



Tolowa Dee-ni' Nation

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By Email: CoquilleCasinoEIS@bia.gov

Bryan Mercier
Northwest Regional Director
Bureau of Indian Affairs
Northwest Region
911 Northeast 11th Avenue
Portland, OR 97232-4169

Re: DEIS Comments on Coquille Indian Tribe Fee-to-Trust and Gaming Facility Project

Dv-laa-ha ~ (Hello) Regional Director Mercier:

On behalf of the Tolowa Dee-ni' Nation, we submit these comments on the adequacy of the Draft Environmental Impact Statement (DEIS) for the Coquille Indian Tribe's Fee-to-Trust and Gaming Facility Project. The Nation appreciates this opportunity to comment, as the proposed project and preferred alternative present a severe threat to the economic and natural environment on which the citizens of the Tolowa Dee-ni' Nation depend for their health and well-being. We do not lightly oppose economic development initiatives by other Indian tribes, but such projects cannot be developed without strict compliance with federal law, including, but not limited to, the National Environmental Policy Act (NEPA) at issue here. Our review of the DEIS shows that the Coquille Indian Tribe gaming project falls far short of fulfilling that legal requirement. The Bureau of Indian Affairs (BIA) has failed to undertake the required "hard look" at the expected environmental consequences of the proposed project.

It is necessary to understand the long and difficult path we have followed to becoming the strong Indian nation we are today to fully appreciate our concerns about a proposed gaming project 120 miles from our community. The Tolowa Dee-ni' Nation is a federally-recognized, sovereign Indian tribe located near Smith River, California. Our tribal government employs 120 people. Our enrolled citizens number more than 1,900. We own approximately 900 acres of land, including land owned in trust on our behalf by the United States. The principal source of revenue for governmental programs and services we provide to our citizens is the Lucky 7 Casino on our lands. It employs 130 people. Beginning in the 1850s, the Tolowa Dee-ni' Nation was subjected to the genocidal practices of the State of California and many of our people were lost to killings and violence intended to extirpate us from our aboriginal territory. Congress terminated us as a sovereign Indian nation in 1960. Our sovereign status was not restored until 1983. Our decades-long recovery continues, as we seek to revitalize our culture, language, economy, and way of life.

The Tolowa Dee-ni' Nation has concerns both about the process that the Bureau of Indian Affairs followed to prepare the DEIS, and the adequacy of the environmental review document that process produced. NEPA requires the BIA to conduct environmental reviews that reflect a "pragmatic judgment" that the "form, content and preparation [of the DEIS] foster both informed decision-making and informed public participation." *Churchill Cty. v. Norton*, 276 F. 3d 1060, 1071 (9th Cir. 2001). Procedurally and substantively, the Coquille Indian Tribe DEIS fails that standard. Our procedural concerns include: 1) the BIA's Notice of Intent failed to comply with 40 C.F.R. § 1509(1)(d); 2) the DEIS is based on a Scoping Report prepared in June 2015, and is, therefore, based on out-of-date and stale information; 3) the proposed project's fee-to-trust lands component is based on inapplicable legal authority, namely the so-called restored

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lands exception to the prohibition on gaming on lands acquired after 1988; and 4) Analytical Environmental Services (AES), the contractor retained by the BIA to prepare the DEIS, has a conflict of interest because there is evidence in the administrative record suggesting it has had a direct contractual relationship to perform work for the Coquille Indian Tribe, the applicant here.

Although NEPA does not impose any substantive outcome on an agency, NEPA review must nonetheless include a “reasonably thorough discussion of the significant aspects of the probable environmental consequences,” as well as a “coherent and comprehensive up-front environmental analysis to ensure . . . that the agency will not act on incomplete information only to regret its decision after it is too late to correct.” *Protect Our Communities Foundation v. Jewell*, 825 F. 3d 571, 579 (9th Cir. 2016) (internal citation omitted). The question is whether the analysis is adequate to inform the BIA, affected Indian Tribes, and the general public about probable environmental consequences of the proposed project and the efficacy of mitigation measures for those consequences that are significant. That standard, too, has not been met here.

