points. Since none of the planning has been done in consideration of wildfire evacuation requirements, unintended consequences could result.

Applicant's Response (verbatim)

"As described in Draft EIS Section 3.14 the cumulative analysis in the Draft EIS included, but was not limited to, the following projects: Windsor Gardens, Old Redwood Highway Villages, Shiloh Crossing, Shiloh Terrace, and Shiloh Business Park; therefore, no adjustments to the cumulative analysis are warranted"

Evaluation of Applicant's Response

The Applicant's response is completely un-related to FIGR's comments; actually, it is unclear what federal actions are involved here. In the FEIS it appears that the other project information (Windsor Gardens, *et.al.*) has been placed in the Land Resources subsection (3.14.1). In FIGR's comment the federal actions that would be the subject are those comprising the emergency evacuation subject area. If this is the case then the most likely subsections with applicability would be 3.14.7 (Transportation) and 3.14.11 (Hazard i.e. Wildfire). In subsection 3.4.11 the use of a model was described with the dependent variable being time needed to leave the danger zone. However, what is missing are the independent variables used as inputs to the model. It is the nature of these independent variables, and how they are used as model inputs, that establishes the robustness of the model and increases the confidence in the results generated by the model. A good example, especially given the rural nature of the Project's setting, and one that has been completely left out of the evacuation process followed in the Applicant's EIS process, is the mix of vehicle types that characterizes baseline traffic and evacuation; with the harbinger being loaded horse trailers. In rural settings it has been consistently observed that wildfire evacuation traffic has higher proportions of medium-weight commercial grade vehicles and equipment and light-to-medium duty vehicles pulling trailers. These types of vehicles create significant changes, in comparison to the baseline, in the use pattern of the road system and are more heavily impacted by the constraints and require far different considerations when doing emergency evacuation planning and mitigation identification. This particular response, taken into consideration along with the example, demonstrates shortcomings that are pervasive throughout this EIS process.

Appendix 4

Meister Economic Consulting, LLC
59 Promesa Avenue
Rancho Mission Viejo, CA 92694
(949) 390-0555 (p) (949) 429-7680 (f)

December 23, 2024

Paul P. Spaulding, III
Shartsis Friese LLP
425 Market Street, 11th Floor
San Francisco, CA 94105

Re: Review of GMA's and Acorn's FEIS Responses to our "Preliminary Assessment of Socioeconomic Information in the May 2024 Draft Environmental Impact Statement for the Koi Nation of Northern California"

Dear Mr. Spaulding:

Graton Economic Development Authority previously commissioned Meister Economic Consulting ("MEC") to assist its General Counsel on behalf of the Federated Indians of Graton Rancheria ("Tribe") with your review of the Draft Environmental Impact Statement for the Koi Nation of Northern California ("DEIS") prepared by Acorn Environmental ("Acorn") in connection with the Proposed Shiloh Resort & Casino ("Proposed Koi Nation Casino"). The previous work completed is herein referred to as "MEC's DEIS Preliminary Assessment."

We have now been commissioned to further assist with review of the Koi Nation's Final Environmental Impact Statement ("FEIS"). Specifically, MEC has now been tasked with reviewing and briefly replying, as appropriate, to responses provided by Acorn and Global Market Advisors ("GMA") to MEC's DEIS Preliminary Assessment.

SUMMARY OF REVIEW

Our replies, as set forth below, collectively underscore that GMA and Acorn's comments are broadly dismissive, insufficiently substantiated, and fail to meaningfully address the key issues identified in MEC's DEIS Preliminary Assessment (in some cases, they do not even reply to key issues that we raised). Sometimes Acorn gives economics and gaming economics opinions when it has no expertise in these areas, as they are an environmental consulting firm. In addition, GMA and Acorn's responses rely in large part on speculative reasoning, flawed methodologies, and assumptions that distort their conclusions. As such, most key issues highlighted in MEC's DEIS Preliminary Assessment, such as relying on faulty assumptions, ignoring important facts, faulty economic analysis, and failing to consider the impacts of decreased tribal government revenues on tribal and local communities, among others, remain.

REVIEW

Set forth below is a high-level review of responses provided by Acorn and GMA to MEC's DEIS Preliminary Assessment. We have presented the responses, or lack thereof, in the order in which the issues were raised in MEC's DEIS Preliminary Assessment.

GMA Used Outdated Information

GMA's analysis relied heavily on MEC's previous outdated work as a fundamental basis and starting point for its competitive effects and economic impact analyses, and this resulted in fundamentally flawed conclusions.

Summary of GMA's Response (pp. 13-15 of Appendix B-5 to FEIS, Reply T8-122)/**Acorn's Response** (p. 3-143 of Response to Comments on the Draft EIS, Reply T8-122)

GMA states that "when GMA was engaged to prepare an economic impact analysis it was asked to do so based on gross revenue estimates and project cost estimates as prepared in the Meister report." GMA defends its approach by stating it conducted an "if/then" analysis: if MEC's revenue estimates hold, then the projected competitive impacts would follow. GMA claims that while gross revenues might change with updated data, the percentage impacts on competitors would remain generally consistent. They also note that while construction costs were acknowledged as conservative, operational forecasts were assumed to reflect post-pandemic recovery. GMA also claims it "developed an independent model to estimate substitution effects."

Acorn states that "GMA relied upon the financial projections prepared by MEC because it believes such projections are reasonably accurate."

MEC's Reply

First, GMA outright admits that it took at face value results from MEC's previous work and used them as the starting point for economic impact analysis. Second, despite GMA's claim, its competitive effects analysis most certainly relied on the results of MEC's previous work as well, namely the projected financial performance of the Proposed Koi Nation Casino, which is a key component of the competitive effects analysis.

As a result, GMA's "if/then" approach is fundamentally flawed because we are currently aware that MEC's previous work contains now outdated data, assumptions, and conclusions, making the conclusions of GMA's economic impact analysis and competitive effects analysis invalid and unreliable. Notably, even slight adjustments to data and assumptions would affect the results of GMA's analyses of competitive effects and economic impacts. "If" you use faulty inputs into an analysis, "then" you will get faulty results.

While we appreciate Acorn's complimentary statement that GMA believed MEC's previous work was reasonably accurate, the fact that our work was outdated by the time they got involved should have been reason enough to not rely on it and insist that the study be updated. We would never do a competitive impact analysis based on another consultant's feasibility/market study. There are too many unknowns and likely to be irreconcilable differences that will exist between the methods used by two different consultants, making them incompatible for yielding reliable results.

GMA Did Not Understand Key Underlying Assumptions in the Prior Work it Relied Upon

GMA could not have fully comprehended the key data, assumptions, variables, and forecasts employed in the gravity model in our previous work that GMA relied upon given some of these were not disclosed in the document that reported MEC's previous work. Consequently, GMA could not have constructed its competitive effects gravity model consistent with our previous work's gravity model that serves as a baseline for GMA's gravity model to begin with. This internal inconsistency necessarily results in fatally flawed estimates of competitive effects. The only way to remedy the inconsistency would be to properly update the market study used to project potential revenues or conduct a whole new market study from scratch.

Summary of Acorn's Response (p. 3-144 of Response to Comments on the Draft EIS, Reply T8-123)

Acorn admits that GMA may not have known all of the assumptions made by MEC in its previous work that GMA relied upon. However, Acorn claims that GMA did not rely on MEC's gravity model used for the feasibility/market analysis, but instead created its own gravity model for the competitive effects analysis.

MEC's Reply

In our comment, we did not contend that GMA was relying directly on our feasibility/market analysis gravity model. However, we know with 100% certainty that GMA used the results of our feasibility/market study, namely the projected performance of the Proposed Koi Nation Casino, as an input into its competitive effects analysis (aka, competitive impact analysis or substitution effects analysis). It had to do so because no one else has done a feasibility/market study but us as supported by the fact that neither GMA nor Acorn identify such an alternative source for the data upon which GMA based its analysis. GMA itself even admitted that it was asked to do its work "based on gross revenue estimates and project cost estimates as prepared in the Meister report" (pp. 13-15 of Appendix B-5 to FEIS, Reply T8-122).

GMA Misrepresents Assumptions of the Prior Work it Relied Upon

GMA incorrectly claimed that the key assumptions in their gravity model were consistent with MEC's previous outdated work, despite lacking knowledge of MEC's actual assumptions.

Summary of GMA's Response (pp. 15-16 of Appendix B-5 to FEIS, Reply T8-124)/**Acorn's Response** (p. 3-144 of Response to Comments on the Draft EIS, Reply T8-124)

GMA states and Acorn confirms that not all of the assumptions utilized in its model were consistent with MEC's previous outdated work, but again notes that it conducted an "if/then" analysis: if MEC's revenue estimates hold, then the projected competitive impacts would follow.

MEC's Reply

GMA is now attempting to distance itself from its original claim that the key assumptions in its analyses were consistent with MEC's previous work. However, the fact is GMA admitted to using the gross revenue estimates from our work, and those gross revenue estimates were derived based on a set of data and assumptions that we know very well, and those data and assumptions were outdated when GMA used them. Therefore, both GMA's competitive effects analysis and economic impact analysis are outdated and unreliable. As previously stated, GMA's "if/then" approach is fundamentally flawed and unreliable for the reasons set forth above.

Acorn and GMA Changed Alternative A Project Scope Without Revising Revenue/Cost Projections from the MEC's Previous Work They Relied Upon

While Acorn and GMA utilized the recommended programming for gaming and hotel offerings from our prior work, they modified the scope of the meeting/event space and food and beverage offerings and added a sportsbook, all without adjusting the construction cost estimates, ancillary revenue forecasts, and possibly gaming revenue forecasts they took from MEC's previous work to properly reflect their expanded project scope.

Summary of Acorn's Response (p. 3-144 of Response to Comments on the Draft EIS, Reply T8-125)/**GMA's Response** (p. 16 of Appendix B-5 to FEIS, Reply T8-125)

Acorn argues that neither it nor GMA developed the proposed scope of Alternative A, and that it was the Koi Nation that did so. Acorn does agree that some of the elements of the project scope analyzed by GMA were not consistent with the scope analyzed by MEC. However, it believes that the differences would not significantly impact MEC's gaming revenue forecasts. Acorn did state the change in project scope would cause the construction costs in the DEIS (i.e., MEC's construction cost estimates) to be slightly conservative.

GMA argues that changes to the mix of non-gaming amenities, such as meeting/event space, would not significantly impact gaming revenue forecasts. GMA did not address the impact to construction costs that would occur with changes to the mix of non-gaming amenities.

MEC's Reply

First, it is highlighted that both Acorn and GMA in the aggregate admit that the construction costs and gaming revenue forecasts relied on in the DEIS and FEIS are not accurate. While both of their statements attempt to downplay the potential degree of inaccuracy, they cannot know the actual magnitude of the inaccuracy because they did not even do the feasibility/market study. The entity in the best position to assess the level of inaccuracy is MEC because we created the feasibility/market gravity model at issue. And we can unequivocally say that the results of our study, especially the overall revenue projections, would meaningfully change with the new project scope in Alternative A. Because the revenue projections would meaningfully change, the competitive impacts estimated by GMA would also change. This is because their analysis relies on our revenue projections.

GMA's claim that non-gaming amenities, such as meeting/event space, do not significantly impact gaming revenue is misguided. Non-gaming amenities play a crucial role in attracting and retaining patrons, and enhancing a casino's overall appeal and competitiveness, especially in a highly competitive market such as the one in which the Proposed Koi Nation Casino would be located, which is likely why the Koi Nation added those amenities to the original scope of the proposed casino to begin with. While the impact of these amenities on gaming revenue may vary for any given project, their influence must be evaluated on a project-specific basis rather than being dismissed outright after the fact as insignificant without a proper analysis, as GMA has done in this case. The casual dismissal of the impact of the added non-gaming amenities appears to be an effort to justify not redoing the feasibility/market gravity model we previously performed, despite the self-evident change in construction costs—building more amenities costs more than building fewer—and the certain change in revenues. Without incorporating these changes, GMA's economic impact analysis remains faulty and unreliable.

GMA Identifies Significant, Detrimental Competitive Impacts on Existing and Planned Tribal Casinos

In its original competitive effects analysis, GMA projected that the Proposed Koi Nation Casino Alternative A would cannibalize existing casinos to the tune of $205.2 million in gaming revenue from the local market in 2033 (sixth year of operations, which it has assumed to be a stabilized year), (pp. 45-46 of Appendix B-1 to the DEIS). If we take GMA's figures at face value, it means that 46% of Proposed Koi Nation Casino projected gaming revenue will be cannibalized from the 19 other tribal casinos in the market. The competitive impact on Graton Resort & Casino alone is estimated by GMA to be an 11.45% loss of gaming revenue (p. 69 of Appendix B-1 to the DEIS).

Summary of Acorn's Response (p. 3-145 of Response to Comments on the Draft EIS, Reply T8-127)

Acorn does not directly refute our comment. However, they instead point to their response to a comment by the Dry Creek Rancheria Band of Pomo Indians (pp. 3-103 through 3-106 of Response to Comments of the Draft EIS, T8-27). In that response, they mainly refute criticisms that the impacts

on the Dry Creek Rancheria are not adequately taken into account. Acorn also states the environmental impacts to other tribes would be less than significant and that potentially significant substitution effects are anticipated to occur only to the Dry Creek Rancheria.

MEC's Reply

We wholly disagree with Acorn's apparent claim that there are no significant competitive impacts or detriment to any tribe other than the Dry Creek Rancheria. Numerous other tribal casinos, and their corresponding tribal owners, including the Federated Indians of Graton Rancheria, will experience significant competitive impacts and detriment. This harm can be seen even in the impacts found by GMA (11.45% for Graton Casino & Resort per Appendix B). However, as noted in the next section, if the competitive effects analysis were done properly correcting for all of GMA's shortcomings (i.e., failure to properly account for the market's advanced maturity level, overestimation of unmet demand, inappropriate exclusion of numerous competitors from the competitive set in its market analysis, and failure to include outer market revenue), the harm to tribal governments with existing casinos would be significantly greater.

GMA Grossly Understates Total Competitive Impact

GMA grossly understated total competitive impact due to a variety of factors including failure to properly account for the market's advanced maturity level, overestimation of unmet demand, inappropriate exclusion of numerous competitors from the competitive set in its market analysis, and failure to include outer market revenue in competitive impacts. GMA also failed to provide an adequate explanation or supporting data as to how it calculated outer market revenue.

Summary of GMA's Response (pp. 17-18 of Appendix B-5 to FEIS, Reply T8-128)**/Acorn's Response** (p. 3-145 of Response to Comments on the Draft EIS, Reply T8-128)

GMA defends its competitive impact projections by emphasizing the rigor of its models and asserting that the Bay Area market has consistently shown it can support additional gaming capacity, as full market penetration in terms of player propensity and spending has not yet been realized. GMA further notes that it was tasked with measuring the competitive effects on tribal casinos, not California card rooms. While GMA acknowledges some overlap between card room patrons and casino patrons was accounted for in their market model, it argues that competition between the two is limited due to differences in their offerings. Additionally, GMA claims that any impacts on card rooms have largely already occurred due to previous casino developments in the region. GMA does not directly address our comment regarding the exclusion of outer market revenue from competitive impacts. However, GMA does address outer market revenue elsewhere in another comment reply (p. 12 of Appendix B-5 to FEIS, T8-28) acknowledging that there is outer market revenue computed in its market analysis, but not included in their competitive effects analysis saying "because the out-of-market area is geographically very large, any substitution effects would be spread among a large number of existing casinos or created via new market growth."

In its responses, Acorn explains that GMA's estimate for outer market revenue comes from tourists, second-home residents, and travelers. They also assert that the outer market area is large, meaning any competitive effects are dispersed across many casinos. Because the substitution effects decline with distance and are relatively small, Acorn contends that the competitive impacts on out-of-market casinos are insignificant, which is why GMA did not estimate these individual impacts in their report.

MEC's Reply

While it is true that the Bay Area market has supported additional gaming capacity over the years, such expansions have resulted in measurable negative impacts on existing casinos. The ability for new casinos to enter the market without driving existing ones entirely out of business does not necessarily imply significant levels of unmet demand. Also, even if the market had successfully absorbed new casinos in the past, it would not necessarily signify the ability to do so in the future. Whether a new casino would cannibalize existing markets or would grow the existing market would need to be analyzed on a case-by-case basis. Our preliminary analyses conducted in preparing MEC's DEIS Preliminary Assessment found that market penetration—both current and future—is far higher than GMA assumes (based on our review of actual players club data for casinos in the market, including Graton Resort & Casino, which GMA was not able to incorporate into its analysis), undermining their projections of local market growth and validating MEC's DEIS Preliminary Assessment that GMA understates competitive impacts.

GMA's assertion that there is only limited competition between card rooms and casinos is misguided and demonstrates a lack of understanding of the market at hand. Although card rooms may be a form of convenience gaming, there is considerable overlap in patron bases, namely for table games. Also, the disparity in specific games offered does not eliminate competition. This overlap was evident during the pandemic when California tribal casinos benefited significantly from the forced closure of card rooms while tribal casinos remained open. Additionally, the experience of numerous gaming markets nationwide demonstrates that expansions in convenience gaming can and do erode casino revenues. Lastly, any previous impacts on card rooms due to previous casino developments in the region do not preclude further erosion.

