UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

December 20, 2010

Dale Morris
Regional Director, Pacific Region
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Subject: Draft Environmental Impact Statement (DEIS), Manzanita Band of Kumeyaay Indians Fee-to-Trust and Casino Facility/Hotel Project, Imperial County, California (CEQ # 20100401)

Dear Mr. Morris:

The U.S. Environmental Protection Agency (EPA) has reviewed the above-referenced document pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act. Our detailed comments are enclosed.

The proposed action would take 61 acres of land into federal trust for development of a destination resort casino and hotel. Based on our review, we have rated the DEIS as Environmental Concerns – Insufficient Information (EC-2) (see enclosed "Summary of Rating Definitions"). Our main concerns regard deficiencies in mitigation and energy efficiency measures to address significant air quality impacts in an air basin that currently does not meet the health-based National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter (PM_{10} and $PM_{2.5}$).

The project does not evaluate energy conservation potential as required by the Council on Environmental Quality (CEQ) Regulations (40 CFR 1502.16(e)) and does not commit to reasonable energy efficiency measures in the project description, which would reduce emissions of air pollutants, including greenhouse gases. This lack of commitment to energy efficiency is especially of concern given the fact that the average power consumption of local utility customers in the project area is one of the highest in the nation due to the extremely warm climate. Additionally, the DEIS references requirements of state and local agencies as the basis for some air quality mitigation, even though these regulations would not apply on tribal land that has been taken into trust. Because of this, it is unclear whether these impacts would be mitigated.

In addition to air quality concerns, EPA is concerned that water quality standards are currently not being met in several waters that would receive project stormwater discharges. We

request project design improvements to incorporate more low-impact development (LID) features into the project.

EPA appreciates the opportunity to review this DEIS. When the Final EIS is released for public review, please send one copy to the address above (mail code: CED-2). If you have any questions, please contact me at (415) 972-3521, or contact Karen Vitulano, the lead reviewer for this project, at 415-947-4178 or vitulano.karen@epa.gov.

Sincerely,

for

Kathleen M. Goforth, Manager
Environmental Review Office (CED-2)

Enclosure: Summary of EPA Rating Definitions
EPA's Detailed Comments

cc: Leroy Elliott, Chairman, Manzanita Band of the Kumeyaay Nation
Keith Adkins, Environmental Director, Manzanita Band of the Kumeyaay Nation
Brad Poiriez, Air Pollution Control Officer, Imperial County Air Pollution Control District

SUMMARY OF EPA RATING DEFINITIONS*

This rating system was developed as a means to summarize the U.S. Environmental Protection Agency's (EPA) level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the Environmental Impact Statement (EIS).

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

ADEQUACY OF THE IMPACT STATEMENT

Category "1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category "2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

Category "3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

*From EPA Manual 1640, Policy and Procedures for the Review of Federal Actions Impacting the Environment.

EPA DETAILED COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT, MANZANITA BAND OF KUMEYAAY INDIANS FEE-TO-TRUST AND CASINO FACILITY/HOTEL PROJECT, IMPERIAL COUNTY, CALIFORNIA, DECEMBER 20, 2010

Air Quality

Reliance on Local Regulation for Air Quality Mitigation

Since the proposal would transfer fee land to tribal trust land, state and local regulations would not apply to the project; however, the DEIS repeatedly cites these regulations in discussions of mitigation "requirements". While the BIA is free to adopt the mitigation measures of local agencies in its decision, presenting them as local agency requirements is not accurate. Additionally, utilizing the Imperial County Air Pollution Control District (ICAPCD) offset program or in-lieu fee program (mitigation measure AQ3 and AQ4, p. 4.4-8) will require coordination with the local agency to ensure that these programs are available to tribes. The DEIS states that the in-lieu fee is due at the time of obtaining a building permit, which also does not appear to be applicable on tribal land.

> *Recommendation:* Wording regarding the applicability of local regulations to the project should be amended in the FEIS, including on, but not limited to, pages ES-8, 3.4-6, 4.4-4, 4.4-8, and 5-5. If mitigation measures used by the APCD will be adopted by BIA and the Tribe for the project, the FEIS should state this and identify the responsible party for implementing and enforcing each measure, and how the success of mitigation measures will be monitored. The CEQ Regulations state that a monitoring and enforcement program shall be adopted in the Record of Decision (ROD) and summarized, where applicable, for any mitigation (40 CFR 1505.2 (c)). We recommend such a program or summary also be included in the FEIS if possible.

Lack of Energy Conservation Analysis/Energy Efficiency Measures

The DEIS contains insufficient mitigation for air quality impacts, including greenhouse gases, and does not discuss the energy conservation potential of the project or alternatives, as required by 40 CFR 1502.16(e).

