Comment Letter 2

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July 18, 2011

Via Facimile & U.S. Mail
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Amy Dutschke
Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, CA 95825

RE: Lytton Rancheria of California
Notice of Final EA for 124 Acre Fee-to-Trust Acquisition
SCH # 2009074006
Comments Due July 18, 2011

Dear Ms. Dutschke:

On request from the California Governor's Office, we have reviewed and submit on behalf of the State of California the following comments on the Final Environmental Assessment (Final EA) filed with regard to the Lytton Rancheria of California's (Lytton or Tribe) application to take approximately 124 acres into trust to be used for Tribal housing, a cultural center, a roundhouse, a retreat, and associated infrastructure. The 124-acre acquisition consists of 14 individual parcels, none of which are within the boundaries of, or contiguous with, the Tribe's existing reservation, which is approximately 60 miles away in the city of San Pablo. The parcels are located approximately two miles west of Highway 101 near the town of Windsor in Sonoma County. 2-1

Comments on the Final EA were originally due by July 8, 2011. However, on June 2, 2011, your office granted our request for an extension of time, extending the deadline for comments to July 18, 2011.

The following comments concern the inadequacy of the Final Environmental Assessment, particularly in light of the largely unexplained addition of 32 acres that were not considered in the draft assessment.

The Final Environmental Assessment Is Inadequate

The Final Environmental Assessment (EA) has been prepared for a project consisting of either 55 or 147 housing units plus community facilities and certain infrastructure improvements. By either measure, the proposed project is a major one and will constitute a significant change of land use. The Department should require the Tribe to provide a thorough environmental impact statement (EIS) that addresses the deficiencies described below. 2-2

A. Proposed Alternative "A" Cannot Be Implemented.

Under proposed Alternative A, the Tribe would construct 147 housing units served by the City of Windsor's water supply and sewage treatment facilities. The Governor's Office is informed that expansion of the geographical area served by these City facilities to include the proposed trust acquisition is precluded by a voter initiative limiting the boundaries of that area. Alternative A is therefore illusory, as water service and sewage treatment must be provided by the Tribe as described under Alternatives "B" and "C." 2-3

B. The Final EA Improperly Includes 32 Additional Acres That Were Neither Included In the Tribe's Application, Nor Evaluated In the Draft EA.

The National Environmental Policy Act of 1969, 42 United States Code § 4321 et seq. (NEPA), requires the preparation of an environmental impact statement (EIS) for major federal actions significantly affecting the human environment. 42 U.S.C. § 4332(2)(c). The Code of Federal Regulations provides that an agency shall first determine whether the proposed action requires an EIS. 40 C.F.R. § 1501.4. When the action is neither the type that normally requires an EIS, nor categorically exempt from the requirement, the agency shall prepare an environmental assessment (EA). 40 C.F.R. § 1501.4(b). The EA must provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact (FONSI), and must aid in the agency's compliance with NEPA. 40 C.F.R. § 1508.9(a)(1) & (2). Agencies are required to make diligent efforts to involve the public in preparing and implementing their NEPA procedures. 40 C.F.R. § 1506.6(a). These efforts shall include soliciting appropriate information from the public. 40 C.F.R. § 1506.6(d). Where, as here, the applicant tribe has prepared the EA, the Bureau shall make its own evaluation of the environmental issues and shall take responsibility for the scope and content of the EA. 2-4

An Indian tribe desiring to have the United States take land into trust for the tribe's benefit is required by 25 C.F.R. § 151.9 to file a written request for approval of the acquisition by the Secretary. The application must describe the land to be acquired. *Id.* In the present case, it is unclear whether the Tribe has filed a written request to take the additional 32 acres into trust, or simply appended the additional land to the Final EA. Thirty-two acres is a significant trust acquisition in its own right. If the Tribe has not filed an application to take the 32 acres into trust, the Secretary should not consider whether to do so until that has been done, and the Bureau should provide a new or amended notice of trust application including the 32 acres, as required by 25 C.F.R. § 151.11(d). In that event, the Bureau should circulate a new draft EA covering the 2-5

additional acreage so that the public and affected agencies may comment upon the additional acquisition and the Bureau should respond to those comments, including by potentially modifying the proposed project on the basis of such comments. 2-5 Cont.

The draft EA contained no assessment whatsoever of the environmental impacts arising from the acquisition of the 32 acres or from the placement of project features upon them. One aspect of the proposed project revealed for the first time in the current Final EA is the construction of a large effluent retention basin on a portion of the additional 32 acres immediately adjacent to an existing housing subdivision. The purposes of NEPA—among them that the agency take a "hard look" at the environmental consequences of the proposed action—are not served by characterizing this significant change in the project as merely a response to comments received concerning the draft EA for the original 92-acre acquisition. Accordingly, if a new draft EA is not required for the additional 32 acres, the current Final EA should be construed as an amended draft EA subject to public comment, response by the Bureau, and the subsequent preparation of a new final EA. 2-6

The proposed trust acquisition and project are large and immediately adjacent to the town of Windsor. The proposed project includes residential densities substantially greater than are allowable under the County's general plan. In the event the Department proceeds solely on the basis of the Final EA, we strongly urge the Department to require the preparation of a full EIS in order to ensure that the Department's final action with regard to this proposed acquisition is based upon full consideration of its environmental impacts with public involvement appropriate for an acquisition and project of this magnitude and location. 2-7

Finally, though Congress specifically authorized the Secretary of the Interior to accept the conveyance of ten acres of land located in Contra Costa County in trust for Lytton under the IRA in enacting the Omnibus Indian Advancement Act of 2000, Public Law 106-568, Title VIII, section 819,[1] that provision does not authorize any other acquisition of land under any IRA provision. Indeed, subsequent legislation, changing the date the ten acres was deemed to have been taken into trust, has made clear that Lytton must comply with the provisions of the IRA. 2-8

[1] Section 819 provides as follows:

SEC. 819. LAND TO BE TAKEN INTO TRUST.

Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costs, California, Deed Instrument Number 2000-229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 467). Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.

Moreover, to the extent that act describes those ten acres of land as Lytton's "reservation," this provision makes clear that Lytton's tribal location should be considered to be Contra Costa County rather than Sonoma County and that the enormous distance between the location of its "reservation" and the proposed Trust Acquisition should be found to preclude it. At a minimum, under the provisions of 25 C.F.R. section 151.11, great weight should be given to any local government objections—in particular those of the town of Windsor and the County of Sonoma. 2-8 Cont.

Conclusion

The inclusion of seven additional parcels consisting of 32 acres in the Final EA that were not considered in the draft EA constitutes a foreshortening of the environmental review process that deprives the public of the opportunity to comment on that portion of the proposed acquisition with the prospect of any response and modification by the Tribe. In light of the many comments received with regard to the first draft EA, and the current 35 percent increase in the size of the proposed acquisition, the objectives of environmental review, including a diligent effort to involve the public in the decision-making process, would be best served by requiring the Tribe to produce a full EIS concerning this large project adjacent to the town of Windsor. 2-9

Please note that these comments do not constitute the entirety of the State's comments or those of its political subdivisions. Other State agencies with specific technical expertise may provide additional comments in separate letters.

Thank you for the opportunity to comment upon this Final EA and application.

Sincerely,

NEIL D. HOUSTON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

NDH:lit
cc: Jacob Appelsmith