A point of clarification regarding our comment on card rooms is needed. We did not comment in MEC's DEIS Preliminary Assessment that GMA failed to compute competitive effects on card rooms, although it is true that they did not. Our original comment was that GMA did not account for card rooms at all or adequately in the market model for its computation of competitive effects. Although GMA states in its comment response that it accounted for card rooms, their quick dismissal of the subject and the results of their analyses clearly indicate that GMA did not properly account for them, because, among other things, in the natural experiment during the pandemic when card rooms were closed, it resulted in increased business for tribal casinos.

In terms of outer market revenue, GMA and Acorn admit that it exists, but there remains a lack of data or analysis showing how the outer market revenue figure was calculated. Without transparency on how this revenue projection was derived, there is no way to assess its accuracy or

credibility. Moreover, in MEC's DEIS Preliminary Assessment, we were not contending that competitive impacts on out-of-market casinos should have been assessed, but rather that the generation of outer market revenue by the Proposed Koi Nation Casino would have competitive impacts on *in-market* facilities just like the generation of local market revenue by the proposed casino would have competitive effects. Their attempt to exclude outer market revenue from the competitive effects analysis without adequate analysis is an error causing a clear underestimation of competitive impacts. It is noted that elsewhere in another comment reply (pp. 7-8 of Appendix B-5 to FEIS, T5-18) and text added to the FEIS (FEIS, p. 3-76), GMA makes vague mention of including outer market revenue in new, never-before-seen substitution effect results, but what they provide in the included table does not make sense. In the table, each existing casino's substitution effect there is lower when including outer market revenue substitution effects than when excluding them. When adding in the outer market substitution effect to the local market substitution effect, the total of the two should be larger than the local market substitution effect. Because GMA neither discloses the basis for the numbers nor explains why they resulted in counterintuitive results, they have failed to properly incorporate the outer market impacts into the competitive impacts, and therefore underestimated the impacts on tribal governments with existing casinos.

Acorn Falsely Claims Competitive Impacts Dissipate Over Time

Acorn asserted that the competitive impacts of Alternative A would "tend to dissipate over time in a growing economy" (p. 3-75 of the DEIS). However, this opinion is not substantiated by any facts or analysis, and is not even mentioned by GMA in any of its studies. Moreover, Acorn's assertion that the competitive impact will dissipate over time due to economic growth is patently and demonstrably false.

Summary of Acorn's Response (pp. 3-145 through 3-146 of Response to Comments on the Draft EIS, Reply T8-129)

Acorn states that the financial position of an existing tribal casino would be stronger in a situation in which a new competitor had not entered the market. Acorn then acknowledges that its statement in the DEIS that "substitution effects tend to dissipate over time in a growing economy" does not explain how inflation factors into substitution effects. Lastly, Acorn notes that it believes substitution effects would diminish over time, provided that there are a manageable or small number of new market entrants, and has updated the text of the FEIS accordingly to state that "substitution effects tend to dissipate over time in a growing economy, if there are few or no new market entrants."

MEC's Reply

First and foremost, Acorn gives economics and gaming economics opinions when it has no expertise in these areas. They are an environmental consulting firm. Second, perhaps due to its lack of subject matter expertise, Acorn is 100% wrong on the subject matter. And it is no surprise that GMA, its intended economic expert, is completely silent on the issue because it likely recognizes the lack of

justification for Acorn's opinion. As already stated in MEC's DEIS Preliminary Assessment, substitution effects will *not* dissipate over time in a growing economy, regardless of how many new market entrants there are. Any natural growth in the market resulting from economic growth is a separate phenomenon that would occur regardless of the opening of the Proposed Koi Nation Casino. Therefore, this natural market growth does not diminish or recover the lost revenue experienced by existing tribal casinos as a result of the Proposed Koi Nation Casino. In essence, while competitive tribal casinos may potentially regain their nominal revenue levels in a growing economy, these revenues, even if adjusted for inflation and market changes, will not restore the tribes to the financial position they would have held if a new casino had not entered the market.

Notwithstanding Acorn's attempted responses, the Proposed Koi Nation Casino represents a significant new market entrant. For the reasons outlined in MEC's DEIS Preliminary Assessment, we maintain that the competitive impacts resulting from the introduction of the Proposed Koi Nation Casino will *not* dissipate over time. The scale and nature of this new competitor suggest that its impact on existing casinos will be sustained, rather than diminishing.

Acorn Incorrectly Assumes No Non-Gaming Substitution Effects

Acorn concluded without relying on any facts or analysis that non-gaming substitution effects would be minimal and therefore that the project would have a less-than-significant effect on local hotel substitution (p. 3-66 of the Koi Nation DEIS). Furthermore, due to the following reasons noted in MEC's DEIS Preliminary Assessment, Acorn's rationale is fatally flawed and leads to the incorrect assumption that there are no non-gaming substitution effects: lack of support for Acorn's rationale; ignoring direct competition with regional non-gaming hotels; ignoring direct competition with regional casino hotels; and inconsistent logic.

Summary of GMA's Response (pp. 19-20 of Appendix B-5 to FEIS, Reply T8-129)/**Acorn's Response** (p. 3-146 of Response to Comments on the Draft EIS, Reply T8-129)

GMA responds to our comment arguing that hotel performance at regional casino resorts is closely tied to gaming performance. They assert that most hotel guests are drawn by gaming-related incentives, such as loyalty programs and comped stays, or are leisure travelers motivated primarily by gaming. GMA concludes that because hotel patrons' economic value largely comes from gaming expenditures, their gaming impact analysis sufficiently captures the substitution effects on hotel demand.

Acorn follows the same line of reasoning to conclude slightly differently that the gaming substitution effects analysis conducted by GMA captures a majority of the economic impact and substitution effects associated with patrons of the proposed hotel.

MEC's Reply

First, both GMA and Acorn discuss only hotel substitution effects, and do NOT even address other non-gaming substitution effects (e.g., food and beverages and retail). In terms of hotel substitution effects, GMA and Acorn have largely ignored the specifics of our comment and then simply wished away these substitution effects without any analysis whatsoever. However, they are not exactly on the same page as GMA says their analysis sufficiently captures the hotel substitution effect, while Acorn states that GMA captures the majority of the hotel substitution effect.

As for their reasoning on hotel substitution effects, both GMA and Acorn largely give the same response without taking into account the shortcomings we identified in MEC's DEIS Preliminary Assessment. While it is true that hotel demand at regional casinos is influenced by gaming, this does not mean that competitive impacts on hotels can be fully captured by gaming revenue analysis alone. Hotels generate revenue independently through room sales, food and beverage, events, and ancillary services. Reductions in gaming-related visitation can lead to declines in overall hotel occupancy and related revenue streams, beyond what is accounted for in gaming impact projections. Additionally, regional casino hotels often attract non-gaming guests who seek amenities and entertainment options. Failing to analyze hotel demand separately overlooks these segments, completely ignoring hotel competitive impacts and understating the full competitive impact on regional casino resorts.

DEIS Uses Overtly Narrow and Faulty Interpretation of "Detrimental Impact" on a Tribe

The DEIS quoted a federal court case regarding the determination of "detrimental impact" on a tribe as a result of a proposed casino: "competition … is not sufficient, in and of itself, to conclude [there would be] a detrimental impact on" a tribe (p. 3-75 of the Koi Nation DEIS). The DEIS goes on to interpret the aforementioned excerpt to mean that "should competition effects be so severe as to ***cause closure of a facility*** … facility closure could result in socioeconomic effects to tribal communities from decreased availability and/or quality of governmental services" (***emphasis*** added). However, this interpretation is overly narrow and faulty. While competition alone is not sufficient direct evidence of detrimental impact on a tribe, negative competitive effects on the tribe's casino (i.e., cannibalization or substitution) are direct evidence of detrimental impact on the casino. And in turn, detrimental impact on a tribal casino directly translates into detrimental impact on the tribe as there is less profit available to transfer back to the tribal government consistent with the purposes of the Indian Gaming Regulatory Act, "to promote tribal economic development, tribal self-sufficiency, and strong tribal government" (25 U.S.C. Sec. 2701(4)). Furthermore, this detrimental impact on the casino and correspondingly on the tribe, need not come in the form of closure of the casino. "[D]ecreased availability and/or quality of governmental services" can come in the form of any negative competitive effects that do not result in closure of the casino that result in a reduction of tribal government revenue. We find that GMA's estimated reduction of 11.45% of gaming revenue at Graton Resort & Casino due to the Proposed Koi Nation Casino (p. 69 of Appendix B-1 to the Koi Nation DEIS) would result in a reduction of funds that are available to be

transferred by the casino to the Tribal government for governmental purposes. Additionally, it would result in a reduction in funds available for community impact mitigations, including support for non-gaming tribes and local community programs.

Summary of Acorn's Response (p. 3-146 of Response to Comments on the Draft EIS, Reply T8-130 and p. 3-148 of Response to Comments on the Draft EIS, Reply T8-138)

In response to our comment, Acorn concedes that "environmental justice effects could or would occur, even in the absence of facility closure." For consideration of those effects, Acorn points to the gaming substitution effects computed by GMA in Appendix B. Acorn also points to a brand new subsection of Section 3.7.3.2 of the FEIS for discussion of Environmental Justice Effects to Tribes in which it concludes that there is no detriment to any tribe except maybe the Dry Creek Rancheria.

In addition, Acorn states that per CEQ NEPA regulations and Executive Order (EO) 12898, environmental justice effects "focus on environmental and health impacts rather than pure economic competition" and that "[w]hile economic impacts have been considered in environmental justice analysis, the effects are typically analyzed in terms of how environmental burdens may create economic disadvantages for communities, not how market competition would affect existing businesses."

MEC's Reply

While we appreciate that Acorn admits a facility closure is not necessary to show detrimental impact to a tribe, its other statements seem to disregard the extensive tribal governmental revenue losses and consequent reduction in tribal governmental services to tribal citizens and the local community that will result from the significant competitive effects of the proposed casino. As noted elsewhere in this document and MEC's DEIS Preliminary Analysis, GMA's computed competitive effects are vastly understated, but even their results would yield significant detriment for a number of tribes, including the Federated Indians of Graton Rancheria. From an economic perspective, regardless of whether detriment is caused directly by the proposed casino itself or indirectly by the economic impacts of the proposed casino that in turn cause socioeconomic, environmental justice, and other impacts, the harm is real and significant and should be considered by the BIA.

GMA's Supplemental Competitive Effects Discussion Fails to Address True Detrimental Impact

GMA's supplemental competitive effects discussion failed to address true detrimental impact of land-in-trust applications by relying upon limited and irrelevant examples that for the most part did not even involve tribal gaming. And while GMA cited markets where casinos experienced revenue declines but remained open, their examples were ones in which revenue declines were in large part due to factors unrelated to new competitors entering their market. Additionally, the casinos in their examples experienced revenue losses that remain permanent, even if revenues eventually returned to previous levels. Some casinos in their examples actually closed (Atlantic City), and in other examples had to be sold off or incur costly investments to save them.

Summary of GMA's Response (pp. 20-22 of Appendix B-5 to FEIS, Reply T8-131)/**Acorn's Response** (p. 3-146 of Response to Comments on the Draft EIS, Reply T8-131)

GMA defends its examples by stating they used publicly available data due to limited tribal gaming data. They argue that their analysis accurately illustrates how some commercial casinos endured revenue declines caused by factors like smoking bans, the recession, and new competitors. They highlight specific cases, such as Grand Victoria and Hollywood Casino Lawrenceburg, to show these venues remained operational despite substantial losses. GMA asserts they applied no bias to their findings and note that MEC did not suggest alternative case studies. Acorn merely points to GMA's response and states that GMA performed the appropriate degree of analysis given the availability of data.

MEC's Reply

While GMA is correct about the lack of publicly available tribal-specific data, their response does not justify the use of misguided examples to try to support their assertions. The examples GMA provided are not relevant to the context of land-in-trust applications and fail to demonstrate that detrimental impacts were properly evaluated. Our concerns about the limitations, relevance, and misleading nature of their examples remain unaddressed. Neither GMA nor Acorn adequately explain how their examples demonstrate that significant new competition reliant on cannibalization of existing tribal casinos' business will not adversely affect the tribal governments that own those impacted casinos or the governmental services they supply to their citizens and their benefits to their localities.

GMA Does Not Provide Sufficient Information to Evaluate the Results of their Analyses

GMA did not provide sufficient information to evaluate the results of their analyses, as it only reports competitive impacts as percentages of lost gaming revenue, without providing actual dollar figures.

Summary of Acorn's Response (pp. 3-147 of Response to Comments on the Draft EIS, Reply T8-133)

Acorn argues that GMA's use of percentages for competitive impacts is standard industry practice, providing sufficient context for understanding the magnitude of the impacts. They compare this to how federal agencies like the Bureau of Labor Statistics (BLS) report economic data, emphasizing that percentages are meaningful for conveying trends without disclosing confidential revenue figures.

MEC's Reply

First, Acorn again gives economics and gaming economics opinions when it has no expertise in these areas. Second, on the subject itself, expressing competitive impacts as percentages lacks the specificity necessary to fully understand the real-world financial consequences for affected tribes.

Unlike macroeconomic indicators, the financial viability of tribal governments often hinges on specific dollar losses rather than abstract percentages. Tribal programs rely on net profits, not gross revenues, meaning even modest percentage declines can translate into substantial losses in funding for essential services like public safety, education, housing, and healthcare.

Additionally, disclosing aggregate revenue impact figures, without revealing proprietary data, would enhance transparency and provide the Bureau of Indian Affairs (BIA) with a clearer understanding of the potential harm to tribal communities (we understand from various FEIS comment responses that the BIA and its consultants did not even have proprietary data anyway as tribes chose not to share their information). The absence of this level of detail weakens the ability of BIA and the public to accurately assess the Proposed Koi Nation Casino's true impact.

GMA Fails to Adequately Justify Alternative C's Feasibility

GMA's assessment of Alternative C lacked sufficient detail, relying on a minimal pro forma statement without the robust market analysis needed to substantiate their conclusions. Their claim that the market can absorb these projects without competitive impacts is unconvincing due to the absence of supporting evidence.

Summary of GMA's Response (pp. 22 of Appendix B-5 to FEIS, Reply T8-134)/**Acorn's Response** (pp. 3-147 through 3-148 of Response to Comments on the Draft EIS, Reply T8-134)

GMA assert that they conducted a detailed, confidential market study that informed their conclusions, including assessments of historical performance and growth trends. GMA claims that the unique positioning of Alternative C (a tribally owned winery and hotel) would attract new visitors rather than impact competitors, thus minimizing substitution effects.

Acorn states that the level of analysis of Alternative C is appropriate for the DEIS/FEIS and that neither a more complete study or a substitution effects analysis are necessary. In terms of substitution effects, Acorn states that "Alternative C would not be expected to have substantial substitution effects."

MEC's Reply

First, it strikes us as odd that GMA was able to include in the publicly available DEIS and FEIS so much data on the proposed tribal casino and hotel in Alternative A, but not for the tribal winery and hotel in Alternative C. To substantiate their conclusions, GMA should have at least included in the DEIS and FEIS more comprehensive insights or anonymized data excerpts from the market study to justify the project's feasibility and the assumption of minimal substitution effects. GMA's assertion that the project will induce incremental visitation is speculative without detailed evidence supporting how the market will accommodate this unique offering.

Acorn's statement about GMA's minimal analysis being appropriate leaves us with serious concerns about transparency, which is essential to ensure analysis is credible and verifiable. We also find it troublesome that Acorn, an environmental consultant, is drawing economic conclusions about the existence of substitution effects without any supporting evidence. Not only did Acorn not actually do a substitution effects analysis, but they are not even qualified to do one. Notably, GMA did not do a substitution effects analysis of Alternative C either.

GMA Does Not Provide Sufficient Information to Adequately Evaluate the Results of their Economic Impact Analyses

There are unexplained discrepancies between the totals for construction and operating costs reported by GMA and the results of their economic impact analyses. Without clarity on how these inputs were derived, it is impossible to verify whether GMA's modeling was conducted accurately and if the results of the analyses are reliable.

Summary of GMA's Response (pp. 23 of Appendix B-5 to FEIS, Reply T8-135)**/Acorn's Response** (p. 3-148 of Response to Comments on the Draft EIS, Reply T8-135)

GMA asserts that their modeling aligns with standard practices for BIA projects. They state that construction inputs were based on detailed schedules from other consultants and adjusted for local factors. They also note that operational impacts were estimated using industry benchmarks and GMA's experience with Native American casinos. They also mention reliance on their experience to estimate wages, employment, and expenses for the project.

Acorn notes that GMA's analysis was based on data made available to it and that it disclosed the proper amount of detail to aid readers in understanding the analysis. Acorn also cites confidentiality concerns for GMA not disclosing more information than they did in their reports.

