

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200



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W 17a**PROPOSED FINDINGS****ON CONSISTENCY DETERMINATION**

Consistency Determination No.	CD-054-05
Staff:	MPD-SF
File Date:	4/15/2005
60th Day:	6/14/2005
75th Day:	6/29/2005
Extended to:	9/16/2005
Commission Vote:	9/14/2005
Hearing on Findings:	10/12/2005

FEDERAL AGENCY: **Bureau of Indian Affairs****DEVELOPMENT****LOCATION:**

East of Humboldt Rd. and northeast of Highway 101 (Martin Ranch Parcel (APN 115-020-28)), east of Crescent City, Del Norte County (Exhibits 1-2)

DEVELOPMENT**DESCRIPTION:**

Placement of 203.5 acre Martin Ranch Parcel into Trust for Elk Valley Rancheria, and development of Elk Valley Rancheria Resort-Casino (Exhibits 3-8)

PREVAILING**COMMISSIONERS:**

Commissioners Aldinger, Burke, Kram, Kruer, Neely, Potter, Reilly, Secord, Shallenberger, Wan, and Chairman Caldwell

SUBSTANTIVE FILE**DOCUMENTS:**

See Page 37.

[Staff Note -- this version of the proposed findings is in "tracked changes" mode. New language is shown in underline text; language to be deleted is shown in ~~strikeout~~ text. Also, to save paper, this version is being printed without the exhibits.]

EXECUTIVE SUMMARY

The Bureau of Indian Affairs (BIA) has submitted a consistency determination for the placement of the 203.5 acre Martin Ranch parcel (which is bisected by the coastal zone boundary) into trust status for the Elk Valley Rancheria, and for the construction of a gaming casino, resort, restaurant, parking and associated improvements. The project would include a 40,000 sq. ft. casino, a restaurant/conference facility, a 156-room hotel, parking lots, and approximately 112,000 cubic yards of grading.

The project site is east of Crescent City in Del Norte County. The parcel is bisected by the coastal zone boundary. The project initially included a golf course within the coastal zone portion of the parcel, and proposed within wetlands. The Commission staff expressed concerns over the consistency of the golf course with the Coastal Act's wetland policies, and the BIA revised the proposal to eliminate the golf course. As now proposed, the vast majority of proposed development (i.e., the proposed casino, resort, restaurant, water tank, and parking lots) would be located outside (landward of) the coastal zone boundary, and adjacent to an existing developed community (the Bertsch Ocean View Community, to the north of the site and also outside the coastal zone). Only the proposed improvements to the access road to the casino from Humboldt Rd., and any signs or highway improvements advertising and/or facilitating vehicular access off Highway 101, would be within the coastal zone.

The project would nevertheless affect the coastal zone in the following ways:

1. **Public Views.** The resort and casino buildings would be visible from Highway 101, a major coastal access thoroughfare, in an area designated as highly scenic in the County's Local Coastal Program, and in a rural, scenic, relatively undeveloped viewshed. Also, any signs at Highway 101, although not specified at this time, would be within the coastal zone and would add to the visual impact.

2. **Traffic/Roads.** The project would add approximately 3,442 additional vehicle trips per day to area roads, the vast majority of which would use Highway 101 to approach or leave the resort. The project would also involve physical road improvements within the coastal zone, including: (a) widening of the narrow access road to the proposed resort from Humboldt Rd., and (b) although not specified at this time, possible intersection improvements (such as turn signals or acceleration and deceleration lanes) at Highway 101.

3. **Sewer/Water.** The project would involve extending water and sewer lines to serve the resort, and project demand may generate the need for additional sewer infrastructure construction within the coastal zone (e.g., expanding the City of Crescent City's sewage treatment plant). Also, if the improvements are not properly sized and located, the project could be growth-inducing and effectively expand the region's urban/rural boundary.

4. **Wetlands/Water Quality.** The project is located upstream of sensitive wetlands in the coastal zone, including the Crescent City Marsh. Both construction-related and operation-related downstream impacts from the proposed approximately 9.3 acres of impervious surfaces and parking lots has the potential to cause erosion, sedimentation, and pollutant loading in the downstream wetlands, and changes to the Crescent City Marsh's hydrological regime.

5. **Agriculture.** The parcel is currently zoned primarily for agricultural use and has historically been used for grazing. While the resort will be predominantly outside the coastal zone, it has the potential to decrease the site's continued agricultural viability through creation of conflicts between agriculture and the intense, more urbanized, resort complex.

6. **Change in status of coastal zone portion of the parcel.** While the resort is predominantly proposed to be located outside the coastal zone, because land held in trust is land owned by the BIA, an agency of the federal government, the proposed action would change the status of the coastal zone half of the 203.5 acre parcel, in that, once in trust, it would be treated similarly to other federally owned lands (which under the Supremacy Clause of the U.S. Constitution are not subject to state or local regulation). This change would modify state regulatory procedures currently in place via State and County permit review under the applicable Local Coastal Program. The Commission would retain federal consistency authority over future activities affecting the coastal zone involving federal agency permits, activities, or funding, but where such federal involvement is absent, or no spillover effects on the coastal zone would occur, the Commission and/or the County would not have any review authority.

Based on the above coastal zone concerns, the Commission staff requested that the BIA provide additional information concerning the project's impacts (Exhibit 19), to which the BIA responded (Exhibit 20). The following discuss summarizes the Commission staff's information requests and the BIA's subsequent responses (prior to the Commission hearing):

1. Concerning **public views**, the Commission staff requested analysis of the project's visual impact from Highway 101 (ideally, including a visual simulation of the view from the highway), include: (a) details for vegetative screening; (b) details for revegetation efforts for slopes disturbed during construction; (c) impacts of any signs along Highway 101; (d) any above-ground water storage tanks needed; (e) community character effects; and (f) night lighting effects.