Our concerns about the adequacy of the environmental reviews set forth in the DEIS include: 1) the socioeconomic impacts on the Tolowa Dee-ni’ Nation are grossly underestimated; 2) the analysis of impacts to biological resources, in particular salmonid species that depend on Bear Creek, is inadequate because it is superficial and there is no assurance that ill-devised mitigation measures will protect against significant harm to these species; 3) the analysis of impacts to cultural resources is inadequate because it is based on an improperly narrow definition of such resources; 4) the analysis of alternatives to the project is deficient because it did not adequately consider alternatives to gaming for economic gain; and 5) mitigation measures are generally inadequate throughout the DEIS because their efficacy is based on best management practices for which no assurance of adoption is provided.

A. Flaws in the NEPA Review Process Led to a DEIS Based on Out-of-Date and Incomplete Information.

The genesis of this problem began in 2015 with start of the scoping process, which was initiated with the publication by the BIA in the Federal Register of the Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Coquille Indian Tribe Fee-to-Trust and Casino Project, City of Medford, Jackson, Oregon. 80 Fed. Reg. 2120, January 15, 2015. The title of the Notice signals that the BIA had prejudged the preferred alternative, limiting the project to the “City of Medford.” Federal regulations implementing NEPA require the Notice of Intent to include “a preliminary description of the proposed action and alternatives the environmental impact statement will consider.” 42 C.F.R. § 1501.9(d). That description is nowhere to be found in the notice published by the BIA. Moreover, the notice is deficient in other ways, which although at first appear to be technical in nature, show the BIA’s haphazard approach to complying with NEPA requirements and its bias in favor of the alternative supported by the Coquille Indian Tribe. For example, the notice describes the Proposed Action as the Coquille Indian Tribe’s trust application for 2.4 acres “upon which the Tribe would renovate an existing bowling alley to convert it into a gaming facility,” which eliminates other alternatives to meet the stated purpose of the Proposed Action to “improve the economic status of the Tribe. . . .” The notice also poorly informs the public of the nature and scope of the BIA decision-making process by omitting the federal approvals and authorizations that will be required to bring the proposed project to fruition.

An additional procedural flaw is the DEIS’ reliance on a scoping report that contains information that is nearly eight years old. Compliance with the NEPA regulations would have required the BIA to prepare an updated scoping report that relies on current information. Use of out-of-date information improperly skewed the determination of which alternatives to include in the DEIS. For example, the 2015 Scoping Report eliminated 15 sites in other Oregon cities for gaming development for reasons of “infeasibility, inability to reduce environmental impacts of the project, not contributing to a reasonable range of alternatives, and not meeting the purpose and need of the Proposed Project.” EIS Scoping Report, Section 2.0, June 2015. (Parenthetically, the conclusion that an alternative does not contribute to a “reasonable range of alternatives” begs the question to be determined: is a particular alternative reasonable and worthy of consideration). Potential locations within the Coquille Indian Tribe’s existing trust lands were also eliminated because of demographics, and lack of infrastructure such as roadways and public services. *Id.*

It requires little investigation to conclude that the circumstances on which the elimination of these alternatives were based may well have changed significantly since 2015. A new scoping report that includes updated information should be prepared in order to assure that the consideration of alternatives is thorough and based on accurate, current information. 42 C.F.R § 1501.9(g) requires an agency to “revise the determinations” regarding, *inter alia*, scope of the environmental review and identification of significant issues to be addressed “if significant new circumstances or information arise which bear on the proposal or its impacts.” It is farfetched to think the circumstances bearing on the reasonableness of alternatives would not have changed in eight years. Reliance on out-of-date information deprives the agency of informed decision-making and the

public of informed comment. See *Lands Council v. Powell*, 395 F. 3d 1019, 1030 (9th Cir. 2005) (13-year-old habitat studies and lack of up-to-date evidence on trout habitat data deprived the U.S. Forest Service of the ability to make an accurate cumulative impact analysis under NEPA); *Seattle Audubon Society v. Espy*, 998 F. 2d 699, 704-05 (9th Cir. 1993) (invalidating agency decision based on “stale scientific evidence”).