MEC's Reply

While GMA claims their modeling follows standard practices and draws from industry experience, their response still lacks the necessary transparency to verify the accuracy of their conclusions. Relying on unspecified schedules, broad industry benchmarks, and generalized experience does not clarify the discrepancies in the reported outputs for construction and operations. Without detailed documentation or data showing how these adjustments and estimates were applied, it is impossible to fully evaluate the validity of GMA's economic impact analysis. Greater transparency is essential to ensure the analysis is credible and verifiable.

We completely disagree with Acorn's statement that sufficient detail on the design and setup of economic impact analysis was provided by GMA in its reports. As economic experts well versed in economic impact analysis, we did not find enough information to aid us in adequately understanding their analysis. As noted already on GMA's response, there is a complete lack of

transparency with GMA's economic impact analysis that does not allow us to verify the accuracy of their conclusions.

GMA Fails to Properly Exclude Operations Tax Impacts Koi Nation Would Not Pay as a Tribal Government

In its economic impact analyses, GMA failed to properly exclude operations tax impacts the Koi Nation would not pay because it is a tribal government.

Summary of GMA's Response (pp. 23-24 of Appendix B-5 to FEIS, Reply T8-135)/**Acorn's Response** (p. 3-148 of Response to Comments on the Draft EIS, Reply T8-135)

GMA claims and Acorn agrees that GMA adjusted tax estimates to reflect the unique tax considerations of tribal projects in Alternatives A, B, and C, noting that tribes are exempt from some taxes while non-tribal vendors may be taxed. However, GMA states they "cannot definitively determine which profits would be subject to tax." GMA also provides an overall caveat with all its economic impact analyses that "the actual tax benefits will likely vary from those presented."

MEC's Reply

While GMA acknowledges the complexities of tribal tax obligations, their response lacks the necessary transparency to fully evaluate their tax impact analysis. In fact, GMA's response that they cannot definitely determine which profits are subject to tax reaffirms that they did not likely properly exclude operations tax impacts that the Koi Nation would not actually pay. Additionally, it is discomforting to see GMA's lack of confidence in its tax impact results. GMA advising that "the actual tax benefits will likely vary from those presented," essentially disclaims the reliability of the analysis and reduces it to a guess about tax applicability despite the fact that BIA is the federal governmental agency responsible for tribal affairs.

GMA Overestimates All Economic and Fiscal Impacts for Operation of All Alternatives by Not Accounting for Competitive Effects

As discussed thoroughly, GMA projected competitive effects on existing tribal casinos, although we find that their results are grossly underestimated. Given the competitive impacts are permanent and can never be recovered, the competitive effects should be taken into account in their economic impact analyses (i.e., deducted from the input into the operations economic impact model for all the Alternatives) because the competitive effect is not new economic activity to Sonoma County, but just substituting for economic activity that is already generated at existing tribal casinos in the County.

Summary of GMA's Response (pp. 24-25 of Appendix B-5 to FEIS, Reply T8-136)/**Acorn's Response** (p. 3-148 of Response to Comments on the Draft EIS, Reply T8-136)

GMA argues that their analysis focuses solely on the project's impacts and follows standard industry practices for BIA submissions. They go on to acknowledge that if substitution effects were included, the reported economic impacts would be lower than they presented in their reports. Acorn confirms that GMA did not deduct potential substitution effects from the numbers run through the economic impact analysis.

MEC's Reply

First and foremost, by stating that their economic impact results would be lower if they took into account competitive impacts, GMA clearly confirms that it did *not* take them into account. Acorn confirms this to be the case. This approach, which is sometimes referred to as gross impact analysis, leads to an overestimation of the project's true economic gains to an area because it counts cannibalized revenue as if it were new when it is not. Technically economic impact studies can be done using gross impacts or net impacts, but it is actually *not* customary to use gross impacts as GMA has done when the goal is to determine the amount of *new* economic activity a project will create in an area. As a result of GMA's choice in modeling, its conclusions about economic impacts are misleading and overstated.

GMA Fails to Properly Analyze Jobs in its Community Effects Analysis

GMA stated that the number of people needed to fill jobs in the County as a result of the Proposed Koi Nation Casino (direct and indirect job) would not be a concern and not require a large influx of residents to fill positions as there are sufficient number of available people already in the County. However, GMA's community effects analysis ignores the fact that despite existing unemployment, there have not been a sufficient number of qualified or interested people to fill current available hospitality industry jobs in Sonoma County.

Summary of Acorn's Response (p. 3-148 of Response to Comments on the Draft EIS, Reply T8-137)

Acorn claims that because of the presence of several other casinos in the market area, as well as other hospitality developments, the population already includes people who are seeking casino and/or hospitality-based employment. In addition, they assert that the Proposed Koi Nation Casino would attract those workers who are currently unemployed and under-employed. Therefore, it is assumed that employment for Alternative A would be filled primarily by the local population and would not generate significant housing demand.

MEC's Reply

As we originally commented in MEC's DEIS Preliminary Analysis, Acorn's stated assumptions do not seem realistic given that there have not been a sufficient number of qualified or interested people to fill currently available hospitality industry jobs in Sonoma County. The addition of over 1,500 new jobs (FEIS, Appendix B, p. 35) would further exacerbate the labor market problem, likely requiring an influx of people moving to the area, thus increasing demand for housing, and/or

employees commuting from outside the county, thus creating additional traffic and related governmental expenditures, among other impacts, leading to further unanalyzed impacts.

Irony of Acorn's Environmental Justice Impacts Analysis

It is ironic that on the one hand Acorn supported its assertion that the Proposed Koi Nation Casino could succeed financially by demonstrating that it would be able to cannibalize the business of surrounding Indian tribes, resulting in reduced revenues to them, and on the other hand, supported its assertion that the new casino would not have adverse environmental justice impacts by ignoring how it would depend upon that same cannibalization.

Summary of GMA's/Acorn's Response (p. 3-148 of Response to Comments on the Draft EIS, Reply T8-138**)**

Acorn states that per CEQ NEPA regulations and Executive Order (EO) 12898, environmental justice effects "focus on environmental and health impacts rather than pure economic competition" and that "[w]hile economic impacts have been considered in environmental justice analysis, the effects are typically analyzed in terms of how environmental burdens may create economic disadvantages for communities, not how market competition would affect existing businesses."

MEC's Reply

Acorn seems to disregard the extensive tribal governmental revenue losses that will result from the significant competitive effects. At face value, even GMA's computed competitive effects would yield significant detriment for a number of tribes, including the Federated Indians of Graton Rancheria. Moreover, as noted elsewhere in this document and MEC's DEIS Preliminary Analysis, GMA's competitive effects are vastly understated, meaning that the detrimental impacts on tribal governments and their services to their citizens and their local communities are also vastly understated. From an economist's perspective, regardless of whether detriment to the local tribes is caused by environmental/health impacts of the proposed casino or due to the economic impacts of the proposed casino, the harm is real and significant and should be considered by the BIA.

If you have any questions regarding this letter, please do not hesitate to contact me. Thank you for the opportunity to assist the Federated Indians of Graton Rancheria with this important matter.

Sincerely,

Alan Meister, Ph.D. Jonathan Clough

From: Scott Gabaldon <scott@g4firearms.com>
Sent: Monday, December 23, 2024 8:50 PM
To: Broussard, Chad N <Chad.Broussard@bia.gov>; Broussard, Chad N <Chad.Broussard@bia.gov>
Cc: patriciap@MishewalWappoTribe.com <patriciap@mishewalwappotribe.com>; michellef mishewalwappotribe.com <michellef@mishewalwappotribe.com>; Vince Salsedo <vsalsedo@cityoflakeport.com>; Boxcarjoe707@gmail.com <Boxcarjoe707@gmail.com>
Subject: [EXTERNAL] Mishewal Wappo Comments on Koi Nation EIS Finalized 12.20.24_bo

Please see attached email

If you have further questions, please feel free to call me at 707-494-9159

Best regards,

Scott Gabaldon
Mishewal Wappo Tribal Chairman

Official Tribal Document

460 Larkfield Center
Santa Rosa, CA 95403
Phone: 707-284-1069

Wizipan Garriott
Principal Deputy Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Amy Dutschke
Regional Director
Bureau of Indian Affairs, Pacific Regional Office
2800 Cottage Way, Room W–2820, Sacramento, CA 95825

Via email to: chad.broussard@bia.gov

Re: FEIS Comments, Shiloh Resort and Casino Project

Dear Principal Deputy Assistant Secretary Garriott and Director Dutschke,

The Mishewal Wappo Tribe of Alexander Valley, (Mishewal Wappo), is the last remaining Wappo Tribe in existence with approximately 340 living members. Our Tribe is presently headquartered in the City of Santa Rosa in Sonoma County, California. Wappo peoples historically resided at the northern end of the Russian River Valley, Knights Valley, all of Napa County, East Santa Rosa and Healdsburg.

The Mishewal Wappo would like to be on record as opposing the Koi Nation's application to the United States Department of Interior to acquire 68.6 acres of land in trust (Project Site) for the benefit of the Koi Nation for gaming purposes (Proposed Action). Koi Nation now proposes to use the Project Site to develop a casino facility, hotel, spa, and associated infrastructure. As described in these comments, Mishewal Wappo has serious concerns regarding the potential effects of the Proposed Project on local Tribes—which notably do not include the Koi Nation itself, whose historic and cultural ties are instead to Lake County—and the surrounding community and environment. The Final Environmental Impact Statement (FEIS) released by the Bureau of Indian Affairs (BIA) is inadequate to address those concerns, and indeed does not even fully acknowledge them.

As a threshold matter, Mishewal Wappo and the rest of the public have not been provided with sufficient opportunity for meaningful review and comment on the environmental implications of this major proposed development, despite the potential for significant impacts to the reservation homelands of Sonoma County Tribes. As the volume of materials has increased dramatically with each step of the review process, the time to review and submit comments on those materials has markedly decreased. Mishewal Wappo has not received proper government-to-government consultation on this project, and we have not been invited to any such

consultations. Moreover, the homelands of our fellow Sonoma County Tribes do not appear to be accounted for in the data underpinning the BIA's wildfire and traffic studies, despite repeated warnings to this effect and the BIA's unsupported assertion to the contrary in its response to comments. Finally, the FEIS fails to adequately account for impacts to water, wildlife, cultural, or economic resources, and continues to rely on proposed mitigation measures that are either speculative, unenforceable, or outsourced to third parties not under the purview of the BIA.

In short, despite Council on Environmental Quality (CEQ) regulations requiring that an EIS "provide full and fair discussion of significant environmental impacts and . . . inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment," 40 C.F.R. § 1502.1, the BIA's rushed timeline and failure to meaningfully address Sonoma County Tribes' legitimate concerns have arbitrarily and capriciously deprived Mishewal Wappo and other local Tribes of the opportunity to fully review and analyze the Proposed Project.

Mishewal Wappo therefore requests that the BIA either adopt Alternative D, the No-Action Alternative, or revisit the environmental analysis underlying the FEIS, which Mishewal Wappo believes to be inadequate, to meaningfully address these shortcomings and to allow for careful, complete consideration of the likely impacts of the Proposed Project to the surrounding Tribes, communities, and environment. Failing either of these remedies, the BIA must at the very least issue a supplement to the FEIS under 40 C.F.R. § 1502.9(d)(1) to account for new construction not incorporated within the 2022 studies the FEIS cites.

I. Procedural Deficiencies Have Plagued the Proposed Project Since its Early Stages.

From the outset, the BIA's timing of Environmental Assessment (EA), DEIS, and FEIS releases and corresponding public comment periods appears designed to minimize public input in service of a pre-determined schedule, rather than to fully resolve outstanding issues identified by local Tribes and others. Not only does the FEIS outright violate statutory length limitations, but the BIA's rushed timelines appear to have affected the FEIS's contents. Symptoms of the BIA's condensed timing include, *inter alia*, its failure to account for substantial changes to the vicinity of the Project Site (identified by the Sonoma County Tribes in prior comments), the dearth of information provided to local Tribes during the scoping process, and the inadequacy of the public comment periods. The BIA's failure to meet the standards laid out in the National Environmental Policy Act (NEPA), its implementing regulations, and governing case law is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of NEPA and the Administrative Procedure Act (APA). 5 U.S.C. §§ 701–706.

a. The Timing and Length of Materials Violate NEPA and its Implementing Regulations.

In September of 2022, an Environmental Assessment (EA) was prepared and made available for public comment for a 45-day period, which was then extended for an additional 15-day period that concluded on November 13, 2023. The BIA then decided to prepare a Draft EIS (DEIS), the publication of which initiated a 45-day comment period that concluded on August 26, 2024. On November 22, 2024, the BIA released the FEIS for a 30-day period "after which the BIA may proceed with a decision." FEIS at 3-2. As the time allotted for public review and

comment on the Proposed Project has decreased, the materials provided in support of the Proposed Project have multiplied. Sonoma County Tribes have consistently raised as problematic the limited timeframes provided to review and comment on the Proposed Project's voluminous technical appendices. And when the BIA released its approximately 6,000-page Draft EIS (DEIS) for only 45 days over a holiday weekend, numerous commenters noted the length and complexity of the materials, and requested extensions to allow for independent review, meaningful comment, and required consultation. *See* FEIS App. P. None were granted.

On November 22, 2024, the BIA released the FEIS, this time for a 30-day comment period, and with holiday weekends on either end. Though the body of the FEIS alone totals 321 pages, there are approximately 10,000 pages of technical materials included in the appendices. To date, the BIA has not responded to requests for extension.

In the FEIS, the BIA points to its adherence to the **minimum** timelines set forth by the CEQ as evidence of procedural compliance. FEIS at 3-l ("Agencies shall allow at least 45 days for comment on a Draft EIS . . . Consistent with this requirement, a NOA for the Draft EIS was issued on July 8, 2024 . . . ."). However, since the BIA bases its analyses on thousands of technically complex pages attached as appendices to the already-lengthy Draft and Final EIS, the BIA's strict adherence to the regulatory minimums does not "ensure that environmental information is available to public officials and citizens **before** decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). Moreover, both NEPA and the CEQ regulations direct that the text of a final EIS—exclusive of citations or appendices—should not exceed 150 pages, except for proposals of extraordinary complexity, "which **shall not exceed 300 pages**." 40 C.F.R. § 1502.7 (emphasis added);[1] *see also* 42 U.S.C. § 4336a(e)(l) (same). Excluding citations and appendices, the FEIS totals **311 pages**. On these grounds alone, the FEIS violates CEQ regulations and NEPA.

In the face of these violations, the BIA's refusal to even grant the public commenters' request for extension is all the more arbitrary and capricious. Public commenters were given a total of **30 days** to pore over tens of thousands of pages of technical data, and to identify the shortcomings of the same. Such a condensed timeline cannot support a finding that the BIA gave the public's concerns due consideration. To the contrary, the decreasing timelines—coupled with the exponential increase in materials to review—indicate that the BIA did not and could not engage in a meaningful dialogue with commenters, who were not provided the opportunity to fully review the materials. Actions that undermine public participation and obscure the actual proposed action under review—such as the BIA's actions here—violate fundamental NEPA requirements. *See* Indian Affairs NEPA Guidebook (Aug. 2012) at § 2.1 (emphasizing that "[t]he NEPA process is intended to facilitate public participation and disclosure in the Federal planning process") (emphasis added); *id.* § 2.4 ("Public disclosure and involvement is a key requirement of NEPA.").[2]

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[1] In describing the reason for this change, the CEQ noted in the January 10, 2020 Notice of Proposed Rulemaking (NPRM) that "every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information."

[2] https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59_IAM_3-H_v1.1_508_OIMT.pdf.

b. The BIA Failed to Adequately Consult or Coordinate with Affected Parties Including Sonoma County Tribes.

Aside from those cultural and paleontological failures discussed in greater detail below, *see* § VIII, the BIA's refusal to consult with or otherwise properly involve Sonoma County Tribes, including Mishewal Wappo and the Lytton Rancheria, (Lytton),—whose reservation homeland abuts the Town of Windsor—is fatal to the FEIS analyses. The CEQ regulations call for the involvement of Tribes that may be affected by a Federal proposal, 40 C.F.R. § 1501.2(b)(4)(ii) ("The Federal agency consults **early** with appropriate State, Tribal, and local governments and with interested persons and organizations when their involvement is reasonably foreseeable.") (emphasis added), and require that agencies integrate the environmental review process with other planning "at the **earliest possible time** to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts," *id.* § 1501.2 (emphasis added).

Here, the BIA's failure to coordinate with Mishewal Wappo and Lytton from the early stages of the Proposed Project has resulted in several critical oversights. As Lytton explained in its comments of July 12, 2024:

> The Lytton Rancheria also takes great umbrage at the EIS's failure to account for the Tribe's new homeland and the possibility that the Koi Nation project could see it and its members destroyed due to evacuation delays the project will inevitably cause. We encourage the Bureau to meet and meaningfully consult with the Sonoma County Tribes who are understandably upset with such a project being pushed through for a Tribe whose homeland is in a different county.

FEIS App. P at 270. In later comments, Lytton identified "new housing projects in the construction phase around the project site which are not accounted for." *Id.* at 281.