The BIA's response was that: (a) the primary view considerations are of views west, not east, of Highway 101; (b) the project is primarily outside the coastal zone; (c) the project's visual impacts would not be significant; (d) the water storage tank will be screened by landscaping; (d) the existing barn and pasture will partly obscure the project's visual impacts;

(e) measures discussed in the Draft EIS¹ would reduce visual impacts, including: downcast lighting, vegetative screening, low sodium light bulbs, fast growing grasses, sensitive architectural treatment, use of earth tones; and (f) a recent court case limits the Commission's authority outside the coastal zone.

2. Concerning **traffic and road improvements**, the Commission staff requested a description of needed improvements, such as widening of the access road to the resort from Humboldt Rd. and turning lanes at Highway 101 (which may be required by Caltrans), and analysis of the adequacy of the proposed parking and impacts of additional traffic on recreational traffic on Highway 101.

The BIA's response was that: (a) the area has adequate road capacity to accommodate the development; (b) only limited intersection and offsite improvements would occur within the coastal zone; (c) the Draft EIS has been revised to show frontage improvements (at the intersection of Humboldt Road, Sandmine Road and the project access road); and (d) the Elk Rancheria's MOU with Del Norte County (Exhibit 15) is in place to address potential future non-project improvements (and those "non-project" improvements would be offsite and subject to County and Caltrans permit processes).

3. Concerning **sewer and water infrastructure**, the Commission staff requested a clear description of the proposed improvements needed (e.g., locations and sizes of water and sewer lines, pump stations (if needed), and on-site water storage, and improvements needed to the City's sewage capacity, which is limited), and analysis of the project's effects on sewer and water capacity.

The BIA's response was that: (a) Crescent City is upgrading its sewage capacity by improving its outfall and expanding wastewater pre-treatment; (b) Crescent City projects that it will have sufficient capacity to serve the proposed development; and (c) Crescent City sewage issues are not the BIA's responsibility and not part of the proposed action.

4. Concerning **wetlands and water quality**, the Commission staff requested: (a) analysis of water quality and hydrological impacts; (b) a commitment to submit water quality plans, which have not yet been prepared, to the Commission staff for its review and concurrence, prior to commencement of construction; (c) an articulation of an overall goal for the plans to design them to assure no increases in runoff and sedimentation beyond baseline conditions; and (d) agreement that the plans will also: (i) address measures to revegetate graded slopes; (ii) include measures to be implemented both permanently and during the construction period; (iii) explain whether and how parking lot runoff will be filtered; (iv) indicate the approximate size and location of the proposed detention basin as mentioned in the

¹ Inter-agency administrative Draft, not yet public, dated April 2005.

DEIS to slow the rate of runoff; and (v) analyze effects on groundwater recharge, including and potential effects on the timing and extent of both surface and groundwater flows to the downstream Crescent City Marsh.

The BIA's response was that: (a) Best Management Practices will be developed to protect water quality and downstream wetlands; (b) the Draft EIS specifies several of these measures, to include: (i) filter fences and barriers; (ii) revegetation of disturbed areas; (iii) directing stormwater runoff from parking lots to vegetative filter strips; and (iv) use of vegetated detention swales (at a ratio of 500 feet of swale per acre of impervious surface to be located within parking areas, south of parking areas and roadways, and along the western edge of the fill slope adjacent to the parking area); (c) the project would result in a small (0.6%) increase in impervious surfaces in the watershed of the downstream Crescent City Marsh, and that the above mitigation will further reduce this impact; (d) the BIA is not able or willing to provide water quality plans to the Commission staff for review and concurrence, prior to commencement of construction; and (e) the Coastal Act and a recent court case limit the Commission's authority outside the coastal zone.

5. Concerning **agriculture**, the Commission staff requested analysis of the project's effects on the continued agricultural viability of the site, as well as a discussion of any mechanisms any place that will assure or assist in the continued protection of the coastal zone resources on the coastal zone portion of the site.

The BIA's response was that: (a) the project will not preclude continued agriculture on the site; (b) the casino will create the economic means for the Elk Rancheria to implement a resource management program to protect important resources; (c) current grazing activities on the ranch are marginally economic and detrimental to the site's (and downstream) wetlands; (d) although 96 acres of the site contain "prime and unique farmland," the soils are not "of Statewide and local importance"; (e) the only proposed improvements on agricultural portion of the property are relatively minor access road improvements; and (f) the Elk Rancheria's development and implementation of a proactive natural resources protection plan under tribal ordinance (Exhibit 14) will serve to protect the interests of the Commission, Tribe and the human environment.

Prior to the Commission public hearing, the Commission staff identified the following, mostly informational, concerns: ~~The deficiencies in these BIA responses are as follows:~~

1. The BIA has not included visual simulations or other descriptive analysis reflecting the effect that the very large commercial complex will have on a scenic, rural, predominantly undeveloped public view from Highway 101.

2. The BIA states that vegetative screening and low-intensity lighting will be used, but the BIA has not provided any standards, landscaping plans, or analysis of how effecting vegetative screening will be (including how long it will take for vegetation to mature).
3. The BIA has not described or discussed signs along Highway 101, signs on Humboldt Rd., access road improvements, Highway 101 intersection improvements, or an analysis of the adequacy of the amount of parking.
4. The BIA states that the City expects to have the sewer capacity for the resort but has not provided documentation to support that assertion or analyze the effects of expanding the City's sewer system. The DEIS contains a letter from the City expressing confidence it will be able to serve the project, but that letter does not describe how this would occur.
5. The BIA references runoff controls, Best Management Practices, and water quality plans, but it has not provided any such plans, any standards they would contain, or any agreement that, when they are prepared, the Commission or its staff would have the opportunity to review them (and if necessary, request changes).
6. The BIA has not provided any hydrological analysis of effects on groundwater recharge and on the Crescent City Marsh.
7. The BIA states that the casino will provide the means for the Elk Rancheria to implement a resource management program to protect wetlands and views, and control non-native vegetation, but it has not provided any such plans, any standards they would contain, or any agreement that, when they are prepared, the Commission or its staff would have the opportunity to review the program to determine when it would be implemented and how it would protect the site's (and downstream) coastal zone resources.