The operational emissions from the project are deemed significant (p. 4.4-8) because the project will contribute to the regional inability to attain the National Ambient Air Quality Standard (NAAQS) for ozone precursors, and operational emissions are above ICAPCD significance thresholds for ozone precursors and PM_{10}. As mentioned above, it is not clear if the mitigation requirements of the Air District discussed in the DEIS (off-site mitigation, payment of operational development fees or in-lieu fees) will be applied to the project since APCD rules do not ordinarily apply to tribal lands. Mitigation measure AQ3 includes only the provision of bicycle lockers/racks, shower facilities, and onsite eating opportunities to reduce lunchtime trips for casino employees. Additional "discretionary" measures include planting shade trees in parking lots to reduce evaporative emissions from parked vehicles, as well as various transit-related improvements which do not appear applicable to the project (although existing transit opportunities for accessing the project were not discussed). Additional and binding mitigation measures are needed to mitigate project impacts.

Of special concern is the apparent lack of commitment to energy efficiency measures despite the

fact that the average power consumption of local utility customers is one of the highest in the nation due to the extreme warm climate (3.9-5). Fossil fuel combustion for energy production is responsible for significant pollutant emissions and is the largest source of greenhouse gas emissions in the U.S., yet the DEIS identifies energy efficiency measures for the project as discretionary (p. 5-5). These measures, which include energy efficient interior lighting, high efficiency space heating, and energy efficient appliances, should be integral project components and identified as such in the project description. Additionally, alternative energy components should be added to the project. One possibility is to install solar panels on carports over the large parking lot, which would reduce evaporative emissions from vehicles, provide shade for customers, and generate energy. Solar water heating should be discussed and evaluated. The Tribe may also want to consider the use of high-efficiency combined heat and power (CHP), also known as cogeneration, to meet project heating and energy loads[1].

Recommendation: EPA has the following recommendations:

- Clarify mitigation commitments for significant operational air quality impacts and identify the implementation mechanism and responsible parties for those measures that are normally implemented by the Air District.
- Incorporate energy efficiency features into the project design in the FEIS to mitigate impacts from air pollutants, including greenhouse gases.
- Discuss the energy conservation potential of the project per 40 CFR 1502.16(e) including CHP and other efficiency measures.
- Incorporate alternative energy components into the project.
- If mitigation measures will include potential improvements in transit to serve the project, transit opportunities should be discussed in the DEIS so the viability of this mitigation is disclosed.

Need for Dust Control Mitigation in PM_{10} Nonattainment Area

There is an apparent lack of commitment to dust control mitigation measures during the construction phase. Basic dust control mitigation measures are identified as discretionary in the DEIS (p. 5-3), including: the watering of exposed surfaces and unpaved haul routes; covering of stock piles with tarps when left unattended for more than 72 hours; lowering speed to 15 miles per hour on unpaved roads; and developing a trip reduction plan for construction employees. Because the project site is located in a serious PM_{10} nonattainment area, implementation of these standard mitigation measures should be required.

Recommendation: Ensure all dust control measures are implemented by including them in construction contracts and as conditions in BIA's approvals.

General Conformity

The DEIS identifies the federal General Conformity Rule (GCR) of the Clean Air Act, including reference to the *de minimis* levels for criteria pollutants that are used in determining applicability of the GCR. It notes that these levels can also be used as significance levels in NEPA

[1] CHP facilities improve energy efficiency by up to 80% when compared to both heat and electricity generation . A market analysis of hotels and casinos developed by EPA's CHP Partnership shows that that there is significant market potential for CHP in the hotel and casino market. See report at: http://www.epa.gov/chp/documents/hotel_casino_analysis.pdf.

documents, and explains that the impact assessment methodology uses the more conservative ICAPCD significance thresholds. We have no concerns with the use of the ICAPCD thresholds in the methodology; however, the NEPA document should still address general conformity and present the results of a general conformity applicability analysis.

> *Recommendation:* The FEIS should include a general conformity applicability analysis, identifying the appropriate *de minimis* levels for those pollutants in nonattainment and providing the calculation of project impacts in comparable units. The FEIS should also note that Imperial County is a moderate 8-hour ozone nonattainment area, a serious PM_{10} nonattainment area, and a nonattainment area for $PM_{2.5}$ as well.

EPA's Proposed Tribal Minor New Source Review (NSR) Program

Minor sources of air pollution on tribal land, including casinos with small boilers or diesel generators, may be subject to air permitting under EPA's Proposed Tribal Minor New Source Review (NSR) Program. Additional information will be available when EPA publishes the final Tribal NSR Rule. Until the rule is finalized, please contact EPA to determine if the proposed facility would need to obtain a permit.