Moreover, a number of the mitigation measures relied upon in the FEIS and that directly affect Lytton (rendering Lytton an "affected Tribe" entitled to deference on preferred mitigation strategies) failed to incorporate Lytton's input during development. To the extent the BIA has consistently failed to consult with Lytton, and excludes Lytton entirely from consideration within the FEIS, *see, e.g.*, § 3.12, the federal government has breached its trust responsibility. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir.1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)) (holding BIA violated trust obligation when failing to comply with own regulations).

As the BIA knows, the Lytton Rancheria, which borders the town of Windsor, has initiated a new development in the area adding hundreds of residents, and possesses its own evacuation plans. Yet the mitigation measures described at ES-31 require the Koi Nation **only** to "coordinate with Sonoma County and the Town of Windsor on their respective emergency operation plans and implement or contribute to the implementation of measures intended to improve early detection of wildfire events, and evacuation times for the Project Site and

vicinity." The FEIS' proposed mitigation plan ignores the inherent conflict in the existence of two potentially contradictory (or identical) evacuation plans covering the same area.[3]

It is particularly galling for Mishewal Wappo and other affected Tribes that the Koi Nation—which does not have its cultural or historic ties to this area[4]—need not consult with the Tribes that maintain their traditional connections to the land regarding use and protection of the area. Even as Koi Nation is engaged in litigation with the City of Clearlake over disturbances to their ancestral sites over 50 miles away.[5] Indeed, with respect to mitigation, the BIA commits the Tribe to coordinate only with "Sonoma County and the Town of Windsor on their respective emergency operation plans," FEIS at 3-136, illogically omitting any reference to the Lytton Rancheria, whose homelands and housing project neighbor the same. *See also id.* at ES-31 (omitting Lytton from evacuation mitigation plans); ES-42 (failing to account for new Lytton housing development); Table 3.12-6 (excluding Lytton from Trigger Evacuation Zone); 3-133 (not incorporating Lytton into evacuation times).

The ancestral homelands of the Mishewal Wappo include the 3,200-acre Pepperwood Preserve adjacent to the Project Site and encompass the Project Site itself. Our ancestors and cultural sites are surely buried near, if not at the Project Site. For the BIA to have failed to consult or communicate with our Tribe in regards to this project is a slap in the face and to grant sovereignty over our ancestors to a Tribe that is non-indigenous to our homelands would be an even graver injustice.

II. The FEIS' Proposed Mitigation Measures Remain Largely Unaddressed and Unenforceable.

According to the BIA, "[a]ny mitigation measure must be enforceable[,] and it is important for BIA Regional and Agency Offices to establish monitoring programs to ensure that mitigation is carried out." Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. Any analysis of alternatives must include a discussion of mitigation measures where mitigation is feasible, and of any monitoring designed for adaptive management. Moreover, "[f]ederal agencies are mandated to specifically consider . . . affected tribes' preferred mitigation strategies." Council on Env't Quality, Exec. Office of President, *Environmental Justice: Guidance Under the National Environmental Policy Act* 16 (1997). Sonoma County Tribes have raised a number of concerns related to the mitigation strategies identified by the BIA. These concerns remain unresolved in the FEIS.

Instead, the BIA points to the CEQ rules directing that a mitigation monitoring and compliance plan "be prepared and incorporated into the BIA's ROD," and claims that "[t]he EIS

[3] It is true that in Appendix P, the BIA claims the Lytton homeland and housing development have been incorporated into the underlying studies informing these mitigation measures, among others. But aside from this self-serving statement, there is no evidence of the same, particularly as the studies pre-date the construction of the housing development.

[4] FEIS 3-62 (determining "no ethnographic villages or camp sites reported within one mile of the APE").

[5] https://www.record-bee.com/2023/08/03/koi-nation-sues-city-of-clearlake-over-sports-complex-development/

is not the document that commits the agency to mitigation."[6] Master Response at 3-11. The Master Response also asserts that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." *Id.* Neither of these responses—which, again, are not included within the FEIS itself, but rather the Appendices—address the underlying concerns with the mitigation measures identified in the FEIS, even pre-enforcement. The limited mitigation measures that **do** exist are facially unenforceable, in violation of BIA policy and the NEPA itself.

First, many of the mitigation measures identified in the FEIS rely on a threshold determination by the Koi Nation or another third party that adverse impacts will occur or have already occurred. *See, e.g*. FEIS at 4-1 (deferring to Town of Windsor's eventual determination that aquifer connectivity results in a "substantial decrease in water levels"). Others seek to reduce impacts "to the maximum extent possible," *id.* at 4-7, or suggest what measures "could be" included, *id.* at 4-26. Still others acknowledge that there is no feasible mitigation within the jurisdiction of the Tribe or the BIA. *Id.* at ES-18;19 (describing instances in which "no mitigation [is] feasible" and acknowledging that "[w]hile the timing for the off-site roadway improvements is not within the jurisdiction or ability of the Tribe or BIA to control, the Tribe shall make good faith efforts"). Where mitigation measures rely on the voluntary future actions of a third party, such as the Town of Windsor, they are speculative and cannot form the basis for rational decision making by the BIA. Plans to make plans after the Proposed Project has begun construction, which are outside of the NEPA process, and which are shielded from public review or comment, are not NEPA-compliant. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding no "hard look" had occurred when mitigation measures addressed post-construction impacts and explaining that "[m]itigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval.").

Nor does a FEIS that merely lists mitigation options comply with NEPA, because "snippets do not constitute real analysis." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (mere mention that protected species may be exposed to risks of oil spills did not provide lawful NEPA analysis). Even if included in the ROD, then, the BIA's vague, subjective, conclusory, or non-existent mitigation measures are, as a practical matter, unenforceable by Mishewal Wappo or others (and illegal under the NEPA).

In its Public Comments on the DEIS, the Lytton Rancheria identified anticipated issues with the enforceability of any mitigation measures eventually adopted against the Koi Nation, a sovereign. In response, the BIA asserted that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." App. P at 3-11. But it is not at all clear that Mishewal Wappo, Lytton, or any affected party, will have

[6] While the FEIS itself does not commit the agency to mitigation, this argument misses the point because the FEIS must adequately describe how the agency or applicant are to be held accountable to ensure the proposed mitigation occurs.

any enforcement recourse under the Koi Nation of Northern California Gaming Ordinance (Ordinance). Rather, the Ordinance provides in relevant part only that

> In the event an affected state or local governmental entity with an interest in the Applicable Mitigations **files a complaint with the NIGC** alleging that the Nation has not complied with the Applicable Mitigations in accordance with this Chapter 14 of the Gaming Ordinance, **upon notice from the NIGC** that such a complaint has been made, the Nation will submit to the NIGC's review and enforcement authority as set forth in 25 C.F.R. 573.1 . . .

Ordinance, attached as Appendix Q to the EIS, at 14.01 (emphasis added). Not only is "state or local government entity" undefined (and therefore potentially exclusive of Mishewal Wappo, Lytton or other Tribes), but it remains unclear under what circumstances the NIGC would accept—much less act upon—an enforcement claim by Mishewal Wappo or other affected parties regarding environmental impacts of the Proposed Project. The existence of the Ordinance does not at all guarantee that "any mitigation required by the ROD will be enforceable as a matter of Tribal law," as the BIA claims. App. P at 3-11.

Finally, it is uncertain to what extent Mishewal Wappo can even rely upon the BIA's repeated representations that the ROD will include enforcement measures (subjective or tenuous as they may be). Mishewal Wappo notes with particular concern the recent holding in *Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*, 2024 WL 4745044 (D.C. Cir. Nov. 12, 2024), wherein the United States Court of Appeals for the District of Columbia Circuit determined that CEQ regulations were promulgated *ultra vires*, and thus unlawfully. Mishewal Wappo is concerned that should any enforcement actions be brought pursuant to the FEIS or any eventual ROD, the BIA and Koi Nation will attempt to cite *Audubon* for the proposition that enforceability regulations are void. Thus, while the BIA defers any mitigation enforcement to the development of a ROD under CEQ regulations, compliance under those regulations is not necessarily assured or even practically enforceable.

III. The FEIS Still Fails to Adequately Address—Much Less Mitigate—Wildfire Concerns.

Despite Lytton and other affected Tribes raising wildfire as a primary concern in response to the DEIS, the FEIS dedicates remarkably little space to addressing the matter. Though the FEIS acknowledges that "the Project Site is primarily designated as 3 (high) wildfire risk," FEIS at 3-125, and concedes that the construction of the Project could increase the risks of wildfires, ES-26, the BIA nevertheless concludes wildfire hazards and impacts are not significant or less than significant. Further, the FEIS fails to incorporate a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. 350. Rather, as with the DEIS, the FEIS shoehorns what should be an independent wildfire risk analysis into its evacuation analysis and defers on the basis that "wildfire evacuation analysis is a new area of study under NEPA and few studies of this type have been completed for NEPA purposes." FEIS App. P at 3-16. And "while . . . federal agencies have substantial discretion to define the scope of NEPA review, an agency may not disregard its statutory obligation to take a 'hard look' at the environmental consequences of a proposed action,

including its cumulative impacts, where appropriate." *Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022).

The FEIS readily concedes that

> [a] project would be considered to have a significant impact if it were to increase wildfire risk on-site or in the surrounding area. This includes, but is not limited to, building in a high-risk fire zone without project design measures to reduce inherent wildfire risk, increasing fuel loads, exacerbating the steepness of the local topography, introducing uses that would increase the chance of igniting fires, eliminating fire barriers, inhibiting local emergency response to or evacuation routes from wildfires, and conflicting with a local wildfire management plan.

FEIS at 3-129. As identified in earlier comments, **each** of these factors is implicated in some fashion by the Proposed Project, which would bring thousands of daily visitors to a site that Sonoma County has already determined to be at high risk.

But despite the significant risk to safety inherent in operating such a large casino facility in such a high-risk location, the FEIS relies on speculative mitigation measures, including "the establishment of public service agreements, such as with the Sonoma County Fire District (SCFD) and other relevant agencies," which the BIA assures "**would** include the resources necessary to effectively manage the increase in service calls without placing an undue financial burden on local fire and EMS." App. P at 3-54; *see* FEIS at 2-13 (emphasis added). To cite a non-existent mitigation measure that "would" somehow address all concerns "without . . . undue financial burden" based on the unquestioning consent of independent third parties is a complete deferral of the BIA's self-imposed obligation to develop enforceable mitigation measures. Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. And although there is a Letter of Intent between Koi Nation and SCFD, FEIS App. O, the Letter does not guarantee that the SCFD would actually respond to fire incidents at the Project Site. Nevertheless, the FEIS concludes that potential impacts to fire protection plans is less than significant. *Id.* at ES-17.

NEPA prohibits reliance on assumptions such as this one. *See e.g.*, *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt*., 36 F.4th 850, 874 (9th Cir. 2022), *cert. denied sub nom. Am. Petroleum Inst. v. Env't Def. Ctr.*, 143 S. Ct. 2582, 216 L. Ed. 2d 1192 (2023) (agreeing with plaintiff "that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts.")*; City of Los Angeles, California v. Fed. Aviation Admin.*, 63 F.4th 835, 850 (9th Cir. 2023) (finding FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not operate simultaneously).

The BIA also acknowledges that the Proposed Project's construction "could increase the risk of wildfire," FEIS at ES-26, but relies on Best Management Practices (BMPs) including "the prevention of fuel being spilled" and spark arresters to conclude that construction "would not increase wildfire risk onsite or in the surrounding area." *Id.* at 3-130. It is unclear how the BIA

arrived at the conclusion that 'preventing fuel spillage' is (a) enforceable, or (b) effective. Further unclear is how such a vague mechanism might reduce fire risk to insignificance, which lays the groundwork for an arbitrary and capricious finding. *See Wilderness Society v. Bosworth*, 118 F.Supp.2d 1082, 1107 (D.Mt. 2000) ("Because BMPs have not been assessed for their effectiveness against landslide events and because a high risk of landslides is acknowledged . . . the Court finds it is not reasonable for the Defendants to just summarily rely on BMPs to mitigate this environmental impact. Therefore, the Court finds the FEIS conclusion that the project will have no effect on water quality to be arbitrary and capricious based on the undisputed risk of landslides in the FEIS").

As with the DEIS, the only factors preventing the BIA from finding the wildfire risks presented by the Proposed Project constitute a significant impact are the hypothetical mitigation measures the Tribe **might** take to reduce wildfire risks. The circular finding is unsupported by the record before the BIA, and should be revisited.

IV. Traffic and Evacuation Concerns Have Not Been Addressed.

Related to the wildfire concerns set forth above, many have raised alarm regarding the BIA's failure to adequately grapple with the Proposed Project's effects on traffic and evacuation concerns. In response, Appendix P to the FEIS simply states that the improvements discussed in the DEIS are "far from illusory," App. P at 3-96, and assures Sonoma County Tribes that its evacuation model "included within its assumptions the development of the Lytton Housing Project in Windsor, Shiloh Terrance, Shiloh Crossing, Clearwater, and other development projects. The model also included Shiloh Estates and other developments in the Mayacamas Mountains both in the opening year (2028) and the cumulative year (2040) scenarios." *Id.* at 3.1.11. But the BIA has failed to identify how it might require independent third parties to comply with the referenced mitigation measures, or support its claim that Lytton's housing development has been considered with any underlying data, studies, or references.

Specifically, though the Evacuation Travel Time Assessment cited in the BIA's response describes "key assumptions . . . used in the development of background and evacuation traffic demand," App. N-2 at 6, **neither the Lytton Housing Project nor any of the other projects identified in the Master Response are listed in these assumptions**. The Evacuation Travel Time Assessment states that "Background traffic data was based on outputs from the SCTA travel demand model from the traffic study for the Project[,]" which we assume refers to the Revised Traffic Impact Study at Appendix I. The Revised Traffic Impact Study bases its "Existing Conditions" on data collected in July 2022, prior to the existence of Lytton's new housing development. The Study further provides that Opening Year 2028 No Project Conditions "includes Existing Conditions, but with the addition of traffic from **approved projects** that are in the development pipeline in the Town of Windsor and Sonoma County, as well as effects from planned roadway improvements constructed by approved projects." (Emphasis added). It notes that "trips from the following approved projects were also added to the study intersections to estimate year 2028 traffic demands," providing a list of projects that **notably does not include the Lytton Housing Project in Windsor.** The BIA has thus failed to support its claim that the additional Lytton development is accounted for in the Study.

In the event of evacuation, the residents of Lytton's housing project will be among those forced to flee across Windsor and travel south on Route 101. They will be directly impacted and threatened by the delay the Koi Nation's Proposed Project will impose. These impacts, which are apparently not incorporated into the Study supporting BIA's analysis, could harm not only Lytton members, but the entire community. The BIA's bare statement that these impacts are considered is not supported by any citation to the actual analysis and Mishewal Wappo could not independently locate where or how Lytton's housing development is accounted for in the analysis. A conclusory finding "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind . . . affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives," *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), and therefore violates NEPA.

V. The FEIS Fails to Adequately Address Impacts to Water Resources

The FEIS's water resources analysis remains incomplete and inadequate to address the environmental impacts that the Project will have on surface and groundwater resources. Maintaining the same deficiencies as the DEIS, the FEIS does not and cannot identify or articulate whether the Project's known and potential environmental impacts are likely to be significant for two primary reasons: First, like the DEIS, the FEIS relies entirely upon BMPs that are speculative or unenforceable. Second, like the DEIS, the FEIS does not rely upon adequate water surveys, monitoring, or studies and provides no baseline water quality data upon which to base its conclusions. As such, the FEIS cannot determine that all impacts to water resources would be "less than significant" or offer surrounding Tribes, organizations, or community members any assurance that their health and the human environment will not be harmed as a result of the Project.

As the FEIS concedes, the Project would significantly impact both surface and groundwater resources if certain circumstances were to occur. FEIS at 3-18. In particular, impacts would be significant when (1) runoff from the site causes localized flooding or introduces contaminants to waterways off site; (2) pumping at the proposed wells impedes groundwater recharge or creates drawdown that would affect local water supply; (3) pumping at the proposed wells interfere with the implementation of local groundwater management plans by causing or contributing to "chronic lowering of groundwater levels; depletion of groundwater storage; water quality degradation due to induced contaminant migration or interference with cleanup efforts or water quality management plans; depletion of interconnected surface waters, including potential flow in Pruitt Creek or impacts to groundwater-dependent ecosystems (GDEs); and/or land subsidence"; or (4) wastewater or runoff generated by the Project impacts the water quality of receiving waterbodies or groundwater. *Id.* Despite acknowledging that wastewater or runoff could impact the water quality of "receiving waterbodies," the FEIS claims that the Project would not impact surface water supplies because it "is a sufficient distance from surface waters, such as the Russian River, used by water suppliers."[7] *Id.*

[7] We note that "sufficient distance" is not defined, and without proper consideration of potential receiving waters, the Project may still impact surface waters that are not immediately adjacent to the site. *See County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 183–185 (2020) (holding

1. Speculative or Unenforceable BMPs

The FEIS concludes that adverse impacts would not occur and any impacts that will occur will be "less than significant" based on BMPs. However, all BMPs relied upon are entirely speculative or unenforceable. As a result, the BIA cannot conclude that any known or potential impacts to water resources will be "less than significant."