Without this information, the Commission lacks sufficient information to find. To address these concerns, during the hearing the BIA agreed to modify the project to include the following agreement:

Prior to commencement of construction, the Tribe will prepare Tribal Ordinances or other equivalent mechanism providing for Commission staff review of detailed project plans, including plans for water quality, hydrology, lighting, signs, roads, sewer and water infrastructure, landscaping and revegetation, and building plans, as applicable.

Pursuant to the Tribal Ordinances, the plans shall be submitted to the Commission staff for its review and agreement, and in the event of a disagreement about whether the plans are adequate to protect coastal zone resources (including wetlands and environmentally sensitive habitat), the BIA will continue to play a mediator role.

Further, pursuant to the Tribal Ordinances, in the event of a continuing disagreement, the matter will be brought before the Commission for a hearing regarding the parties' respective positions.

Subject to applicable law the Commission also retains the ability to require additional consistency review if the project no longer remains consistent with the California Coastal Management Program.

The above commitment (to which the Elk Valley Rancheria also agreed during the hearing) was incorporated into the project as part of the BIA's submittal. In addition, during the hearing, the Tribe agreed in concept to a waiver of sovereign immunity for this project; however the Tribe also noted that such a waiver could not legally be provided orally. Therefore the Tribe and the Commission agreed that the appropriate mechanism for such a waiver to be implemented was through its inclusion (in writing) within Tribal Ordinances. Accordingly, the Commission adopted a condition, which provides:

1. **Waiver of Sovereign Immunity.** Within 30 days of the Commission's action the Elk Valley Rancheria will submit a Tribal Ordinance to the Commission staff that includes a waiver of sovereign immunity.

With the above project modification, combined with the above condition, the Commission finds the project, as conditioned, to be consistent the project consistent with the public view, public services, public access/recreation, concentration of development, wetlands, environmentally sensitive habitat, water quality, and agricultural resource protection policies (Sections 30251, 30254, 30252, 30250, 30254, 30233, 30231, 30240, 30241 and 30242, respectively) of the Coastal Act.

As provided in 15 CFR § 930.4(b), should the BIA not agree with the Commission's condition of concurrence, then all parties shall treat this conditional concurrence as an objection.

The Commission's deliberation included an agreement by the Commission staff to hold a local workshop, after the above-referenced plans are provided to the Commission staff for its review, and a subsequent briefing session at a following Commission meeting (during which the public could also comment to the Commission), before any final staff agreement with the plans.

Finally, the Commission also notes that in making several arguments, ~~In addition,~~ the BIA relies on an inapplicable court case to assert that the case limits the Commission's ability to review activities outside the coastal zone. The case the BIA citeds involves state law permit authority. The proposed action is being reviewed under federal law (the Coastal Zone Management Act), which clearly authorizes the Commission to review coastal zone effects from federal agency activities outside the coastal zone.

STAFF SUMMARY AND RECOMMENDATION

I. Project Description. The Bureau of Indian Affairs (BIA) has submitted a consistency determination for the placement of the 203.5 acre Martin Ranch parcel (which is bisected by the coastal zone boundary) into trust status for the Elk Valley Rancheria, and for the construction of a 40,000 sq. ft. gaming casino/bingo facility (Exhibits 1-8). The project would include approximately 400 slot machines and 60 gaming tables, a 500-seat bingo/multi-function, restaurants, a 20,000 sq. ft. convention center, a 156-room hotel, approximately 1,250 parking spaces, and associated sewer, water, and other infrastructure improvements. The project's overall appearance is as depicted in Exhibit 4. With the exception of the access road from Humboldt Rd., which forms the western boundary of the site, the improvements would be located landward of the coastal zone boundary (Exhibits 4-5). As currently described, the project does not include any advertising signs or Highway 101 intersection improvements.

Water would be served by the City of Crescent City or the (adjacent) Bertsch Ocean View Community Services District (BOVCSD), which contracts with the City for its water. Water service involves a 3 or 4 inch water line connection from the property line to an on-site storage reservoir (which would be a 500,000 – 700,000 gallon buried or at-grade reservoir), and a pump station.

Sewer services would include construction of onsite wastewater pretreatment and pumping facilities (to pump sewage to the City's sewer system). Pretreatment would include a grease trap, pH control system, flow measurement devices, pump station, and force main. City sewer lines abut the property to the north.

The project also includes 112,000 cubic yards of grading (balanced cut and fill), road improvements at the intersection of Humboldt Rd., Sandmine Rd., and undefined (at this time) improvements to the access road to the resort from that intersection. Road improvements (e.g., turning lanes) may also be included at Highway 101's intersection with Humboldt and/or Sandmine Roads, if required by Caltrans (however, they are not part of this submittal).

The site currently contains a single-family residence, associated outbuildings, and a barn, and is used primarily for grazing and residential uses. The parcel ranges in elevation from 10 ft. to 320 ft. The eastern portion of the site, which is forested and not proposed for development, is

quite steep. The site is zoned for agricultural and forestry uses – the coastal zone portion is zoned agriculture (Agriculture General, with a 5-acre minimum parcel size, and a Resource Conservation Area/Farmed Wetland ("RCA-2" (FW)) overlay, mostly over wetlands and streams covering a portion of the site (Exhibit 21). RCA overlay areas are generally not developable (unless the entire site is an RCA). Although it is not applicable outside the coastal zone, the County's Local Coastal Program also specifies, with respect to this parcel:

The [subject] parcel ...shall be identified for an agricultural use as an interim use. Should the parcel be developed for a public or quasi-public use, such as a community education center this area may be used for low intensive uses related to the public or quasi-public use in conformance with the local coastal program.