The BIA’s framing of the purpose and need for the project unreasonably narrowed the environmental consultant’s evaluation of alternatives to the proposed project. The statement of purpose and need should be guided by the statutory objectives the agency intends to meet with the proposed project. As one court has observed, it is “the statutory goal that serves as a guide by which to determine the reasonableness of the objectives outlined.” *Protect Our Communities Foundation v. Jewell*, 825 F. 3d 571, 579-80 (9th Cir. 2016). Here, the DEIS cites the generic goal of the Indian Gaming Regulatory Act (IGRA) to acquire lands for gaming purposes, but that cryptic statement elides IGRA’s prohibition on acquiring lands for gaming after 1988. So that cannot be the statutory goal. To that problem, the DEIS responds that the 2.4 acres in the application qualify as “restored lands” under the Coquille Restoration Act of 1989. 25 U.S.C. § 715 et seq. The Restoration Act appears to be the statutory goal the purpose and need purportedly promotes. The problem that presents for NEPA analysis is it eliminates the evaluation of detrimental impacts to the surrounding communities that IGRA’s two-part analysis otherwise requires for post-1988 off-reservation land acquisitions for gaming purposes. 25 U.S.C. § 2719(b)(1). A statement of purpose and need that “unreasonably narrows the agency’s consideration of alternatives so that the outcome is preordained” violates NEPA. *Alaska Survival v. Surface Transportation Board*, 705 F. 3d 1073, 1084 (9th Cir. 2013).

The DEIS’s purpose and need statement that an off-reservation gaming facility in Medford, Oregon, promotes the goals of the Coquille Indian Tribe Restoration Act is based on a faulty legal premise. The 2.4 acres proposed to be taken into trust in Medford do not qualify as “restored lands” under the Coquille Restoration Act, and are not, therefore, eligible for off-reservation gaming. The Act requires the Secretary of the Interior to accept into trust up to 1,000 acres “located in Coos and Curry Counties.” 25 U.S.C. § 715c(a). For lands outside those counties, the Secretary “may accept any additional acreage in the Tribe’s service area pursuant to his authority under the Act of June 18, 1934 (citation omitted).” *Id.* The Tribe’s service area is defined by the Act to include Jackson County, where Medford is located. 25 U.S.C. § 715(5). The plain meaning of these terms is that trust acquisitions are mandatory for acreage up to 1,000 in Coos and Curry Counties, and trust acquisitions are discretionary and to be considered under the Indian Reorganization Act regulations for lands elsewhere. Thus, the 2.4 acres do not qualify as “restored lands” under 25 C.F.R. § 292.11 (a).

Nor do these lands qualify as restored lands under 25 C.F.R. § 292.12. Other than noting Coquille ownership of the 2.4 acres in Medford, the DEIS contains no information, and we are aware of none, that demonstrates a Coquille “current connection to the land” or a significant historical connection to the land.” 25 C.F.R. § 292.12(a)(4) and (b). Moreover, the Coquille Tribe was restored to federal status in 1988, and the subject acres here were acquired at some point in the recent past, which means the Tribe cannot meet the requirement to show a “temporal connection between the date of acquisition of the land and the date of the tribe’s restoration.” This misguided effort to shoehorn this acreage into the restored lands exception fails.