Both construction and operation of the Project would significantly impact surface and groundwater. *Id.* at 3-18–20. Construction of the Project could lead to soil erosion and sedimentation in nearby surface waters, which would inevitably degrade water quality and could even violate applicable water quality standards. Construction would also include the use of hazardous materials, including concrete washings, oil, and grease, the discharge of which into surface waters or groundwater would result in significant pollution. *Id.* at 3-18. The FEIS almost entirely relies upon the Koi Nation's future—and wholly speculative—adherence to the National Pollutant Discharge Elimination System (NPDES) general permit for construction stormwater discharges (NPDES General Construction Permit), issued pursuant to the Clean Water Act, to ensure that impacts to surface waters from construction activities would only be "less than significant." *See* NPDES Permit No. CAS000002 (Sept. 8, 2022), available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2022/wqo_2022-0057-dwq.pdf.

The Koi Nation has not yet obtained coverage under the NPDES General Construction Permit, nor has it prepared the requisite Stormwater Pollution Prevention Plan (SWPPP). Yet, the FEIS almost entirely relies on the Koi Nation's promised implementation of and adherence to the permit and SWPPP to conclude that sufficient BMPs would "minimize adverse impacts to the local and regional watershed from construction activities . . . ." *Id.* As a result, any assurance that the above-described impacts would be "less than significant" is entirely speculative. Moreover, without reviewing the exact SWPPP to which Koi Nation would be bound, the BIA cannot now conclude that it is (or will be) sufficient to protect against stormwater pollution. In other words, the BIA must conduct its own environmental review rather than rely on an entirely nonexistent SWPPP that may or may not be approved by the EPA sometime in the future. Rather than rely on speculation and future promises, the BIA must require Koi Nation to prepare the requisite SWPPP and conduct its own review to ensure that such SWPPP is adequate to protect against adverse environmental impacts before or concurrently to its own environmental review. Because the BIA's decision necessarily relies on the Koi Nation's future coverage under the NPDES General Construction Permit and SWPPP, these actions are connected and must be considered in the same NEPA review. *See* 40 C.F.R. § 1501.3(b) ("The agency shall also consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that: (1) Automatically trigger other actions that may require NEPA review; (2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) Are interdependent parts of a larger action and

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that a point source may still discharge into navigable waters as regulated by the Clean Water Act when there is the "functional equivalent of a direct discharge," based upon considerations of various factors, including: time, distance, nature of material through which a pollutant travels, the extent to which a pollutant is diluted, and the amount of pollutant that enters the water, among others).

depend on the larger action for their justification."); *id.* § 1502.24(a) ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws [including the Clean Water Act] and Executive orders applicable to the proposed action . . . ."); *Friends of Animals v. U.S. Fish & Wildlife Svc.*, 28 F.4th 19, 34 (9th Cir. 2022).

Operation of the Project may also impact surface waters due to the increase of impervious surfaces, which would result in increased stormwater flows and discharge from the site during precipitation events. FEIS at 3-19. The FEIS assures that "[s]tormwater treatment and detention would be provided by bioswales, a detention basin, and/or the wastewater treatment plant (WWTP)" and that additional BMPs would include "weekly sweeping of internal roadways and parking areas to reduce sediment and debris from entering the stormwater drainage system." *Id.* Additionally, various facilities would be constructed within the 100-year floodplain. *Id.* The FEIS relies on balanced earthwork to ensure that changes to the delineated floodplain mapping would be prevented and floodplain impacts would be "less than significant." *Id.*

The FEIS, however, only relies on its grading and drainage plan to treat stormwater, and does not require the Koi Nation to route all stormwater to the wastewater treatment plant. The FEIS therefore does not require the Koi Nation to apply for or obtain an individual NPDES permit for any stormwater discharges into Pruitt Creek that may occur, except those from the wastewater treatment plant. *See id.* at 2-11–13. Pruitt Creek is a tributary of Pool Creek, which flows into Windsor Creek, the Laguna de Santa Rosa, and ultimately the Russian River. *See* FEIS, App. G-8 (Approved Jurisdictional Decision), at 3–4. As such, the portion of Pruitt Creek that runs directly through the Project site and into which the Project proposes to discharge stormwater is a navigable water subject to the permitting requirements in the Clean Water Act, 33 U.S.C. §§ 1342, 1344. *Id.* at 2. To that end, the Project proposes no future or ongoing SWPPPs beyond construction of the site, including any BMPs, to which it would be subject during operation. Accordingly, aside from various design features, there is no enforcement mechanism, regulatory compliance requirements, or oversight to which the Project would be subject that ensures all stormwater discharged from the Project site meets water quality standards and prevents contaminants from entering nearby surface waters, which are already impaired.[8]

The FEIS proposes that, as a mitigation measure to impacts to "Biological Resources" from construction of the site, "[i]f impacts to Waters of the U.S. or wetland habitat are unavoidable, a 404 permit and 401 Certification under the Clean Water Act shall be obtained from the USACE and U.S. Environmental Protection Agency (USEPA)." FEIS at 4-9. However, as with the NPDES General Construction Permit, any coverage under a 404 permit is entirely speculative, and relying on the Koi Nation's future promise of adherence to a yet-obtained permit is inadequate justification for a determination of "less than significant" impacts.

[8] Pruitt Creek and other tributaries of Windsor Creek are currently listed as impaired for sedimentation/siltation and temperature on California's most recently approved § 303(d) List from 2018. *See* 2018 Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report), available at https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2018_integrated_report.html.

The BIA must require the Koi Nation to determine whether a 404 permit is required and, if so, obtain—or at the very least apply for—such permit before or concurrently to its review. Without knowing whether or what impacts to Waters of the U.S. or wetland habitat are unavoidable, there is no way for the BIA to now determine whether such impacts can or would be mitigated by a 404 permit, or whether such permit (if obtained, which is entirely dependent on the U.S. Army Corps of Engineers' own environmental analysis) would provide adequate mitigation under the BIA's own review. Furthermore, future environmental analyses cannot constitute adequate mitigation measures; the BIA must review what is before it *now* and cannot rely on the promise of future environmental review to ensure protection of resources at risk by the agency's action. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011).

Additionally, the grading and drainage plan is designed for a 100-year, 24-hour storm event. FEIS at 2-11, 3-19. However, due to the impacts of climate change, 100-year, 24-hour storm events are occurring more often and precipitation is increasingly more severe. *See* FEIS App. E, at 16. The stormwater management system should therefore be modeled and sized based on larger storm events to adequately manage increased stormwater as a result of climate change and prevent pollution discharges. *See* 40 C.F.R. § 1502.16(a)(6) (requiring environmental consequences section of EIS to include analysis of "climate-change related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives *and the effects of climate change on the proposed action and alternatives*." (emphasis added)); *see also* EPA Comments on EA, A-7 (advising BIA to "clarify whether and how increased precipitation intensity occurring under climate change has been accommodated in the drainage plans and if pre-development hydrology would be maintained considering these larger flows").

Lastly, the FEIS does not adequately address groundwater drawdown concerns or consider the impact to the new Lytton Rancheria development in its groundwater assessments. In particular, the Supplemental Groundwater Resources Impact Assessment ("SGRIA") still does not take into account the Lytton Rancheria housing development project and its reliance on groundwater wells for community water supply. *See* FEIS, Appendix D-4. As with fire evacuation and traffic concerns, the FEIS fails to consider the 146 families residing in the new Lytton Rancheria housing development with regard to groundwater drawdown. The FEIS has failed to incorporate the prior input from Sonoma County Tribes or to meaningfully consider the concerns in comments on the DEIS. Without considering the Lytton Rancheria housing development—which consists of approximately 150 homes and structures—and its use of groundwater wells, the FEIS entirely fails to accurately assess the impact the Project would have on local water supplies. By failing to properly consult with Sonoma County's Tribes and excluding the new Lytton homeland entirely from consideration within the FEIS, the BIA has breached its trust responsibility. *See Oglala Sioux Tribe*, 603 F.2d at 721.

2. No Baseline Water Quality Data

In addition to relying upon speculative or unenforceable BMPs, the FEIS further relies on nonexistent environmental analyses and fails to provide baseline water quality data upon which to base its determination that impacts would be less than significant. In particular, the FEIS does not include, nor has the BIA considered, any adequate water quality assessments of current conditions, benthic data, or comprehensive field data of nearby receiving waters or wetlands.

The Water and Wastewater Feasibility Study conducted in February 2023, upon which the BIA relies, discusses a future "Baseline Monitoring Program" and notes,

> In order to begin detailed discussions with the [Regional Water Quality Control Board ("RWQCB")] on the feasibility of discharging to the Pruitt Creek, *the Project would need to begin to collect receiving water quality data* near anticipated discharge site and at the Mark West Creek gauge station. This data would help the RWQCB evaluate the background water quality of receiving waters, identify potential water quality restrictions, and understand the impacts of the proposed new discharge on the aquatic habitat.

FEIS, App. D-1, at 4-4 (emphasis added). Clearly then, neither the Koi Nation nor the BIA has yet collected or reviewed any water quality data of the receiving waters. But without this crucial baseline data, the BIA cannot now make a determination as to the existing structure and function of Pruitt Creek or other waterways to determine what the direct, indirect, or cumulative effects on such water would be as a result of construction or operation of the Project. *See* 40 C.F.R. § 1508.1(i)(4) (defining the environmental "effects" or "impacts" that must be identified and considered under NEPA to include, among other things, "ecological (such as the effects on natural resources *and on the components, structures, and functioning of affected ecosystems*)" (emphasis added)). If any survey was conducted that actually collected water samples, conducted testing, and considered the water quality and benthic data of the site, it was nearly three years ago in February 2022 and only accounted for plant species and soil in surface waters and wetlands in the immediate vicinity of the Project area; it did not consider other benthic data—such as the presence of macroinvertebrates or other aquatic ecosystems—or the quality of nearby surface waters or wetlands offsite. *See* FEIS, App. G-4, at 11–15, App. A.

Likewise, as a mitigation measure, the FEIS proposes a "Baseline Groundwater Level and Stream Discharge Monitoring Program" and "GDE Verification Monitoring," wherein the Koi Nation would monitor the groundwater levels and stream discharges and collect baseline data (importantly) in the future, after the BIA issues its final Record of Decision. FEIS at 4-3–5. A similar set of circumstances was determined by the Ninth Circuit to be arbitrary and capricious. *See N. Plains Res. Council*, 668 F.3d at 1084–85. There, the Surface Transportation Board had agreed to conduct certain wildlife studies and surveys as a mitigation measure to the construction of a railroad, pre-construction but post-agency approval. *Id.* at 1083–84. The Ninth Circuit held that "[b]ecause the [Final Supplemental EIS] does not provide baseline data for many of the species, and instead plans to conduct surveys and studies as part of its post-approval mitigation measures, we hold that the Board did not take a sufficiently 'hard look' to fulfill its NEPA-imposed obligations at the impacts to these species prior to issuing its decision." *Id.* In explaining its decision, the Ninth Circuit noted:

> Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might

> counteract the effect without first understanding the extent of the problem.
>
> This is inconsistent with what NEPA requires. NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. The use of mitigation measures as a proxy for baseline data does not further either purpose. First, without this data, an agency cannot carefully consider information about significant environmental impacts. Thus, the agency 'fail[s] to consider an important aspect of the problem,' resulting in an arbitrary and capricious decision. Second, even if the mitigation measures may guarantee that the data will be collected sometime in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Id. at 1084–85 (citations omitted).

The same is true here. The BIA cannot rely on future surveys to determine the baseline water quality or biological data of the site; the agency must consider that information now in its pre-approval analysis. Without even the most basic understanding of the existing conditions, the BIA is entirely unable to determine what the effects of the Project will be on water resources or ensure that all proposed BMPs or mitigation measures will in fact guarantee the protection or restoration of such resources. The BIA must therefore collect such data or require the Koi Nation to collect such data, provide that data to the public, and then adequately consider such data before issuing its final Record of Decision or risk arbitrary and capricious agency decision-making.

VI. The FEIS Fails to Adequately Address Impacts to Wildlife Resources

Like in its review of impacts to water resources, the FEIS similarly bases a determination of "less than significant" impacts to wildlife resources on speculative and unenforceable BMPs and mitigation measures and fails to consider baseline data. Specifically, to avoid impacts to wildlife and other biological resources, the FEIS assures that the Project construction would comply with the NPDES General Construction Permit and SWPPP and other mitigation measures. FEIS at 3-52–54, 4-7–9. However, as discussed above, the promise of future compliance with yet-obtained NPDES permits is inadequate justification upon which to base a determination that any impacts to wildlife and biological resources would be "less than significant." Additionally, as discussed above, without an adequate understanding of the baseline conditions of the site, the BIA has no way to determine what the actual impacts to wildlife or biological resources would be and thus cannot ensure that the proposed measures will avoid or mitigate such impacts.

The FEIS does not discuss the direct, indirect, or cumulative impacts to all wildlife. Rather, it only specifically discusses the Project's impacts to federally listed or protected special-status species, critical and essential habitat, and migratory birds. *Id.* at 3-53–56. To support its determination that impacts to certain identified species would be "less than significant," the BIA ensures the adherence to conditions of other (not-yet issued) permits and implementation of BMPs and other mitigation measures. Specifically, this includes compliance with the NPDES General Construction Permit and SWPPP, both of which are entirely speculative. *Id.* at 2-15–16. Further, the FEIS proposes certain mitigation measures, nearly all of which are inadequate and fail to provide the BIA with baseline data of the water and biological resources necessary to make a determination as to the Project's impacts. Again, as explained above, without baseline data, the BIA risks arbitrary and capricious decision-making.

Lastly, with regard to special-status fish species, particularly certain species of Pacific salmonids, the FEIS further acknowledges "that BIA has begun consultation with NOAA Fisheries," but that such consultation is still ongoing and no decision on the BIA's Biological Assessment has been issued. *FEIS* at 3-54, 5-1, App. G-7. The FEIS notes that NOAA provided comments on BIA's first Biological Assessment on February 9, 2024, but those comments are not available to the public. *Id.* at 5-1. To ensure it takes an adequate "hard look" at the impacts to special-status fish species, the BIA must not issue a final Record of Decision until consultation with NOAA has been completed.

VII. Economic Studies

In comments to the DEIS, concerns were raised regarding the economic impact studies. The first being that the studies upon which the BIA relied are woefully dated and inaccurate. In response to these comments, the BIA agrees that the data is dated, but claims that "[i]t is not practical nor required by NEPA to continually update financial analyses for the passage of time that inevitably takes place during any project and public review." T5-18. This ignores the fact, however, that "[r]eliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious." *N. Plains Res. Council*, 668 F.3d at 1086 (citing *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005)). Here, while economic data prepared by governmental agencies may lag, the BIA assigns great weight to the particular economic impact study here, which does not account for major changes in circumstance, like the fact that the study was conducted while the community was still recovering from the COVID-19 pandemic or without taking into account the Scotts Valley Casino. The data in that particular economic impact study is therefore too stale to carry the weight assigned to it by the BIA.

Mishewal Wappo is pleased that a supplemental substitution effects cumulative analysis that assumes the opening of the Scotts Valley Casino was prepared. FEIS, Appendix B-5. However, the FEIS still fails to address or mitigate the fact that the cumulative economic adverse effects of the Project will be far more impactful to the Tribes, including Mishewal Wappo, actually located in Sonoma County and the result of those impacts on the quality of life and services available to their members. *See id.* at 3-166–67. Particularly the FEIS does not analyze the effects the casino would have, should Mishewal Wappo someday proceed with a similar project in order to provide for its members, who we emphasize, are actually from Sonoma County, and include the Project Site among our ancestral homelands. There is no analysis on what market share would be available to Mishewal Wappo, and to what degree of success a

project from the Tribe could see. In other words, the BIA's supplemental study still does not take the requisite "hard look" at the economic impacts of this Project.

VIII. Cultural and Paleontological Resources

As the FEIS acknowledges, there are "records of sacred lands on or in the vicinity" of the Project site. However, the BIA has not properly complied with the National Historic Preservation Act (NHPA) and has not properly consulted with the necessary tribes regarding these cultural resources. On July 10, 2024, Juliane Polanco, the State Historic Preservation Officer (SHPO) for the California Department of Parks and Recreation, Office of Historic Preservation, sent the BIA a letter that: (1) advised the BIA to conduct consultation in a manner that complies with 36 C.F.R. § 800.2(c)(2)(ii)(A); (2) objected to a finding of no historic properties affected, noting that the BIA's efforts to identify historic properties was "insufficient, inadequate, and not reasonable"; and (3) requested BIA re-initiate Section 106 consultation. *See* T6, Comments of Federated Indians of Graton Rancheria (Aug. 26, 2024) (FIGR DEIS Comments), Attachment 27 (SHPO Letter). We await an invitation or request to consult with the BIA.