Outside the coastal zone the site is zoned "Prime Agriculture" and "Forestry." Surrounding development includes a residential community to the north, Highway 101 and a state wildlife area to the west, private forest land owned by Save-the-Redwoods League to the east, two single-family homes and open space to the south, and a motel just across Humboldt Rd. to the southwest.

Most of the five sub-drainages on the site (Exhibit 12) drain (through culverts under Humboldt Rd. and Highway 101) to offsite wetlands, including the Crescent City Marsh (Exhibit 22). The largest drainage (in the center of the property, from north to south) drains to a marsh south of Crescent City Marsh and south of Sandmine Rd. Overland storm flow rates across the site are as follows:

10-yr. Storm -	160.3 cubic ft./sec. (cfs)
25-yr. storm -	211.7 cfs
100-yr. storm -	266.5 cfs.

The property contains 28.85 acres of wetlands (based on the Army Corps wetland definition, not the Coastal Act definition), shown on Exhibits 5 & 10. The wetlands are located within the coastal zone portion of the site and are not proposed to be filled. The largest of the wetlands is 21.56 acres and drains under Humboldt Rd. to a California State Game Refuge.

The Elk Valley Rancheria currently operates a smaller casino on existing tribal lands to the north (outside the coastal zone and approximately one mile to the north of the project site, just north of Howland Hill Rd.). The Elk Valley Rancheria proposes to cease using the existing casino and to convert it into Tribal administrative facilities.

The BIA states the project goals include:

- Provide increased employment opportunities for Tribal members;

- Improve the socioeconomic status of the tribe by providing a new revenue source that could be used to build a strong Tribal government; improve existing Tribal housing; provide new Tribal housing; fund a variety of social, governmental, administrative, educational, health and welfare services to improve the quality of life of Tribal members;
- Provide capital for other economic development and investment opportunities; and
- Allow Tribal members to become economically self-sufficient, thereby eventually removing Tribal members from public-assistance programs.

The Tribe has adopted an "Off-Reservation Impact Ordinance" (Exhibit 14) providing for preparation of an Environmental Assessment including analyzing off-site impacts, and, pursuant to that ordinance, has prepared an Environmental Assessment. The Tribe has also entered into a Memorandum of Understanding (MOU) with Del Norte County (and reviewed by the Bureau of Indian Affairs) (Exhibit 15) that address off-site impacts, building and safety inspections, infrastructure issues, financing, law enforcement, and consistency with County Land Use policies.

II. Federal Agency's Consistency Determination. The Bureau of Indian Affairs has determined the project consistent to the maximum extent practicable with the California Coastal Management Program.

III. Applicable Legal Authorities.

Section 307 of the Coastal Zone Management Act (CZMA) provides in part:

(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.

A. Conditional Concurrences.

15 CFR § 930.4 provides, in part, that:

(a) Federal agencies, ... agencies should cooperate with State agencies to develop conditions that, if agreed to during the State agency's consistency review period and included in a Federal agency's final decision under Subpart C ... would allow the State agency to concur with the federal action. If instead a State agency issues a conditional concurrence:

(1) The State agency shall include in its concurrence letter the conditions which must be satisfied, an explanation of why the conditions are necessary to ensure consistency with specific enforceable policies of the management program, and an identification of the specific enforceable policies. The State agency's concurrence letter shall also inform the parties that if the requirements of paragraphs (a)(1) through (3) of the section are not met, then all parties shall treat the State agency's conditional concurrence letter as an objection pursuant to the applicable Subpart...

(2) The Federal agency (for Subpart C) ... shall modify the applicable plan [or] project proposal, ... pursuant to the State agency's conditions. The Federal agency ... shall immediately notify the State agency if the State agency's conditions are not acceptable; and ...

(b) If the requirements of paragraphs (a)(1) through (3) of this section are not met, then all parties shall treat the State agency's conditional concurrence as an objection pursuant to the applicable Subpart.

B. Consistent to the Maximum Extent Practicable.

Section 930.32 of the federal consistency regulations provides, in part, that:

(a)(1) The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.

The Commission recognizes that the standard for approval of Federal projects is that the activity must be "consistent to the maximum extent practicable" (Coastal Zone Management Act Section 307(c)(1)). This standard allows a federal activity that is not fully consistent with the CCMP to proceed, if compliance with the CCMP is "prohibited [by] existing Federal law applicable to the Federal agency's operations" (15 C.F.R. § 930.32). The Bureau of Indian Affairs did not provide any documentation to support a maximum extent practicable argument in its consistency determination. Therefore, there is no basis to conclude that existing law applicable to the Federal agency prohibits full consistency.

IV. Staff Recommendation. The staff recommends that the Commission adopt the following motion in support of its decision:

Motion:

I move that the Commission adopt the following findings in support of its conditional concurrence in the Bureau of Indian Affairs' consistency determination CD-054-05.

Staff Recommendation:

The staff recommends a YES vote on this motion. Pursuant to section 30315.1 of the Coastal Act, adoption of findings requires a majority vote of the members of the prevailing side present at the September 14, 2005, hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action on the consistency determination are eligible to vote. A majority vote by the prevailing Commissioners listed on page 1 of this report will result in adoption of the findings.

Resolution To Conditionally Concur With Consistency Determination:

The Commission hereby conditionally concurs with the consistency determination by Bureau of Indian Affairs on the grounds that, if modified as described in the Commissions' conditional concurrence, the project would be consistent with the enforceable policies of the CCMP, provided the Bureau of Indian Affairs satisfies the condition specified below pursuant to 15 CFR §930.4.