That the DEIS suggests a preordained outcome is perhaps not surprising in light of the apparent fact that Analytical Environmental Services lists the Coquille Indian Tribe among its clients. The relationship between AES and the Coquille Indian Tribe should be further investigated and the results made public, so the other Indian tribes adversely affected by the Medford gaming project and the general public may assess the DEIS for bias and conflicts of interest. In addition, there is congressional testimony showing that, at least at the time the Scoping Report was prepared, the BIA had rarely retained any firm other than AES to conduct environmental reviews, and AES returned the favor with an apparent record of never having concluded that a BIA-proposed project would have environmental consequences that could not be mitigated. See House Resources Committee, Subcommittee on Indian Alaska Native Affairs Oversight Hearing on “Executive Branch Standards for Land-in-Trust Decisions for Gaming Purposes,” September 19, 2013, at 55:20. There are serious questions here about whether AES’ relationship to the Coquille Tribe and its history with the BIA violates impartiality standards of NEPA. “[T]he comprehensive “hard look” mandated by Congress and required by the statute must be timely, and it 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 v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)

B. The DEIS’ Evaluation of Environmental Consequences of the Proposed Action is Inadequate.

The heart of an agency’s legal obligation under NEPA is its evaluation of the projected consequences of the proposed federal action on the health of the environment. This is often characterized as the requirement for the agency to take a “hard look” at those environmental consequences. The hard look requires a “reasonably thorough discussion of the significant

aspects of the probable environmental consequences.” *Churchill Cty. v. Norton*, 276 F. 3d 1060, 1071 (9th Cir. 2001) (internal quotation omitted). The DEIS fails to meet this obligation in many of the impacts that are examined, but the Tolowa Dee-ni’ Nation here highlights those impacts of special concern to the Nation and its environmental stewardship responsibilities: socioeconomic impacts; biological resource impacts; and cultural resources impacts.

1. *Socioeconomic Impacts*

The DEIS analyzes impacts to the Tolowa Dee-ni’ Nation’s on-reservation casino under the anodyne label of “substitution effects”, as if the Coquille Indian Tribe’s capture of market share in Medford, Oregon, merely substitutes revenues previously earned by an adjacent Indian tribe for revenues earned by a new casino. That approach discounts, if not outright ignores, the real-world effects of lost gaming revenues on the governmental programs and operations of the Tolowa Dee-ni’ Nation and the corresponding adverse effects on the health and welfare of Nation citizens. The DEIS concludes that the impacts on the Tolowa casino from Alternative A, which is located about 120 miles from the proposed Coquille Medford facility, will likely be an annual loss of revenue of 2.7%. According to the economist retained by either the Coquille Indian Tribe or AES, that percentage translates into an annual revenue loss of \$372,305.

For the following reasons, that calculation grossly underestimates the adverse impacts on the Nation’s Lucky 7 Casino. The estimate is based on an abstract “gravity” model, the factual assumptions of which have not been disclosed to the Tolowa Dee-ni’ Nation nor are they set forth in the DEIS. The few facts cited are stale, dating from 2019. The economic analysis and estimates did not include a discrete gaming market segment for the Tolowa Dee-ni’ Nation, which means demographics and projected growth, gaming market capture, income levels, jobs information, tax data, economic trends, gaming patronage data, and similar information necessary for accurate estimates were inexplicably omitted. (The map showing market segments includes a “Northern California” area but the boundaries do not include the Tolowa Dee-ni Nation). There is no evidence in the gaming impact study that any consultant visited the Tolowa Dee-ni’ Nation, how long that visit lasted, and what information was collected or requested from the Nation’s gaming management or staff. Moreover, it is not clear what criterion of significance was applied for determining whether revenue loss constitutes a “socioeconomic impact” that should be mitigated. AES determined that impacts are less than significant if the competing casino is projected to remain “operational.” (“A typical properly managed facility should have the ability to streamline operations to absorb the magnitude of impacts . . . and remain operational.” Section 4.7.1 at page 4-22). There is no support in the NEPA regulations nor case law for concluding that a socioeconomic impact is less than significant, and therefore does not need to be mitigated, if the affected economic enterprise merely remains in business, at whatever reduced level of revenue.