> *Recommendation:* The tribe should consult with EPA Region 9 Air Division about whether an air permit will be needed for any boilers or generators associated with the hotel and casino. Please contact Anita Lee at (415) 972-3958 or Lee.Anita@epa.gov. The FEIS, including Table 1-1, should be updated to reflect this potential permit requirement.

Water Resources

Need to Maximize Low-Impact Development (LID) Techniques for Stormwater

We appreciate the inclusion of stormwater detention basins in the project site plan (p. 4.9-11); however, detention basins function mostly to slow runoff and do not address water quality as well as properly constructed bioretention basins and other low impact development (LID) techniques. Vegetated Best Management Practices (BMPs) that promote infiltration and evapotranspiration, including bioretention, biofiltration and bio-treatment, can provide on-site treatment of stormwater runoff by incorporating many of the pollutant removal mechanisms that occur in unaltered ecosystems. In arid climates such as that of the project location, bioretention areas should be landscaped with drought-tolerant plant species.

EPA encourages project design that maximizes infiltration and minimizes flow offsite. This is consistent with the requirements included in municipal separate storm sewer system (MS4) permits issued by the Regional Water Quality Control Board and reviewed by EPA. Quantitative LID requirements should be adopted for the project, where possible, such as specifying the percent of runoff retained onsite or specifying the amount of impervious surface. Other quantitative LID examples are referenced in the North Orange County MS4 permit[2]. We also note that the City of Calexico Service Area Plan[3] indicates that the Imperial Irrigation District (IID) limits the amount of storm water runoff from urban developments when the land is

[2] http://www.waterboards.ca.gov/santaana/water_issues/programs/stormwater/oc_permit.shtml
[3] http://www.iclafco.com/CMS/Media/08102010d899ee8245d38cd/Section5-Drainage-Facilities.pdf

converted from agricultural use. Maximizing LID techniques in the project design would be consistent with the IID directive.

LID techniques that promote infiltration and treatment include use of permeable or porous pavements for parking lots. Studies have shown that porous pavement treats the water that passes through the system by retaining oils and heavy metals and provides a direct water quality benefit, as well as an indirect water quality benefit by reducing the volume of runoff. Porous pavement may also reduce irrigation demand by providing water to trees with extensive root systems. More information on LID in arid climates is available in the publication *Green Infrastructure in Arid and Semi-Arid Climates*, available at: http://www.epa.gov/npdes/pubs/arid_climates_casestudy.pdf

Stormwater from the project will flow to the Strout drain (p. 3.3-7). On-site stormwater treatment is important because 1,225 miles of Imperial Valley drains currently do not meet water quality standards and are designated as impaired for sediment. The Alamo River receiving water is also impaired for sediment. Onsite flows eventually discharge into the Salton Sea, which is impaired for nutrients.

> *Recommendation:* Modify the project description to include the use of bioretention basins/rain gardens designed for pollutant removal in a manner appropriate to arid climates, and to include the use of permeable or porous pavements for the parking lots. We recommend adopting quantitative LID goals for the project.
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> Because of existing sediment concerns, it is vital that practices to reduce sediment loads, especially during the construction phase, be strictly enforced. Ensure construction site sediment and erosion control practices are included in all construction contracts. Employ pre- and post-construction monitoring to evaluate the impact of construction and development activity.
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> Fertilizer use should be minimized during the operational phase because of nutrient impairment of receiving waters. We recommend that the Tribe commit to the use of native plants in landscaping to minimize fertilizer use.

Wetlands

The DEIS states that the project site does not have any federal jurisdictional waters, as defined by Sections 401 and 404 of the Clean Water Act, because the onsite agricultural irrigation ditches are not jurisdictional due to the fact that they are artificially man-made and maintained, have not been abandoned, and continue to be used for the purpose for which they are intended (Appendix C, p. 9). Since agriculture is no longer occurring on the site, it is unclear whether they have been abandoned or continue to be used for the purpose for which they are intended. Also, we note that only the Army Corps of Engineers can determine jurisdiction, and irrigation ditches can be jurisdictional. There is no indication that the Corps of Engineers has confirmed the conclusion that the project site has no federal jurisdictional waters.

> *Recommendation:* Obtain concurrence from the Corps that there are no jurisdictional waters on the project site. We recommend this occur concurrent with the NEPA process

so accurate information on impacts to waters of the U.S. can be included in the final EIS.