The NHPA requires federal agencies to consult with federally recognized Indian tribes that may attach religious and cultural significance to a property early in the planning process. 36 C.F.R. § 800.1. At a minimum the BIA should properly consult with these Tribes, who admittedly do not include Mishewal Wappo. That being said, the federally recognized and Non federally recognized Sonoma County tribes should be given a reasonable opportunity to identify their concerns, advise on the identification and evaluation of properties, articulate its views on a project's effects on such properties, and participate in the resolution of adverse effects. *Id.* § 800.2(c)(2)(ii)(A). This duty for federal agencies to consult with tribes is nondiscretionary.

Here, the BIA failed to consult with the necessary tribes early in the planning process, and sent letters only after field surveys, trenching, and collection of obsidian samples for destruction had already been conducted. These surveys and other activities should not have occurred until *after* the proper Section 106 consultation with the necessary tribes. Furthermore, as discussed in the FIGR DEIS Comments, the BIA improperly "rushed ahead" without consulting the necessary tribes, and dismissed, ignored, or did not take seriously Tribal concerns regarding effects and identification efforts or requests to review documents and participate in surveys. FIGR DEIS Comments at 7–8. The SHPO's objection letter reiterated these failures, explaining that it objected to the BIA's finding of no historic properties affected and finding "the efforts to identify historic properties, including those of religious and cultural significant to Tribes to be insufficient, inadequate, and not reasonable." SHPO Letter at 3. Based on these concerns, failures, and deficiencies, the BIA should have re-initiated the Section 106 consultation process and invited all identified Tribes to participate in consultation again. Without adequate or proper Section 106 consultation, the FEIS does not and cannot adequately protect Tribal sacred sites and cultural resources at risk as a result of the Project's construction and operation. Such sacred sites and cultural resources at risk include those of the Mishewal Wappo.

Conclusion

We appreciate the opportunity to provide comment to the BIA, and would like to emphasize our concerns that allowing a Tribe from Lake County to establish this Proposed Project will impinge on the Tribal sovereignty of Sonoma County Tribes as well as dramatically increase the risk of injury and death in the event of a wildfire. We reiterate our request that the Bureau opt for Alternative D or at least create an accurate Environmental Impact Statement.

Sincerely,

Scott Gabaldon
Chairman
Mishewal Wappo Tribe of Alexander Valley

From: Michelle Lee <Michelle@thecirclelaw.com>
Sent: Monday, December 23, 2024 4:36 PM
To: Broussard, Chad N <Chad.Broussard@bia.gov>
Subject: [EXTERNAL] Dry Creek Comment letter re Koi FEIS

Please see attached.

Respectfully,

Michelle C. Lee
The Circle Law Group, P.C.
930 F Street
Sacramento, CA 95814
Phone: (916) 809-8900
Fax: (916) 809-8901
Cell: (916) 204-5724
michelle@thecirclelaw.com

The Circle Law Group P.C.

December 23, 2024

Wizipan Garriott
Principal Deputy Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Amy Dutschke
Regional Director
Bureau of Indian Affairs, Pacific Regional Office
2800 Cottage Way, Room W–2820, Sacramento, CA 95825

Via email to: chad.broussard@bia.gov

Re: FEIS Comments, Shiloh Resort and Casino Project

Dear Principal Deputy Assistant Secretary Garriott and Director Dutschke,

The Dry Creek Rancheria of California, also known as the Dry Creek Rancheria, Band of Pomo Indians (Dry Creek), is a federally recognized Indian Tribe with reservation lands in Geyserville, California. Dry Creek's homeland is twelve (12) miles from the Koi Nation of California's (Koi Nation, or Tribe) proposed Shiloh Resort and Casino project (Proposed Project). Dry Creek is on record opposing the Koi Nation's application to the United States Department of Interior to acquire 68.6 acres of land in trust (Project Site) for the benefit of the Koi Nation for gaming purposes (Proposed Action). Koi Nation now proposes to use the Project Site to develop a casino facility, hotel, spa, and associated infrastructure. As described in this and previous comments, Dry Creek has serious concerns regarding the potential effects of the Proposed Project on local Tribes—which notably do not include the Koi Nation itself, whose historic and cultural ties are instead to Lake County—and the surrounding community and environment. The Final Environmental Impact Statement (FEIS) released by the Bureau of Indian Affairs (BIA) is inadequate to address those concerns, and indeed does not even fully acknowledge them.

As a threshold matter, Dry Creek and the rest of the public have not been provided with sufficient opportunity for meaningful review and comment on the environmental implications of this major proposed development, despite the potential for significant impacts to Dry Creek's reservation homelands. As the volume of materials has increased dramatically with each step of the review process, the time to review and submit comments on those materials has markedly decreased. Dry Creek has also been excluded from Tribal consultation and from mitigation measures relied upon in the FEIS that require or involve coordination and cooperation between

tribal and local governments in the vicinity of the Proposed Project. Moreover, Dry Creek's tribal members still do not appear to be accounted for in the data underpinning the BIA's wildfire and traffic studies. Finally, the FEIS fails to adequately account for impacts to water, wildlife, cultural, or economic resources, and continues to rely on proposed mitigation measures that are either speculative, unenforceable, or outsourced to third parties not under the purview of the BIA.

In short, despite Council on Environmental Quality (CEQ) regulations requiring that an EIS "provide full and fair discussion of significant environmental impacts and . . . inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment," 40 C.F.R. § 1502.1, the BIA's rushed timeline and failure to meaningfully address Dry Creek's legitimate concerns have arbitrarily and capriciously deprived Dry Creek and other local Tribes of the opportunity to fully review and analyze the Proposed Project.

Dry Creek therefore reiterates its request that the BIA either adopt Alternative D, the No-Action Alternative, or revisit the environmental analysis underlying the FEIS, which Dry Creek believes to be inadequate, to meaningfully address these shortcomings and to allow for careful, complete consideration of the likely impacts of the Proposed Project to the surrounding Tribes, communities, and environment. Failing either of these remedies, the BIA must at the very least issue a supplement to the FEIS under 40 C.F.R. § 1502.9(d)(1) to account for new construction not incorporated within the 2022 studies the FEIS cites.

I. Procedural Deficiencies Have Plagued the Proposed Project Since its Early Stages.

From the outset, the BIA's timing of Environmental Assessment (EA), DEIS, and FEIS releases and corresponding public comment periods appears designed to minimize public input in service of a pre-determined schedule, rather than to fully resolve outstanding issues identified by Dry Creek and others. Not only does the FEIS outright violate statutory length limitations, but the BIA's rushed timelines appear to have affected the FEIS's contents. Symptoms of the BIA's condensed timing include, *inter alia*, its failure to account for substantial changes to the vicinity of the Project Site (identified in prior comments), the dearth of information provided to Dry Creek during the scoping process, and the inadequacy of the public comment periods. The BIA's failure to meet the standards laid out in the National Environmental Policy Act (NEPA), its implementing regulations, and governing case law is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of NEPA and the Administrative Procedure Act (APA). 5 U.S.C. §§ 701–706.

a. The Timing and Length of Materials Violate NEPA and its Implementing Regulations.

In September of 2022, an Environmental Assessment (EA) was prepared and made available for public comment for a 45-day period, which was then extended for an additional 15-day period that concluded on November 13, 2023. The BIA then decided to prepare a Draft EIS (DEIS), the publication of which initiated a 45-day comment period that concluded on August

26, 2024. On November 22, 2024, the BIA released the FEIS for a 30-day period "after which the BIA may proceed with a decision." FEIS at 3-2. As the time allotted for public review and comment on the Proposed Project has decreased, the materials provided in support of the Proposed Project have multiplied. Dry Creek has consistently raised as problematic the limited timeframes provided to review and comment on the Proposed Project's voluminous technical appendices. And when the BIA released its approximately 6,000-page Draft EIS (DEIS) for only 45 days over a holiday weekend, Dry Creek—and numerous other commenters—noted the length and complexity of the materials, and requested extensions to allow for independent review, meaningful comment, and required consultation. *See* FEIS App. P. None were granted.

On November 22, 2024, the BIA released the FEIS, this time for a 30-day comment period, and with holiday weekends on either end. Though the body of the FEIS alone totals 321 pages, there are approximately 10,000 pages of technical materials included in the appendices. To date, the BIA has not responded to Dry Creek's request for extension.

In the FEIS, the BIA points to its adherence to the **minimum** timelines set forth by the CEQ as evidence of procedural compliance. FEIS at 3-l ("Agencies shall allow at least 45 days for comment on a Draft EIS . . . Consistent with this requirement, a NOA for the Draft EIS was issued on July 8, 2024 . . . ."). However, since the BIA bases its analyses on thousands of technically complex pages attached as appendices to the already-lengthy Draft and Final EIS, the BIA's strict adherence to the regulatory minimums does not "ensure that environmental information is available to public officials and citizens **before** decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). Moreover, both NEPA and the CEQ regulations direct that the text of a final EIS—exclusive of citations or appendices—should not exceed 150 pages, except for proposals of extraordinary complexity, "which **shall not exceed 300 pages**." 40 C.F.R. § 1502.7 (emphasis added);[1] *see also* 42 U.S.C. § 4336a(e)(l) (same). Excluding citations and appendices, the FEIS totals **311 pages**. On these grounds alone, the FEIS violates CEQ regulations and NEPA.

In the face of these violations, the BIA's refusal to even grant the public commenters' request for extension is all the more arbitrary and capricious. Public commenters were given a total of **30 days** to pore over tens of thousands of pages of technical data, and to identify the shortcomings of the same. Such a condensed timeline cannot support a finding that the BIA gave the public's concerns due consideration. To the contrary, the decreasing timelines—coupled with the exponential increase in materials to review—indicate that the BIA did not and could not engage in a meaningful dialogue with commenters, who were not provided the opportunity to fully review the materials. Actions that undermine public participation and obscure the actual proposed action under review—such as the BIA's actions here—violate fundamental NEPA requirements. *See* Indian Affairs NEPA Guidebook (Aug. 2012) at § 2.1 (emphasizing that "[t]he

[1] In describing the reason for this change, the CEQ noted in the January 10, 2020 Notice of Proposed Rulemaking (NPRM) that "every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information."

NEPA process is intended to facilitate public participation and disclosure in the Federal planning process") (emphasis added); *id.* § 2.4 ("Public disclosure and involvement is a key requirement of NEPA.").[2]

b. The BIA Failed to Adequately Consult or Coordinate with Dry Creek, an Affected Party.

Aside from those cultural and paleontological failures discussed in greater detail below, *see* § VIII, the BIA's refusal to consult with or otherwise involve Dry Creek—whose reservation homeland abuts the Town of Windsor—is fatal to the FEIS analyses. The CEQ regulations call for the involvement of Tribes that may be affected by a Federal proposal, 40 C.F.R. § 1501.2(b)(4)(ii) ("The Federal agency consults **early** with appropriate State, Tribal, and local governments and with interested persons and organizations when their involvement is reasonably foreseeable.") (emphasis added), and require that agencies integrate the environmental review process with other planning "at the **earliest possible time** to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential

Moreover, a number of the mitigation measures relied upon in the FEIS and that directly affect Dry Creek (rendering Dry Creek an "affected Tribe" entitled to deference on preferred mitigation strategies) failed to incorporate Dry Creek's input during development. To the extent the BIA has consistently failed to consult with Dry Creek, and excludes Dry Creek entirely from consideration within the FEIS, *see, e.g.*, § 3.12, the federal government has breached its trust responsibility to Dry Creek. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir.1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)) (holding BIA violated trust obligation when failing to comply with own regulations).

Finally, it is particularly galling for Dry Creek and other affected Tribes that the Koi Nation—which does not have its cultural or historic ties to this area[3]—need not consult with the Tribes that maintain their traditional connections to the land regarding use and protection of the area. Particularly as Koi Nation is engaged in litigation with the City of Clearlake over disturbances to their ancestral sites over 50 miles away.[4]

Dry Creek requested Section 106 consultation in September of 2024 and we had one meeting with Amy Dutschky and Chad Brossard that was general and without the benefit of seeing the information developed by Koi and its consultants. it is clear that the BIA does not prioritize consultation with **all** affected government entities or Tribes. Indeed, with respect to mitigation, the BIA commits the Tribe to coordinate only with "Sonoma County and the Town of Windsor on their respective emergency operation plans," FEIS at 3-136, illogically omitting any reference to Dry Creek.

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[2] https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59_IAM_3-H_v1.1_508_OIMT.pdf.

[3] FEIS 3-62 (determining "no ethnographic villages or camp sites reported within one mile of the APE").

The BIA Failed to Adequately Respond to Previous Dry Creek Comments.

Although the BIA failed to consult or coordinate with Dry Creek as an affected Tribe, Dry Creek has nevertheless made a concerted effort, to the best of its ability, to review and submit comments on the environmental review documents within the constraints of BIA's compressed timelines. NEPA requires agencies to "address or refute the concern presented" in comments, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1168 (9th Cir. 2003), and an FEIS must "'analyze,' 'respond to,' and 'discuss"' specific issues raised therein. *Pac. Coast Fed'n of Fishermens Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1255 (W.D. Wash. 2007). NEPA thus obligates the BIA to respond in the FEIS to Dry Creek's specific concerns—including, but not limited to, impacts to Dry Creek and its members, its housing efforts, and cultural monitoring—but the BIA failed to do so. There has not been any meaningful consultation regarding any concerns because the BIA has not responded to Dry Creek's comment letters. I would suggest that the easiest way to consult would be to respond to the letter with a meeting set to review the comments and go over the documentation to ensure that everyone is fully informed.

Instead, we have an offer of a thirty (30) minute Teams meeting with all Sonoma County tribes with no review of the tribes' comments, but instead shifting the burden on the tribes to provide more information, rather than BIA and Koi providing responsive information. It is all very backward.

The BIA points to its revised definition of "Interested Sonoma County Tribes" to include "the tribes who requested to be consulted with under Section 106 (i.e. FIGR, Kashia Band of Pomo Indians of the Stewarts Point Rancheria, and Dry Creek Rancheria Band of Pomo Indians), as well as any other Sonoma County tribe that expresses interest in writing to the BIA prior to the initiation of construction," App. P at 3-25. But Dry Creek, which (1) requested Section 106 consultation in September of 2024, and (2) expressed in multiple public comments its interest in the Proposed Project, is concerned by the BIA's ongoing failure to consult with Dry Creek under Section 106 or more informally. The logical outgrowth of this failure is a lack of tribally-informed mitigation strategies, in violation of NEPA and its regulations.

II. The FEIS' Proposed Mitigation Measures Remain Largely Unaddressed and Unenforceable.

According to the BIA, "[a]ny mitigation measure must be enforceable[,] and it is important for BIA Regional and Agency Offices to establish monitoring programs to ensure that mitigation is carried out." Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. Any analysis of alternatives must include a discussion of mitigation measures where mitigation is feasible, and of any monitoring designed for adaptive management. Moreover, "[f]ederal agencies are mandated to specifically consider . . . affected tribes' preferred mitigation strategies." Council on

[4] https://www.record-bee.com/2023/08/03/koi-nation-sues-city-of-clearlake-over-sports-complex-development/

Env't Quality, Exec. Office of President, *Environmental Justice: Guidance Under the National Environmental Policy Act* 16 (1997). Here, Dry Creek—an affected Tribe—has raised a number of concerns related to the mitigation strategies identified by the BIA. These concerns remain unresolved in the FEIS.

Instead, the BIA points to the CEQ rules directing that a mitigation monitoring and compliance plan "be prepared and incorporated into the BIA's ROD," and claims that "[t]he EIS is not the document that commits the agency to mitigation."[5] Master Response at 3-11. The Master Response also asserts that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." *Id.* Neither of these responses—which, again, are not included within the FEIS itself, but rather the Appendices—address the underlying concerns with the mitigation measures identified in the FEIS, even pre-enforcement. The limited mitigation measures that **do** exist are facially unenforceable, in violation of BIA policy and the NEPA itself.

First, many of the mitigation measures identified in the FEIS rely on a threshold determination by the Koi Nation or another third party that adverse impacts will occur or have already occurred. *See, e.g*. FEIS at 4-1 (deferring to Town of Windsor's eventual determination that aquifer connectivity results in a "substantial decrease in water levels"). Others seek to reduce impacts "to the maximum extent possible," *id.* at 4-7, or suggest what measures "could be" included, *id.* at 4-26. Still others acknowledge that there is no feasible mitigation within the jurisdiction of the Tribe or the BIA. *Id.* at ES-18;19 (describing instances in which "no mitigation [is] feasible" and acknowledging that "[w]hile the timing for the off-site roadway improvements is not within the jurisdiction or ability of the Tribe or BIA to control, the Tribe shall make good faith efforts"). Where mitigation measures rely on the voluntary future actions of a third party, such as the Town of Windsor, they are speculative and cannot form the basis for rational decision making by the BIA. Plans to make plans after the Proposed Project has begun construction, which are outside of the NEPA process, and which are shielded from public review or comment, are not NEPA-compliant. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084 (9th Cir. 2011) (holding no "hard look" had occurred when mitigation measures addressed post-construction impacts and explaining that "[m]itigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval.").