There is no evidence in the gaming impact study that the economic consultants requested or reviewed the Tolowa Dee-ni’ Nation’s evaluation of expected impacts from the Coquille casino in Medford, Oregon. Rather, the economic consultants simply assumed that those effects would diminish over time, even from the modest initial adverse effect. That is an unfounded assumption that has no place in the NEPA analysis. The Nation’s evaluation of adverse impacts shows that there is a sizeable level of market share for the Nation’s Lucky 7 Casino that comes from the Rogue Valley and Medford area. Utilizing the calculated ratio of player activity from patrons within the subject area, there is sufficient data to predict the potential negative financial impacts on the Lucky 7 Casino & Hotel operations resulting from the loss of patronage should the Coquille gaming facility become operational. Due to the proximity of the proposed project to the Tolowa Dee-ni’ Nation gaming market, we anticipate that a high percentage of the Lucky 7 Casino market share would be lost from the opening of a full-service tribal gaming operation within the City of Medford.

Contrary to the superficial analysis and conclusion in the DEIS, we project the adverse financial impacts to the Tolowa Dee-ni’ Nation as a result of the loss of income that could be directly attributable to the proposed project to be \$1.25 million per year, more than three times the amount projected by the DEIS. The Lucky 7 Casino & Hotel is a modest Tribal gaming operation with a very limited market size and would be unable to offset this loss of revenue through alternative sources of revenue. This will negatively impact our business operations and would also likely result in a loss of 15-20 full-time jobs within the Nation’s gaming facility.

The Tolowa Dee-ni’ Nation has limited financial resources and its Lucky 7 Casino & Hotel enterprise generates a large portion of the funding used to provide governmental program and services. In addition to the loss of jobs within the gaming facility, this reduction of enterprise funds available to the Nation would create budget shortfalls and likely result in the reduction of support services for our citizens. We anticipate that the loss of the Rogue Valley market share could not be recoverable nor replaced from other sources, and therefore the financial impacts would permanently impact the Tolowa Dee-ni’ Nation’s financial health. The gaming impact study should be redone to include these facts and the Nation’s evaluation of adverse impacts.

2. *Biological Resources Impacts*

The Tolowa Dee-ni' Nation has a demonstrated long-standing concern about the health of salmonid populations in northern California and southern Oregon. Since time immemorial, the Nation has depended and continues to depend on salmon from the rivers and streams in this area for its food, identity and cultural life. The Nation frequently acts to protect salmonid populations from the adverse effects of development. For these reasons, the Nation is particularly concerned about the DEIS' evaluation of adverse effects on Bear Creek, a river system that supports salmonid populations protected by the Endangered Species Act. The DEIS' evaluation of the projected environmental impacts on this river system is inadequate.

The DEIS notes that it is likely that the project will discharge storm runoff to Bear Creek, which is located only one-third of a mile from the Coquille proposed gaming site. Section 2.14. Bear Creek is a tributary of the Rogue River that is located 10 miles north of the Medford site. Section 3-12. Bear Creek is listed on the impaired water list under section 303(d) of the Clean Water Act. The DEIS describes Bear Creek has "a potential anadromous bearing stream" which "may contain habitat for federally listed species Chinook salmon, coho salmon and green sturgeon." Section 3-26.

There is no explanation in the DEIS why this issue was not further investigated to determine the existence and geographic scope of salmonid habit so close to the Medford site. Nor is it explained why the neither the BIA nor AES consulted the National Marine Fisheries Service for its assistance in making this determination. The inference that the environmental consultants did not want to find out whether this habit and these species would trigger section 7 consultation under the Endangered Species Act is unavoidable. Excluding salmonid habitat from the baseline environmental condition skews the impacts analysis in favor of no significant impact. It is no answer to say that the effects of storm runoff will be mitigated by best management practices, when there is no assurance in the DEIS or elsewhere that such practices will be required to be adopted as a condition of any permit. Mitigation measures inadequate on their face are of special concern when none must be adopted unless they are "reasonable and practicable," a standard that is nowhere defined. Attempts to avoid the issue by refusing to investigate readily ascertainable facts about the projected impacts to salmonids violates NEPA.