Hazardous Materials
It is likely that pesticide residues are present in the soil from years of agricultural use (p. 4.10-6). The DEIS states that, prior to development of the project site, soil sampling shall be done to determine if the soils on the site are contaminated (p. 4.10-7). This geotechnical study is also mentioned in the mitigation measures chapter, but with the purpose of providing recommendations for dewatering discharge.

> *Recommendation:* EPA supports the soil sampling effort identified on p. 4.10-6 and recommends that the wording of the mitigation measure be clarified to include the goal of determining levels of soil contamination. To inform the sampling effort, we recommend that efforts be made to try to identify whether there were pesticide mixing areas on site, perhaps by interviewing individuals familiar with previous site agricultural operations. This is especially important because these areas have a much higher potential to be significantly contaminated, with a greater risk to human health and the environment if contacted or mobilized. Sampling should be conducted in accordance with any knowledge discovered about site operations, and with a focus on areas that could offer opportunities for human contact or ecological impacts. We recommend that sample testing include organochlorine pesticides, arsenic, and lead as analytes. If levels above EPA's Regional Screening Levels[4] (RSLs) for residential soils are found, we recommend additional analyses be performed to ensure that the site does not present an unacceptable risk to human health. We further recommend that the comparison with RSLs and any subsequent analyses be performed by a qualified and experienced risk assessor.

Impacts to Burrowing Owls
The DEIS includes mitigation measures for impacts to burrowing owls that include consultation by BIA with the California Department of Fish and Game to determine which mitigation options will be used (p. 5-6, 5-7). We appreciate that the BIA recognizes the expertise of this State agency and is willing to consult with them regarding mitigation after BIA's decision is made; however, the voluntary nature of this commitment should be clear.

> *Recommendation*: The FEIS should indicate that it is adopting state requirements as mitigation measures for resource impacts and identify which measures it is adopting and who would implement them. For example, the mitigation to provide a 75-meter "no construction" buffer, which the DEIS says is "required", presumably under a State authority, should instead be worded as project mitigation being adopted to minimize impacts per NEPA's goals and objectives. To the greatest extent possible, the Record of Decision (ROD) should identify which specific mitigation measures are being adopted, per 40 CFR 1505.3, and include them as conditions in BIA's approvals.

Cultural Resources
The DEIS cites a State level Senate bill signed by Arnold Schwarzenegger as the authority for Native American consultation. As a NEPA document, the FEIS should also reference the various federal authorities for Native American consultation. These include, among others,

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[4] See http://www.epa.gov/region9/superfund/prg/index.html

Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (November 6, 2000) which was issued in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies and to strengthen the United States government-to-government relationships with Indian tribes, and the National Historic Preservation Act (16 U.S.C. 470 et seq.) which requires that Federal agencies consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property (Section 101(d) (6) (B)).

The DEIS identifies the tribes that were contacted during the Environmental Impact Report process in 2006 and the 2 responses received; however, the results of the consultations are contained in a confidential appendix that was not included in the DEIS. It is not clear whether any more recent consultations have been conducted.

> *Recommendation:* In the FEIS, include federal authorities for Native American consultation, and provide additional information regarding the results of the tribal consultations in a manner that does not divulge confidential information. Include any recent information or a discussion as to why more recent consultation is not necessary.

Additional comments

- Green Building Certification - The DEIS identifies Leadership in Energy and Environmental Design (LEED) certification as a mitigation measure "where possible" (p. 5-14). The Tribe should strongly consider specifying that project facilities, at least the hotel facility, will be constructed for certification by LEED. This specification will guide the building process and create a high-performance, sustainable building and enable the Tribe to establish themselves as recognized leaders in the green building sector, with the opportunity to market their venue as an environment-friendly facility.
- The DEIS references numerous state and local regulations and authorities, which would not be applicable to a project on tribal trust land. This includes numerous references to obtaining building permits, references to coordination with and requirements of the California Department of Fish and Game, and references to the City of Calexico municipal code for noise. The FEIS should clarify which laws and regulations apply on tribal trust land and remove references to those that do not, unless the Tribe is agreeing to voluntarily comply with such requirements, in which case BIA should ensure these are identified in the ROD and included as conditions in its approvals.
- Table 1-1 indicates that the project requires issuance of a National Pollutant Discharge Elimination System (NPDES) permit for wastewater discharges (p. 1-13). Since the DEIS indicates that wastewater service will be provided by the City of Calexico, there would be no need for EPA to issue this permit. An NPDES permit would, however, be required for stormwater discharges related to construction activities, as indicated. The FEIS should reflect this information.
- The last sentence on page 3.3-3 states that, should there be a need to use groundwater (in a drinking water context), the Tribe will be required to comply with applicable regulations of the Clean Water Act. This should refer to applicable regulations of the Safe Drinking Water Act, not the Clean Water Act.