Condition:

1. Waiver of Sovereign Immunity. Within 30 days of the Commission's action the Elk Valley Rancheria will submit a Tribal Ordinance to the Commission staff that includes a waiver of sovereign immunity.

As provided in 15 CFR § 930.4(b), should the BIA not agree with the Commission's condition of concurrence, then all parties shall treat this conditional concurrence as an objection.

~~Staff Recommendation.~~ The staff recommends that the Commission adopt the following motion:

MOTION: ~~I move that the Commission concur with consistency determination CD-054-05 that the project described therein is fully consistent, and thus is consistent to the maximum extent practicable, with the enforceable policies of the California Coastal Management Program (CCMP).~~

STAFF RECOMMENDATION:

~~Staff recommends a NO vote on the motion. Failure of this motion will result in an objection to the determination and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.~~

RESOLUTION TO OBJECT TO CONSISTENCY DETERMINATION:

The Commission hereby **objects to** consistency determination CD-054-05 by the Bureau of Indian Affairs, finding that the consistency determination lacks information necessary to evaluate the project's consistency with the California Coastal Management Program.

IV. Applicable Legal Authorities. Section 307 of the Coastal Zone Management Act (16 USC § 1456) provides in part:

(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of the approved State management programs.

A. Necessary Information. Section 930.43(b) of the federal consistency regulations (15 CFR Section 930.43(b)) requires that, if the Commission bases its objection on a lack of information, the Commission must identify the information necessary for it to assess the project's consistency with the CCMP. That section states:

If the State agency's objection is based upon a finding that the Federal agency has failed to supply sufficient information, the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal agency activity with the enforceable policies of the management program.

Nature of Information Requested

As described in Sections V(A)–V(D) of this report below (pp. 12–30), the Commission finds this consistency determination lacks the information that the Commission has requested from the Bureau of Indian Affairs (BIA) to enable the Commission to determine whether the proposed project is consistent with the public view, public services, public access/recreation, concentration of development, wetlands, environmentally sensitive habitat, water quality, and agricultural resource protection policies (Sections 30251, 30254, 30252, 30250, 30254, 30233, 30231, 30240, 30241 and 30242, respectively) of the Coastal Act. In order to determine the project's consistency with these policies, the Commission has requested the BIA to provide it with the following necessary information:

1. Visual simulations or other descriptive analysis reflecting the effect a very large commercial complex will have on the scenic, rural, predominantly undeveloped public view from Highway 101.

2. ~~Standards, landscaping plans, and analysis of how effective vegetative screening will be (including how long it will take for vegetation to mature, and how extensive the screening will be).~~
3. ~~A clear description, location, and analysis of the effects of: (a) any signs that will be use to advertise the resort along Highway 101 or any other public road used for recreational traffic in the coastal zone; (b) access road improvements (including width of pavement, amount of grading, and drainage features); and (c) Highway 101 intersection improvements (or an explanation of why they would not be needed).~~
4. ~~An analysis of the adequacy of the amount of parking proposed to serve the development.~~
5. ~~A clear description of access road improvements in the coastal zone and pathways (if needed) from Humboldt Rd. to the resort complex.~~
6. ~~Evidence that Crescent City will have and will allocate adequate sewer capacity for the resort, including a description of (and locations of) any pump stations that will be needed, as well as improvements to the City's treatment plant that will be needed to accommodate the project.~~
7. ~~A description of (and location of) any sewer line extensions connecting existing lines to the resort complex.~~
8. ~~Water quality and hydrological analyses of effects of construction and post-construction runoff on downstream wetland, groundwater recharge, and the Crescent City Marsh, including changes in runoff rates, changes in pollutant loads, rates and amounts of water retention, locations and other specifications for the Best Management Practices that will be implemented, standards that the water quality plans will adhere to, plans to monitor the effectiveness of the BMPs, and a description of any on-going on-site and/or off-site water quality testing that will occur.~~
9. ~~Alternatively, if BIA is unable to provide the information requested in #8 above at this time, a commitment that the BIA will submit the water quality plans to the Commission staff for its review and concurrence, prior to commencement of any construction of the resort.~~

~~10. A mechanism to enable the Commission or its staff a meaningful role in the review of the Elk Rancheria's to be prepared resource management plan to protect the resources of the site.~~

~~Without this information, the Commission lacks sufficient information to find the project consistent with the public view, public services, public access/recreation, concentration of development, wetlands, environmentally sensitive habitat, water quality, and agricultural resource protection policies (Sections 30251, 30254, 30252, 30250, 30233, 30231, 30240, 30241 and 30242, respectively) of the Coastal Act.~~

B. Practicability. The federal consistency regulations implementing the CZMA include the following provision:

~~Section 930.32 Consistent to the maximum extent practicable.
(a)(1) The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency.~~

Since the BIA has raised no issue of practicability, as so defined, the standard before the Commission is full consistency with the policies of the California Coastal Management Program (CPRC §§ 30200-30265.5).

C. Federal Agency Response to Commission Objection. Section C(a)(i) of Chapter 11 of the CCMP requires federal agencies to inform the Commission of their response to a Commission objection. This section provides:

~~If the Coastal Commission finds that the Federal activity or development project ... is not consistent with the management program, and the federal agency disagrees and decides to go forward with the action, it will be expected to (a) advise the Coastal Commission in writing that the action is consistent, to the maximum extent practicable, with the coastal management program, and (b) set forth in detail the reasons for its decision. In the event the Coastal Commission seriously disagrees with the Federal agency's consistency determination, it may request that the Secretary of Commerce seek to mediate the serious disagreement as provided by Section 307(h) of the CZMA, or it may seek judicial review of the dispute.~~

The federal consistency regulations reflect a similar obligation; 15 CFR §930.43 provides:

~~State agency objection. ...~~

~~—(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (see §930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency's objection unless: ... (2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.~~

~~—(e) If a Federal agency decides to proceed with a Federal agency activity that is objected to by a State agency, or to follow an alternative suggested by the State agency, the Federal agency shall notify the State agency of its decision to proceed before the project commences.~~

V. Findings and Declarations. The Commission finds and declares as follows:

A. Water Quality, Wetlands, and Environmentally Sensitive Habitat. Section 30231 of the Coastal Act provides:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30233(a) provides:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following [, including]: ...