3. *Cultural Resources Impacts*

The DEIS' evaluation of potential impacts to cultural resources from the proposed project is likewise deficient. The scope of those deficiencies is difficult to discern because the cultural resources report was "bound separately" as Appendix G, and presumably not disclosed to other Indian tribes or the public. The Tolowa Dee-ni' Nation has not examined it. Although the Nation's ancestral territory boundary in Oregon comes within few miles to the west of Medford, Oregon, the site of Alternative A, the BIA did not consult with the Nation about potential impacts to cultural resources from the Coquille gaming project. Environmental impacts do not respect territorial boundaries, so the decision of the BIA to exclude the Tolowa Dee-ni' Nation from cultural consultation is arbitrary and unreasonable.

Based on the publicly-available record, the principal defect on the DEIS cultural impacts analysis is its exclusive focus on archaeological resources. By apparently defining "cultural resources" as the physical manifestation of cultural practices, the DEIS excludes whole categories of cultural resources that would likely be affected by construction and operation of a casino in Medford. For example, there is no discussion of Traditional Cultural Properties in the DEIS. (The cultural resources report could not be reviewed for this issue). There were no surveys to identify sacred sites, sacred objects, ceremonial items or items of cultural patrimony of Indian tribes with ancestral or contemporary ties to this area. In other words, the DEIS proceeds from the assumption that "culture" is what was left behind by Indian tribes who used and occupied the project site before European contact. The broad range of practices and lifeways that constitute culture were entirely omitted. It strains credulity to conclude that the only evidence of cultural resources at the site are two lithic scatters and a "stone-lined well". Section 3.6.2. Moreover, a robust cultural resources analysis would have included investigation and examination of cultural resources outside the narrow confines of the Medford site itself; impacts to cultural resources do not stop at arbitrarily defined boundaries.

4. *Alternatives Analysis*

The DEIS' analysis of alternatives to the proposed project is inadequate. If the purpose and need for the project is economic self-sufficiency for the Coquille Indian Tribe, alternatives that do not rely on gaming that would produce economic gain should have been more thoroughly evaluated. Moreover, by relying exclusively on gross economic benefits and ignoring net economic benefits, the DEIS analysis inflates the potential economic gain. The factors that bear on economic benefit are cherry-picked to choose those more likely to result in gain from gaming. A more thorough and robust analysis of alternatives

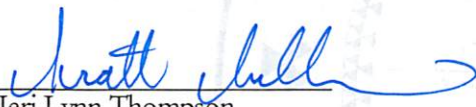
is necessary to allow agency decision-makers, neighboring Indian tribes and the general public to make informed decisions based on complete and unbiased information. Finally, the DEIS fails to explain why certain alternatives were eliminated from evaluation. Conclusory statements that such alternatives do not contribute to a reasonable range of alternatives cannot substitute for careful and informed analysis.

5. *Mitigation*

For those environmental impacts deemed to be significant, the DEIS identifies mitigation measures purportedly intended to lessen the impacts to insignificant levels. We have already noted that the absence of any criteria for significance is a fatal flaw in the impacts analysis. The principal means by which the DEIS proposes significant impacts to be reduced to insignificant levels is mitigation agreements with the Coquille Indian Tribe. No assurances are provided that such agreements will be made, or that they will be effective when made in mitigating impacts. Plitudinal references to “best management practices” are hollow promises. The DEIS does not explain how the Coquille Indian Tribe could be required to adhere to such practices or to adopt specific project design measures calculated to mitigate environmental impacts. Empty promises to address impacts in the future violate NEPA.

The Tolowa Dee-ni’ Nation appreciates the opportunity to comment on the Draft Environmental Impact Statement for the Coquille Indian Tribe fee-to trust gaming facility project. The deficiencies we have identified require further factual development, analysis, and revision in order to comply with NEPA. We look forward to your response.

Shu' shaa nin-la (Thank you),

for 
Jeri Lynn Thompson
Chairperson, on behalf of Tribal Council