Nor does an FEIS that merely lists mitigation options comply with NEPA, because "snippets do not constitute real analysis." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988) (mere mention that protected species may be exposed to risks of oil spills did not provide lawful NEPA analysis). Even if included in the ROD, then, the BIA's

[5] While the FEIS itself does not commit the agency to mitigation, this argument misses the point because the FEIS must adequately describe how the agency or applicant are to be held accountable to ensure the proposed mitigation occurs.

vague, subjective, conclusory, or non-existent mitigation measures are, as a practical matter, unenforceable by Dry Creek or others (and illegal under the NEPA).

In its Public Comments on the DEIS, Dry Creek identified anticipated issues with the enforceability of any mitigation measures eventually adopted against the Koi Nation, a sovereign. In response, the BIA asserted that "any mitigation required by the ROD will be enforceable as a matter of Tribal law under Chapter 14 of the Tribe's Gaming Ordinance." App. P at 3-11. But it is not at all clear that Dry Creek—or any affected party—will have any enforcement recourse under the Koi Nation of Northern California Gaming Ordinance (Ordinance). Rather, the Ordinance provides in relevant part only that

> In the event an affected state or local governmental entity with an interest in the Applicable Mitigations **files a complaint with the NIGC** alleging that the Nation has not complied with the Applicable Mitigations in accordance with this Chapter 14 of the Gaming Ordinance, **upon notice from the NIGC** that such a complaint has been made, the Nation will submit to the NIGC's review and enforcement authority as set forth in 25 C.F.R. 573.1 . . .

Ordinance, attached as Appendix Q to the EIS, at 14.01 (emphasis added). Not only is "state or local government entity" undefined (and therefore potentially exclusive of Dry Creek or other Tribes), but it remains unclear under what circumstances the NIGC would accept—much less act upon—an enforcement claim by Dry Creek or other affected parties regarding environmental impacts of the Proposed Project. The existence of the Ordinance does not at all guarantee that "any mitigation required by the ROD will be enforceable as a matter of Tribal law," as the BIA claims. App. P at 3-11.

Finally, it is uncertain to what extent Dry Creek can even rely upon the BIA's repeated representations that the ROD will include enforcement measures (subjective or tenuous as they may be). Dry Creek notes with particular concern the recent holding in *Marin Audubon Society, et al., v. Federal Aviation Administration, et al.*, 2024 WL 4745044 (D.C. Cir. Nov. 12, 2024), wherein the United States Court of Appeals for the District of Columbia Circuit determined that CEQ regulations were promulgated *ultra vires*, and thus unlawfully. Dry Creek is concerned that should any enforcement actions be brought pursuant to the FEIS or any eventual ROD, the BIA and Koi Nation will attempt to cite *Audubon* for the proposition that enforceability regulations are void. Thus, while the BIA defers any mitigation enforcement to the development of a ROD under CEQ regulations, compliance under those regulations is not necessarily assured or even practically enforceable.

III. The FEIS Still Fails to Adequately Address—Much Less Mitigate—Wildfire Concerns.

Despite Dry Creek and other affected Tribes raising wildfire as a primary concern in response to the DEIS, the FEIS dedicates remarkably little space to addressing the matter. Though the FEIS acknowledges that "the Project Site is primarily designated as 3 (high) wildfire risk," FEIS at 3-125, and concedes that the construction of the Project could increase the risks of wildfires, ES-26, the BIA nevertheless concludes wildfire hazards and impacts are not significant or less than significant. Further, the FEIS fails to incorporate a meaningful analysis of the direct, indirect, and cumulative effects of the Project's construction on wildfire risks as required under NEPA. 350. Rather, as with the DEIS, the FEIS shoehorns what should be an independent wildfire risk analysis into its evacuation analysis and defers on the basis that "wildfire evacuation analysis is a new area of study under NEPA and few studies of this type have been completed for NEPA purposes." FEIS App. P at 3-16. And "while . . . federal agencies have substantial discretion to define the scope of NEPA review, an agency may not disregard its statutory obligation to take a 'hard look' at the environmental consequences of a proposed action, including its cumulative impacts, where appropriate." *Montana v. Haaland*, 50 F.4th 1254, 1272 (9th Cir. 2022).

The FEIS readily concedes that

> [a] project would be considered to have a significant impact if it were to increase wildfire risk on-site or in the surrounding area. This includes, but is not limited to, building in a high-risk fire zone without project design measures to reduce inherent wildfire risk, increasing fuel loads, exacerbating the steepness of the local topography, introducing uses that would increase the chance of igniting fires, eliminating fire barriers, inhibiting local emergency response to or evacuation routes from wildfires, and conflicting with a local wildfire management plan.

FEIS at 3-129. As Dry Creek identified in its earlier comments, **each** of these factors is implicated in some fashion by the Proposed Project, which would bring thousands of daily visitors to a site that Sonoma County has already determined to be at high risk.

But despite the significant risk to safety inherent in operating such a large casino facility in such a high-risk location, the FEIS relies on speculative mitigation measures, including "the establishment of public service agreements, such as with the Sonoma County Fire District (SCFD) and other relevant agencies," which the BIA assures "**would** include the resources necessary to effectively manage the increase in service calls without placing an undue financial burden on local fire and EMS." App. P at 3-54; *see* FEIS at 2-13 (emphasis added). To cite a non-existent mitigation measure that "would" somehow address all concerns "without . . . undue financial burden" based on the unquestioning consent of independent third parties is a complete deferral of the BIA's self-imposed obligation to develop enforceable mitigation measures. Indian Affairs NEPA Guidebook (Aug. 2012) at § 6.4.6. And although there is a Letter of Intent between Koi Nation and SCFD, FEIS App. O, the Letter does not guarantee that the SCFD

would actually respond to fire incidents at the Project Site. Nevertheless, the FEIS concludes that potential impacts to fire protection plans is less than significant. *Id.* at ES-17.

NEPA prohibits reliance on assumptions such as this one. *See e.g*., *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt*., 36 F.4th 850, 874 (9th Cir. 2022), *cert. denied sub nom. Am. Petroleum Inst. v. Env't Def. Ctr.*, 143 S. Ct. 2582, 216 L. Ed. 2d 1192 (2023) (agreeing with plaintiff "that the agencies' excessive reliance on the asserted low usage of well stimulation treatments distorted the agencies' consideration of the significance and severity of potential impacts.")*; City of Los Angeles, California v. Fed. Aviation Admin.*, 63 F.4th 835, 850 (9th Cir. 2023) (finding FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not operate simultaneously).

The BIA also acknowledges that the Proposed Project's construction "could increase the risk of wildfire," FEIS at ES-26, but relies on Best Management Practices (BMPs) including "the prevention of fuel being spilled" and spark arresters to conclude that construction "would not increase wildfire risk onsite or in the surrounding area." *Id.* at 3-130. It is unclear how the BIA arrived at the conclusion that 'preventing fuel spillage' is (a) enforceable, or (b) effective. Further unclear is how such a vague mechanism might reduce fire risk to insignificance, which lays the groundwork for an arbitrary and capricious finding. *See Wilderness Society v. Bosworth*, 118 F.Supp.2d 1082, 1107 (D.Mt. 2000) ("Because BMPs have not been assessed for their effectiveness against landslide events and because a high risk of landslides is acknowledged . . . the Court finds it is not reasonable for the Defendants to just summarily rely on BMPs to mitigate this environmental impact. Therefore, the Court finds the FEIS conclusion that the project will have no effect on water quality to be arbitrary and capricious based on the undisputed risk of landslides in the FEIS").

As with the DEIS, the only factors preventing the BIA from finding the wildfire risks presented by the Proposed Project constitute a significant impact are the hypothetical mitigation measures the Tribe **might** take to reduce wildfire risks. The circular finding is unsupported by the record before the BIA, and should be revisited.

IV. Traffic and Evacuation Concerns Have Not Been Addressed.

Related to the wildfire concerns set forth above, Dry Creek and many others have raised alarm regarding the BIA's failure to adequately grapple with the Proposed Project's effects on traffic and evacuation concerns. In response, Appendix P to the FEIS simply states that the improvements discussed in the DEIS are "far from illusory," App. P at 3-96, and assures Dry Creek that its evacuation model "included within its assumptions the development of the Dry Creek Housing Project in Windsor, Shiloh Terrance, Shiloh Crossing, Clearwater, and other development projects. The model also included Shiloh Estates and other developments in the Mayacamas Mountains both in the opening year (2028) and the cumulative year (2040) scenarios." *Id.* at 3.1.11. But the BIA has failed to identify how it might require independent third parties to comply with the referenced mitigation measures, or support its claim that Dry

Creek's housing development has been considered with any underlying data, studies, or references.

Specifically, though the Evacuation Travel Time Assessment cited in the BIA's response describes "key assumptions . . . used in the development of background and evacuation traffic demand," App. N-2 at 6, **neither the Dry Creek Housing Project nor any of the other projects identified in the Master Response are listed in these assumptions**. The Evacuation Travel Time Assessment states that "Background traffic data was based on outputs from the SCTA travel demand model from the traffic study for the Project[,]" which we assume refers to the Revised Traffic Impact Study at Appendix I. The Revised Traffic Impact Study bases its "Existing Conditions" on data collected in July 2022, prior to the existence of Dry Creek's new housing development. The Study further provides that Opening Year 2028 No Project Conditions "includes Existing Conditions, but with the addition of traffic from **approved projects** that are in the development pipeline in the Town of Windsor and Sonoma County, as well as effects from planned roadway improvements constructed by approved projects." (Emphasis added). It notes that "trips from the following approved projects were also added to the study intersections to estimate year 2028 traffic demands," providing a list of projects that **notably does not include the Dry Creek Housing Project in Windsor.** The BIA has thus failed to support its claim that the additional Dry Creek development is accounted for in the Study.

In the event of evacuation, the residents of Dry Creek's housing project will be among those forced to flee across Windsor and travel south on Route 101. They will be directly impacted and threatened by the delay the Koi Nation's Proposed Project will impose. These impacts, which are apparently not incorporated into the Study supporting BIA's analysis, could harm not only Dry Creek members, but the entire community. The BIA's bare statement that these impacts are considered is not supported by any citation to the actual analysis and Dry Creek could not independently locate where or how its housing development is accounted for in the analysis. A conclusory finding "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind . . . affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives," *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), and therefore violates NEPA.

V. The FEIS Fails to Adequately Address Impacts to Water Resources

The FEIS's water resources analysis remains incomplete and inadequate to address the environmental impacts that the Project will have on surface and groundwater resources. Maintaining the same deficiencies as the DEIS, the FEIS does not and cannot identify or articulate whether the Project's known and potential environmental impacts are likely to be significant for two primary reasons: First, like the DEIS, the FEIS relies entirely upon BMPs that are speculative or unenforceable. Second, like the DEIS, the FEIS does not rely upon adequate water surveys, monitoring, or studies and provides no baseline water quality data upon which to

base its conclusions. As such, the FEIS cannot determine that all impacts to water resources would be "less than significant" or offer surrounding Tribes, organizations, or community members any assurance that their health and the human environment will not be harmed as a result of the Project.

As the FEIS concedes, the Project would significantly impact both surface and groundwater resources if certain circumstances were to occur. FEIS at 3-18. In particular, impacts would be significant when (1) runoff from the site causes localized flooding or introduces contaminants to waterways off site; (2) pumping at the proposed wells impedes groundwater recharge or creates drawdown that would affect local water supply; (3) pumping at the proposed wells interfere with the implementation of local groundwater management plans by causing or contributing to "chronic lowering of groundwater levels; depletion of groundwater storage; water quality degradation due to induced contaminant migration or interference with cleanup efforts or water quality management plans; depletion of interconnected surface waters, including potential flow in Pruitt Creek or impacts to groundwater-dependent ecosystems (GDEs); and/or land subsidence"; or (4) wastewater or runoff generated by the Project impacts the water quality of receiving waterbodies or groundwater. *Id.* Despite acknowledging that wastewater or runoff could impact the water quality of "receiving waterbodies," the FEIS claims that the Project would not impact surface water supplies because it "is a sufficient distance from surface waters, such as the Russian River, used by water suppliers."[6] *Id.*

1. Speculative or Unenforceable BMPs

The FEIS concludes that adverse impacts would not occur and any impacts that will occur will be "less than significant" based on BMPs. However, all BMPs relied upon are entirely speculative or unenforceable. As a result, the BIA cannot conclude that any known or potential impacts to water resources will be "less than significant."

Both construction and operation of the Project would significantly impact surface and groundwater. *Id.* at 3-18–20. Construction of the Project could lead to soil erosion and sedimentation in nearby surface waters, which would inevitably degrade water quality and could even violate applicable water quality standards. Construction would also include the use of hazardous materials, including concrete washings, oil, and grease, the discharge of which into surface waters or groundwater would result in significant pollution. *Id.* at 3-18. The FEIS almost entirely relies upon the Koi Nation's future—and wholly speculative—adherence to the

[6] We note that "sufficient distance" is not defined, and without proper consideration of potential receiving waters, the Project may still impact surface waters that are not immediately adjacent to the site. *See County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 183–185 (2020) (holding that a point source may still discharge into navigable waters as regulated by the Clean Water Act when there is the "functional equivalent of a direct discharge," based upon considerations of various factors, including: time, distance, nature of material through which a pollutant travels, the extent to which a pollutant is diluted, and the amount of pollutant that enters the water, among others).

National Pollutant Discharge Elimination System (NPDES) general permit for construction stormwater discharges (NPDES General Construction Permit), issued pursuant to the Clean Water Act, to ensure that impacts to surface waters from construction activities would only be "less than significant." *See* NPDES Permit No. CAS000002 (Sept. 8, 2022), available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2022/wqo_2022-0057-dwq.pdf.

As explained in Dry Creek's comments on the DEIS, the Koi Nation has not yet obtained coverage under the NPDES General Construction Permit, nor has it prepared the requisite Stormwater Pollution Prevention Plan (SWPPP). Yet, the FEIS almost entirely relies on the Koi Nation's promised implementation of and adherence to the permit and SWPPP to conclude that sufficient BMPs would "minimize adverse impacts to the local and regional watershed from construction activities . . . ." *Id.* As a result, any assurance that the above-described impacts would be "less than significant" is entirely speculative. Moreover, without reviewing the exact SWPPP to which Koi Nation would be bound, the BIA cannot now conclude that it is (or will be) sufficient to protect against stormwater pollution. In other words, the BIA must conduct its own environmental review rather than rely on an entirely nonexistent SWPPP that may or may not be approved by the EPA sometime in the future. Rather than rely on speculation and future promises, the BIA must require Koi Nation to prepare the requisite SWPPP and conduct its own review to ensure that such SWPPP is adequate to protect against adverse environmental impacts before or concurrently to its own environmental review. Because the BIA's decision necessarily relies on the Koi Nation's future coverage under the NPDES General Construction Permit and SWPPP, these actions are connected and must be considered in the same NEPA review. *See* 40 C.F.R. § 1501.3(b) ("The agency shall also consider whether there are connected actions, which are closely related Federal activities or decisions that should be considered in the same NEPA review that: (1) Automatically trigger other actions that may require NEPA review; (2) Cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) Are interdependent parts of a larger action and depend on the larger action for their justification."); *id.* § 1502.24(a) ("To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws [including the Clean Water Act] and Executive orders applicable to the proposed action . . . ."); *Friends of Animals v. U.S. Fish & Wildlife Svc.*, 28 F.4th 19, 34 (9th Cir. 2022).

Operation of the Project may also impact surface waters due to the increase of impervious surfaces, which would result in increased stormwater flows and discharge from the site during precipitation events. FEIS at 3-19. The FEIS assures that "[s]tormwater treatment and detention would be provided by bioswales, a detention basin, and/or the wastewater treatment plant (WWTP)" and that additional BMPs would include "weekly sweeping of internal roadways and parking areas to reduce sediment and debris from entering the stormwater drainage system." *Id.* Additionally, various facilities would be constructed within the 100-year floodplain. *Id.* The

FEIS relies on balanced earthwork to ensure that changes to the delineated floodplain mapping would be prevented and floodplain impacts would be "less than significant." *Id.*

The FEIS, however, only relies on its grading and drainage plan to treat stormwater, and does not require the Koi Nation to route all stormwater to the wastewater treatment plant. The FEIS therefore does not require the Koi Nation to apply for or obtain an individual NPDES permit for any stormwater discharges into Pruitt Creek that may occur, except those from the wastewater treatment plant. *See id.* at 2-11–13. Pruitt Creek is a tributary of Pool Creek, which flows into Windsor Creek, the Laguna de Santa Rosa, and ultimately the Russian River. *See* FEIS, App. G-8 (Approved Jurisdictional Decision), at 3–4. As such, the portion of Pruitt Creek that runs directly through the Project site and into which the Project proposes to discharge stormwater is a navigable water subject to the permitting requirements in the Clean Water Act, 33 U.S.C. §§ 1342, 1344. *Id.* at 2. To that end, the Project proposes no future or ongoing SWPPPs beyond construction of the site, including any BMPs, to which it would be subject during operation. Accordingly, aside from various design features, there is no enforcement mechanism, regulatory compliance requirements, or oversight to which the Project would be subject that ensures all stormwater discharged from the Project site meets water quality standards and prevents contaminants from entering nearby surface waters, which are already impaired.[7]

The FEIS proposes that, as a mitigation measure to impacts to "Biological Resources" from construction of the site, "[i]f impacts to Waters of the U.S. or wetland habitat are unavoidable, a 404 permit and 401 Certification under the Clean Water Act shall be obtained from the USACE and U.S. Environmental Protection Agency (USEPA)." FEIS at 4-9. However, as with the NPDES General Construction Permit, any coverage under a 404 permit is entirely speculative, and relying on the Koi Nation's future promise of adherence to a yet-obtained permit is inadequate justification for a determination of "less than significant" impacts. The BIA must require the Koi Nation to determine whether a 404 permit is required and, if so, obtain—or at the very least apply for—such permit before or concurrently to its review. Without knowing whether or what impacts to Waters of the U.S. or wetland habitat are unavoidable, there is no way for the BIA to now determine whether such impacts can or would be mitigated by a 404 permit, or whether such permit (if obtained, which is entirely dependent on the U.S. Army Corps of Engineers' own environmental analysis) would provide adequate mitigation under the BIA's own review. Furthermore, future environmental analyses cannot constitute adequate mitigation measures; the BIA must review what is before it *now* and cannot rely on the promise of future environmental review to ensure protection of resources at risk by the agency's action. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011).