(l) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

Section 30240 of the Coastal Act provides:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The site contains a variety of habitat types (Exhibit 11): Sitka spruce forest (38 acres, or 18% of the property) and Red Alder/Mixed deciduous woodland (19 acres, or 11% of the property), primarily along the steep eastern portion of the property, annual grassland/pasture (116 acres,

or 56% of the property, which includes the area proposed for development), wetland prairie (23 acres, or 11% of the property), riparian wetland (5.5 acres, or 3% of the property), and several intermittent drainages (2 acres, or 1% of the property).

Sensitive and listed species in the project area include western lily (*Lilium occidentale*), found to the west of the site, across Humboldt Rd. on the state wildlife refuge. Past agricultural practices on the project site have eliminated any western lilies on the site itself; nevertheless the U.S. Fish and Wildlife Service believes the site contains conditions conducive for the species, and the BIA notes:

The only other portion of the property that had habitat even remotely similar to the reference population was located in the large central wetland of the property. This wetland was colonized with non-native weed species and was severely trampled by cattle. However the moisture regime of this portion of the site (saturation to the surface) was equivalent to the fens of the reference site. Though a western lily population was absent, this location may offer opportunity for restoration of western lily, buckbean, and [Pacific reedgrass] Calamagrostis nutkaensis habitat.

Other sensitive species in the area include: (a) tidewater gobies (*Eucyclogobius newberryi*), found in Crescent City Marsh, downstream from the site (Exhibit 22); (b) red legged frogs (*Rana aurora aurora*), found in wetlands on the project site; and (c) several species of raptors, which may nest or roost in the eastern forested portion of the site (not proposed for development).

As noted on page 2 above, as originally proposed the project would have included a golf course within the coastal zone portion of the parcel, and proposed within wetlands. The Commission staff expressed concerns over this initial proposal, in part due to the fact that golf courses are not among the eight allowable uses for wetland fill under Section 30233(a) of the Coastal Act. Accordingly, the BIA revised the proposal to eliminate the golf course.

The project is located upstream of sensitive wetlands in the coastal zone, including but not limited to Crescent City Marsh. The BIA indicates that Best Management Practices would be followed and lists several that would be used; however the water quality plans have not yet been drafted. In these types of situations where the water quality plans are not available at the consistency review stage, and as it has done so for the subject proposal, the Commission staff regularly and consistently requests that applicants (including but not limited to federal agency applicants) agree to a review process in which the to-be-prepared water quality control plans will be submitted to the Commission staff for its review and concurrence, prior to commencement of construction, and with an overall goal articulated to design them to assure no increases in runoff and sedimentation beyond what occurs at the site currently (i.e., above baseline conditions). For this project these plans need to include/address: (a) measures to

revegetate graded slopes; (b) measures to be implemented both permanently and during the construction period; (c) whether and how parking lot runoff will be filtered; (d) depiction of the approximate size and location of the proposed detention basins to slow the rate of runoff; and (e) analysis of the effects on groundwater recharge, including effects on the timing and extent of both surface and groundwater flows to the downstream Crescent City Marsh.

This last concern was raised in EPA's July 12, 2004, letter to the BIA (commenting on the BIA's initial proposal). In that letter EPA noted the small size of the watershed of the Crescent City marsh (339 acres) compared to the large (for the area) amount of impervious surfaces proposed. It also noted that the watershed "... according to the California Native Plant Society, is home to more than half the global distribution of the endangered western lily [*Lilium occidentale*], and at least a dozen other state or federally listed plant species, and plant communities found nowhere else in Northern California." Even without the golf course, the large amount of impervious surfaces could redistribute (both spatially or temporally) groundwater recharge, which could adversely affect the marsh.

In response to the Commission staff's requests for information (and/or agreement to a review process) requests, the BIA states that:

(1) Best Management Practices will be developed to protect water quality and downstream wetlands;

(2) its Draft EIS specifies several of these measures, to include: (a) filter fences and barriers; (b) revegetation of disturbed areas; (c) directing stormwater runoff from parking lots to vegetative filter strips; and (d) use of vegetated detention swales (at a ratio of 500 feet of swale per acre of impervious surface to be located within parking areas, south of parking areas and roadways, and along the western edge of the fill slope adjacent to the parking area);

(3) the project would result in a small (0.6%) increase in impervious surfaces in the watershed of the downstream Crescent City Marsh, and the above mitigation will further reduce this impact;

(4) it does not have the ability or willingness to provide water quality plans to the Commission staff for review and concurrence, prior to commencement of construction; and

(5) the Coastal Act and a recent court case limit the Commission's authority outside the coastal zone.

The BIA states:

Water Quality/Habitat. Best Management Practices and mitigation for water quality impacts are included in the DEIS as measures to address the Coastal Commission's concerns of increased runoff and sedimentation. The measures will be further specified upon the completion of detailed water quality plans. The DEIS identified mitigation measures which includes: filter fences and barriers, revegetation of disturbed areas, especially on graded slopes, direct stormwater runoff from parking lots to vegetative filter strips, vegetated detention swales at a ratio of 500 feet of swale per acre of impervious surface to be located within parking areas, south of parking areas and roadways, and along the western edge of the fill slope adjacent to the parking area. As the Commission will see in the DEIS, the watershed which drains to the Crescent City Marsh consists of 1,500 acres of which approximately 1,000 acres are currently developed and the remaining 500 acres are undeveloped. Proposed development of 9.3 acres under the Preferred Alternative would represent a 0.6% increase in developed area within the Crescent City Marsh watershed. This amount would not create a significant effect on stormwater runoff to the marsh, however, mitigation measures are specified to further reduce potential impacts to the marsh.

The Commission's request for review and concurrence of the finalized water quality plans, prior to the commencement of construction is outside the ability of the BIA to grant. The BIA is neither the permitting agency for the proposed development nor the applicant under provisions of the Clean Water Act. Additionally, Section 30604(d) of the Coastal Act, states:

No development or any portion thereof that is outside the coastal zone shall be subject to the coastal development permit requirements of [the Coastal Act], nor shall anything in [the Coastal Act] authorize the denial of a coastal development permit by the commission on the grounds the proposed development within the coastal zone will have an adverse environmental effect outside the coastal zone.

Further, in Sierra Club v. California Coastal Commission,² the California Supreme Court, issued an opinion on May 19, 2005, in support of the Commission's extensive findings that it did not have permit authority or jurisdiction over proposed development outside the coastal zone for a project which straddled the coastal zone boundary.

Based on the BIA's original submittal, the Commission's concerns were as follows: The deficiencies in these BIA responses are as follows:

² Sierra Club v. California Coastal Commission (2005), 35 Cal.4th 839.

1. Although the DEIS includes a hydrological analysis, that analysis is limited to surface flows, and although that analysis recommends mitigation measures to address runoff, water quality, and wetlands, it does not provide any design details or standards, but rather indicates that there is sufficient area on the site to include such measures as detention basins and drainage swales. In addition, it does not analyze hydrological effects on the Crescent City Marsh. Thus, the BIA has not provided sufficient details to enable the Commission to determine what measures would be included, how they would be designed, and what the project's construction and post-construction effects on downstream wetlands, groundwater recharge, and the Crescent City Marsh. The Commission is requesting additional analyses, including but not limited to estimating changes in runoff rates, changes in pollutant loads, rates and amounts of water retention, depicting locations, sizes, and other specifications for the list of Best Management Practices, providing standards that the water quality plans should adhere to, monitoring of the effectiveness of the BMPs, or on-going water quality testing that will occur.

2. As an alternative to providing such plans at this time, consistent with past Commission practice the Commission would accept BIA commitment to overall standards such plans would contain, combined with an agreement that, when the plans are prepared, and prior to commencement of any construction of the resort, the Commission or its staff would have the opportunity to review them (and if necessary, request changes).³

~~Without this information and/or commitment to provide the water quality plans to the Commission for its review, the Commission lacks sufficient information to find the project consistent with the wetlands, environmentally sensitive habitat and water quality policies (Sections 30231, 30233, and 30240) of the Coastal Act.~~

~~In addition, the BIA relies on an inapplicable Coastal Act citation and court case to assert that either the Coastal Act or the court case limits the Commission's ability to review activities outside the coastal zone. The Coastal Act policy and the court case the BIA cites both involve state law permit authority. The proposed action is being reviewed under federal law (the Coastal Zone Management Act (CZMA)), which clearly authorizes the Commission to review effects and protect resources within the coastal zone from federal agency activities located outside the coastal zone. Section 307(c)(1)(A) of the CZMA provides⁴:~~

³ The federal consistency regulations, at 15 CFR Part 930, §930.45, provides a context and a procedure which the Commission has historically relied on for this type of continuing review of federal agency activities.

⁴ 16 U.S.C. Section 1456, with implementing regulations at 15 CFR Part 930.

~~(1) (A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.~~

To address these concerns, during the hearing the BIA agreed to modify the project to include the following agreement:

Prior to commencement of construction, the Tribe will prepare Tribal Ordinances or other equivalent mechanism providing for Commission staff review of detailed project plans, including plans for water quality, hydrology, lighting, signs, roads, sewer and water infrastructure, landscaping and revegetation, and building plans, as applicable.

Pursuant to the Tribal Ordinances, the plans shall be submitted to the Commission staff for its review and agreement, and in the event of a disagreement about whether the plans are adequate to protect coastal zone resources (including wetlands and environmentally sensitive habitat), the BIA will continue to play a mediator role.

Further, pursuant to the Tribal Ordinances, in the event of a continuing disagreement, the matter will be brought before the Commission for a hearing regarding the parties' respective positions.

Subject to applicable law the Commission also retains the ability to require additional consistency review if the project no longer remains consistent with the California Coastal Management Program.

The above commitment (to which the Elk Valley Rancheria also agreed during the hearing), was incorporated into the project as part of the BIA's submittal. In addition, during the hearing, the Tribe agreed in concept to a waiver of sovereign immunity for this project; however the Tribe also noted that such a waiver could not legally be provided orally. Therefore the Tribe and the Commission agreed that the appropriate mechanism for such a waiver to be implemented was through its inclusion (in writing) within Tribal Ordinances. Accordingly, the Commission adopted a condition, which provides:

1. Waiver of Sovereign Immunity. Within 30 days of the Commission's action the Elk Valley Rancheria will submit a Tribal Ordinance to the Commission staff that includes a waiver of sovereign immunity.

To enable public input in future plan review, the Commission has also directed its staff to hold a local area workshop, after the above-referenced plans are provided to the Commission staff for its review, and a subsequent briefing session at a following Commission meeting (during

which the public could also comment to the Commission), before any final staff agreement with the plans. Also, any future development on the site may require further consistency review (e.g., any activity including federal funding or authorization), and the Rancheria's Tribal Compact with the State may afford further protections for the site's and downstream resources.

With the above project modifications, condition, and considerations, the Commission finds the project, as conditioned, would provide the procedural mechanisms necessary to enable the Commission to be able determine that the project would protect water quality, downstream wetlands and coastal waters, and nearby environmentally sensitive habitat. The Commission therefore concludes that the project, as conditioned, is consistent with the water quality, wetlands and nearby environmentally sensitive habitat policies (Sections 30231, 30233, and 30240) of the Coastal Act.