[7] Pruitt Creek and other tributaries of Windsor Creek are currently listed as impaired for sedimentation/siltation and temperature on California's most recently approved § 303(d) List from 2018. *See* 2018 Integrated Report (Clean Water Act Section 303(d) List and 305(b) Report), available at

Additionally, the grading and drainage plan is designed for a 100-year, 24-hour storm event. FEIS at 2-11, 3-19. However, due to the impacts of climate change, 100-year, 24-hour storm events are occurring more often and precipitation is increasingly more severe. *See* FEIS App. E, at 16. The stormwater management system should therefore be modeled and sized based on larger storm events to adequately manage increased stormwater as a result of climate change and prevent pollution discharges. *See* 40 C.F.R. § 1502.16(a)(6) (requiring environmental consequences section of EIS to include analysis of "climate-change related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives *and the effects of climate change on the proposed action and alternatives*." (emphasis added)); *see also* EPA Comments on EA, A-7 (advising BIA to "clarify whether and how increased precipitation intensity occurring under climate change has been accommodated in the drainage plans and if pre-development hydrology would be maintained considering these larger flows").

Lastly, the FEIS does not adequately address groundwater drawdown concerns or consider the impact to the new Dry Creek Rancheria development in its groundwater assessments. In particular, the Supplemental Groundwater Resources Impact Assessment ("SGRIA") still does not take into account the Dry Creek Rancheria housing development project and its reliance on groundwater wells for community water supply. *See* FEIS, Appendix D-4. As with fire evacuation and traffic concerns, the FEIS fails to consider the 146 families residing in the new Dry Creek Rancheria housing development with regard to groundwater drawdown. As explained above, *supra* §§ I.3 & II, the FEIS has failed to incorporate Dry Creek's prior input or meaningfully consider the concerns raised by Dry Creek in its comments on the DEIS. Without considering the Dry Creek Rancheria housing development—which consists of approximately 150 homes and structures—and its use of groundwater wells, the FEIS entirely fails to accurately assess the impact the Project would have on local water supplies. By failing to properly consult with Dry Creek and excluding the new Dry Creek homeland entirely from consideration within the FEIS, the BIA has breached its trust responsibility. *See Oglala Sioux Tribe*, 603 F.2d at 721.

2. No Baseline Water Quality Data

In addition to relying upon speculative or unenforceable BMPs, the FEIS further relies on nonexistent environmental analyses and fails to provide baseline water quality data upon which to base its determination that impacts would be less than significant. In particular, the FEIS does not include, nor has the BIA considered, any adequate water quality assessments of current conditions, benthic data, or comprehensive field data of nearby receiving waters or wetlands. As discussed in Dry Creek's comments on the DEIS, the Water and Wastewater Feasibility Study conducted in February 2023, upon which the BIA relies, discusses a future "Baseline Monitoring Program" and notes,

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https://www.waterboards.ca.gov/water_issues/programs/water_quality_assessment/2018_integrated_report.html.

> In order to begin detailed discussions with the [Regional Water Quality Control Board ("RWQCB")] on the feasibility of discharging to the Pruitt Creek, *the Project would need to begin to collect receiving water quality data* near anticipated discharge site and at the Mark West Creek gauge station. This data would help the RWQCB evaluate the background water quality of receiving waters, identify potential water quality restrictions, and understand the impacts of the proposed new discharge on the aquatic habitat.

FEIS, App. D-1, at 4-4 (emphasis added). Clearly then, neither the Koi Nation nor the BIA has yet collected or reviewed any water quality data of the receiving waters. But without this crucial baseline data, the BIA cannot now make a determination as to the existing structure and function of Pruitt Creek or other waterways to determine what the direct, indirect, or cumulative effects on such water would be as a result of construction or operation of the Project. *See* 40 C.F.R. § 1508.1(i)(4) (defining the environmental "effects" or "impacts" that must be identified and considered under NEPA to include, among other things, "ecological (such as the effects on natural resources *and on the components, structures, and functioning of affected ecosystems*)" (emphasis added)). If any survey was conducted that actually collected water samples, conducted testing, and considered the water quality and benthic data of the site, it was nearly three years ago in February 2022 and only accounted for plant species and soil in surface waters and wetlands in the immediate vicinity of the Project area; it did not consider other benthic data—such as the presence of macroinvertebrates or other aquatic ecosystems—or the quality of nearby surface waters or wetlands offsite. *See* FEIS, App. G-4, at 11–15, App. A.

Likewise, as a mitigation measure, the FEIS proposes a "Baseline Groundwater Level and Stream Discharge Monitoring Program" and "GDE Verification Monitoring," wherein the Koi Nation would monitor the groundwater levels and stream discharges and collect baseline data (importantly) in the future, after the BIA issues its final Record of Decision. FEIS at 4-3–5. A similar set of circumstances was determined by the Ninth Circuit to be arbitrary and capricious. *See N. Plains Res. Council*, 668 F.3d at 1084–85. There, the Surface Transportation Board had agreed to conduct certain wildlife studies and surveys as a mitigation measure to the construction of a railroad, pre-construction but post-agency approval. *Id.* at 1083–84. The Ninth Circuit held that "[b]ecause the [Final Supplemental EIS] does not provide baseline data for many of the species, and instead plans to conduct surveys and studies as part of its post-approval mitigation measures, we hold that the Board did not take a sufficiently 'hard look' to fulfill its NEPA-imposed obligations at the impacts to these species prior to issuing its decision." *Id.* In explaining its decision, the Ninth Circuit noted:

> Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects

> construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.
>
> This is inconsistent with what NEPA requires. NEPA aims (1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public. The use of mitigation measures as a proxy for baseline data does not further either purpose. First, without this data, an agency cannot carefully consider information about significant environmental impacts. Thus, the agency 'fail[s] to consider an important aspect of the problem,' resulting in an arbitrary and capricious decision. Second, even if the mitigation measures may guarantee that the data will be collected sometime in the future, the data is not available during the EIS process and is not available to the public for comment. Significantly, in such a situation, the EIS process cannot serve its larger informational role, and the public is deprived of their opportunity to play a role in the decision-making process.

Id. at 1084–85 (citations omitted).

The same is true here. The BIA cannot rely on future surveys to determine the baseline water quality or biological data of the site; the agency must consider that information now in its pre-approval analysis. Without even the most basic understanding of the existing conditions, the BIA is entirely unable to determine what the effects of the Project will be on water resources or ensure that all proposed BMPs or mitigation measures will in fact guarantee the protection or restoration of such resources. The BIA must therefore collect such data or require the Koi Nation to collect such data, provide that data to the public, and then adequately consider such data before issuing its final Record of Decision or risk arbitrary and capricious agency decision-making.

VI. The FEIS Fails to Adequately Address Impacts to Wildlife Resources

Like in its review of impacts to water resources, the FEIS similarly bases a determination of "less than significant" impacts to wildlife resources on speculative and unenforceable BMPs and mitigation measures and fails to consider baseline data. Specifically, to avoid impacts to wildlife and other biological resources, the FEIS assures that the Project construction would comply with the NPDES General Construction Permit and SWPPP and other mitigation measures. FEIS at 3-52–54, 4-7–9. However, as discussed above, the promise of future compliance with yet-obtained NPDES permits is inadequate justification upon which to base a determination that any impacts to wildlife and biological resources would be "less than significant." Additionally, as discussed above, without an adequate understanding of the

baseline conditions of the site, the BIA has no way to determine what the actual impacts to wildlife or biological resources would be and thus cannot ensure that the proposed measures will avoid or mitigate such impacts.

The FEIS does not discuss the direct, indirect, or cumulative impacts to all wildlife. Rather, it only specifically discusses the Project's impacts to federally listed or protected special-status species, critical and essential habitat, and migratory birds. *Id.* at 3-53–56. To support its determination that impacts to certain identified species would be "less than significant," the BIA ensures the adherence to conditions of other (not-yet issued) permits and implementation of BMPs and other mitigation measures. Specifically, this includes compliance with the NPDES General Construction Permit and SWPPP, both of which are entirely speculative. *Id.* at 2-15–16. Further, the FEIS proposes certain mitigation measures, nearly all of which are inadequate and fail to provide the BIA with baseline data of the water and biological resources necessary to make a determination as to the Project's impacts. Again, as explained above, without baseline data, the BIA risks arbitrary and capricious decision-making.

Lastly, with regard to special-status fish species, particularly certain species of Pacific salmonids, the FEIS further acknowledges "that BIA has begun consultation with NOAA Fisheries," but that such consultation is still ongoing and no decision on the BIA's Biological Assessment has been issued. *FEIS* at 3-54, 5-1, App. G-7. The FEIS notes that NOAA provided comments on BIA's first Biological Assessment on February 9, 2024, but those comments are not available to the public. *Id.* at 5-1. To ensure it takes an adequate "hard look" at the impacts to special-status fish species, the BIA must not issue a final Record of Decision until consultation with NOAA has been completed.

VII. Economic Studies

In its comments to the DEIS, Dry Creek raised several concerns regarding the economic impact studies. The first being that the studies upon which the BIA relied are woefully dated and inaccurate. In response to these comments, the BIA agrees that the data is dated, but claims that "[i]t is not practical nor required by NEPA to continually update financial analyses for the passage of time that inevitably takes place during any project and public review." T5-18. This ignores the fact, however, that "[r]eliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious." *N. Plains Res. Council*, 668 F.3d at 1086 (citing *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005)). Here, while economic data prepared by governmental agencies may lag, the BIA assigns great weight to the particular economic impact study here, which does not account for major changes in circumstance, like the fact that the study was conducted while the community was still recovering from the COVID-19 pandemic or without taking into account the Scotts Valley Casino. The data in that particular economic impact study is therefore too stale to carry the weight assigned to it by the BIA.

Dry Creek is pleased that a supplemental substitution effects cumulative analysis that assumes the opening of the Scotts Valley Casino was prepared. FEIS, Appendix B-5. However, the FEIS still fails to address or mitigate the fact that the cumulative economic adverse effects of

the Project will be far more impactful to the Tribes, including Dry Creek, actually located in Sonoma County and the result of those impacts on the quality of life and services available to their members. *See id.* at 3-166–67. In other words, the BIA's supplemental study still does not take the requisite "hard look" at the economic impacts of this Project.

VIII. Cultural and Paleontological Resources

As the FEIS acknowledges, there are "records of sacred lands on or in the vicinity" of the Project site. However, the BIA has not properly complied with the National Historic Preservation Act (NHPA) and has not properly consulted with the necessary tribes regarding these cultural resources. On July 10, 2024, Juliane Polanco, the State Historic Preservation Officer (SHPO) for the California Department of Parks and Recreation, Office of Historic Preservation, sent the BIA a letter that: (1) advised the BIA to conduct consultation in a manner that complies with 36 C.F.R. § 800.2(c)(2)(ii)(A); (2) objected to a finding of no historic properties affected, noting that the BIA's efforts to identify historic properties was "insufficient, inadequate, and not reasonable"; and (3) requested BIA re-initiate Section 106 consultation. *See* T6, Comments of Federated Indians of Graton Rancheria (Aug. 26, 2024) (FIGR DEIS Comments), Attachment 27 (SHPO Letter). When it received notice of the SHPO's objection letter, Dry Creek provided the BIA with a letter on September 17, 2024, explaining that the Tribe agreed with the SHPO and formally requested that the Section 106 consultation process be re-initiated. (See attachment). The Tribe never received a response to their September 17 letter and the BIA has never re-initiated the Section 106 consultation process.

The NHPA requires federal agencies to consult with federally recognized Indian tribes that may attach religious and cultural significance to a property early in the planning process. 36 C.F.R. § 800.1. Such tribes should be given a reasonable opportunity to identify their concerns, advise on the identification and evaluation of properties, articulate its views on a project's effects on such properties, and participate in the resolution of adverse effects. *Id.* § 800.2(c)(2)(ii)(A). This duty for federal agencies to consult with tribes is nondiscretionary.

Here, the BIA failed to consult with the necessary tribes early in the planning process, and sent letters only after field surveys, trenching, and collection of obsidian samples for destruction had already been conducted. These surveys and other activities should not have occurred until *after* the proper Section 106 consultation with the necessary tribes. Furthermore, as discussed in the FIGR DEIS Comments, the BIA improperly "rushed ahead" without consulting the necessary tribes, and dismissed, ignored, or did not take seriously Tribal concerns regarding effects and identification efforts or requests to review documents and participate in surveys. FIGR DEIS Comments at 7–8. The SHPO's objection letter reiterated these failures, explaining that it objected to the BIA's finding of no historic properties affected and finding "the efforts to identify historic properties, including those of religious and cultural significant to Tribes to be insufficient, inadequate, and not reasonable." SHPO Letter at 3. Based on these concerns, failures, and deficiencies, the BIA should have re-initiated the Section 106 consultation process and invited all identified Tribes to participate in consultation again. Dry

Creek specifically made such a request, which went ignored. Without adequate or proper Section 106 consultation, the FEIS does not and cannot adequately protect Tribal sacred sites and cultural resources at risk as a result of the Project's construction and operation.

Conclusion

We appreciate the opportunity to provide comment to the BIA, and would like to emphasize our concerns that allowing a Tribe from Lake County to establish this Proposed Project will impinge on the Tribal sovereignty of Sonoma County Tribes as well as dramatically increase the risk of injury and death in the event of a wildfire. We reiterate our request that the Bureau opt for Alternative D or at least create an accurate Environmental Impact Statemen

Sincerely,

/s/ Michelle C. Lee

Counsel to Dry Creek Rancheria, Band of Pomo Indians

T12

REDDING RANCHERIA

December 10, 2024

Amy Dutschke, Regional Director
Bureau of Indian Affairs, Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Subject: Support for the Koi Nation of Northern California's Shiloh Project

Dear Ms. Dutschke:

The Redding Rancheria is pleased to provide our support for the Koi Nation of Northern California's Shiloh Project and offer these comments on the BIA's publication of the Final Environmental Impact Statement ("FEIS"). We first note that the FEIS contains several revisions from the Draft Environmental Impact Statement ("DEIS"), which reflects a careful reading of the public comments of the DEIS. The result is a strong, well-reasoned FEIS, which addresses in-depth water resources, traffic, fire evacuation and other environmental issues of concern to the community.

While the DEIS addressed community concerns related to existing water resources and the potential for groundwater depletion, the FEIS contains additional analysis as well as responsive mitigations pertaining to water resources following the construction and operation of the Shiloh Project. This additional work demonstrates that the BIA genuinely considered and incorporated into its analyses the comments submitted pursuant to the publication of the DEIS.

Likewise, the FEIS considered a more expansive list of measures intended to mitigate traffic concerns raised by the local community, including alternative modifications to local roadways and modified fair share contributions. These modifications strengthened the FEIS and confirmed that local community input was an effective component in the environmental review process for this project.

It is evident from the FEIS that the BIA has taken a hard look at all the environmental issues that were raised during the DEIS comment period, including water resources, traffic, fire evacuation, and tribal consultations, and has addressed these concerns and others in the FEIS. Each stage of the Shiloh Project environmental analysis has been thoughtful in its consideration of environmental risks associated with any project of this nature, but this Final Environmental Impact Statement represents a review and analysis of highest quality. In sum, we wholeheartedly support

2000 Redding Rancheria Rd. Redding, CA 96001 Tribal Office: 530-225-8979 Fax: 530-241-1879

the final approval of the Shiloh Project and believe that it will create jobs and have a favorable overall economic impact for the long term.

Please contact Jack Potter Jr. at Jack.Potter@reddingrancheria-nsn.gov with any questions you may have regarding our support.

Sincerely,

Jack E. Potter Jr.

Jack E Potter Jr.

Redding Rancheria Chairman