B. Public Services, Traffic, and Public Access and Recreation. Section 30250 of the Coastal Act provides, in part:

(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. ...

(c) Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

Section 30254 provides:

New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division; provided, however, that it is the intent of the Legislature that State Highway Route 1 in rural areas of the coastal zone remain a scenic two-lane road. Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

(1) Traffic and Parking. While the casino would be located outside the coastal zone, it could affect public access and recreation within the coastal zone if inadequate parking is provided, or if users of the casino generate sufficient traffic to affect the capacity of Highway 101 serve the recreational needs of the region. In addition to the above Coastal Act policies, Section 30252 of the Coastal Act provides:

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

The BIA estimates the project would add approximately 3442 additional vehicle trips per day to area roads, the vast majority of which would use Highway 101 to approach or leave the resort. It would appear from the BIA's analysis that Highway 101 in this area is not near its capacity, and it is unlikely the proposed project would exceed available highway capacity. It does appear likely, however, that the project would generate sufficient traffic to necessitate intersection improvements (such as turning lanes or a traffic light) at Humboldt Rd. and Highway 101, and possibly Sandmine Rd. and Highway 101, to route traffic onto and off Highway 101 safely. It also appears clear that the unpaved, one-lane, on-site access road from Humboldt Rd. to the resort complex (Exhibit 13) is far too narrow to serve the traffic a large resort complex would generate and would need to be widened. Consequently the Commission staff requested that BIA provide additional details for needed Highway 101 improvements and the access road, and an analysis of the how the BIA determined the appropriate amount of on-site parking proposed to serve the resort.

In response to these information requests, the BIA states:

- (1) that adequate road capacity existing in the area to accommodate the development;
- (2) that only limited intersection and offsite improvements would occur within the coastal zone;

(3) that the Draft EIS has been revised to show frontage improvements (at the intersection of Humboldt Road, Sandmine Road and the project access road);

(4) that the Elk Rancheria's MOU with Del Norte County (Exhibit 15) is in place to address potential future non-project improvements (and will be subject to the County's and Caltrans' permit processes).

The BIA states:

Traffic. The BIA agrees that the proposed resort development will add vehicle trips to area roads, including Highway 101. However, significant impacts to either public safety or intersection performance are not expected. Based on existing plus project traffic volumes and trip distribution patterns contained in the traffic study for the project (DEIS, Appendix C) and the fact that all roadways expected to serve the project are well below capacity, impacts to area roadways would be less than significant. Limited intersection and off-site roadway improvements are proposed in the Coastal Zone as part of the preferred alternative project. Page iii of the DEIS has been revised to describe frontage improvements at the intersection of Humboldt Road, Sandmine Road and the project access road which are partially in the Coastal Zone and proposed to be upgraded and widened. Best Management Practices, within the DEIS, pages 5-2 through 5-5, would reduce impacts to the Coastal Zone to a less than significant level. We believe the limited roadway related improvements within the Coastal Zone are consistent with Sections 30250, 30252 and 30254 of the Coastal Act. Additionally, the Memorandum of Understanding between the Elk Valley Rancheria and Del Norte County addresses potential future non-project improvements subject to the County's and Caltrans permit process.

Thus, the only details the BIA has provided at this time are that turning lanes at Highway 101 "may be required by Caltrans," and the statement that the project has been revised to upgrade and widen the access road and improve the intersection of Humboldt Road, Sandmine Road and the access road. However, the BIA has not yet submitted any such further revisions, plans, or details to the Commission staff. Based on the original submittal, the Commission was concerned over the absence of project revisions, plans, or details, and its inability to therefore ~~unable to~~ determine what, if any, Highway 101 intersection improvements within the coastal zone would be, and/or whether the access road improvements would be designed to protect coastal zone resources. Also, the BIA ~~has~~ not explained its rationale for the number of parking spaces proposed; therefore the Commission ~~was originally~~ is unable to determine the adequacy of the amount of parking proposed. ~~Without this information, with respect to traffic, parking, and public access and recreation, the Commission lacks sufficient information to find the project consistent with Sections 30250, 30254, and 30252 of the Coastal Act.~~

To address these concerns, during the hearing the BIA agreed to modify the project to include procedural mechanisms for further staff review of specific plans, including detailed project plans and building plans, as discussed on pages 6-7. This "modification" (to which the Elk Valley Rancheria also agreed), was incorporated into the project as part of the BIA's submittal. The Tribe agreed in concept to a waiver of sovereign immunity for this project; and as conditioned (see page 7), such a waiver would be provided. With these agreements, combined with the condition, the Commission finds that the necessary mechanisms are in place to enable the Commission to find the project, as conditioned, to be consistent with Sections 30250, 30254, and 30252 of the Coastal Act.

(2) Sewer and Water Infrastructure. While the subject parcel is adjacent to an existing developed residential community, the project would involve extending water and sewer lines to what is currently a rural area. Therefore the infrastructure improvements need to be located, sized and designed to not excessively induce growth in rural areas, to only serve the projected needs of the resort, and to avoid inducing systemwide improvements that would be regionally growth inducing. Accordingly, the Commission staff posed several questions concerning these infrastructure improvements, requesting the following descriptions and analyses:

(a) locations and descriptions of water and sewer lines extensions and pump stations on the parcel;

(b) analysis of the adequacy of the area's sewage systems to accommodate the approximately 100,000 - 150,000 gallons/day (above and beyond the level of the existing Elk Rancheria Casino to the north) of sewage generated by the project, including explaining whether such demand can be accommodated within existing infrastructure constraints, or whether it will generate the need for additional physical infrastructure construction within the coastal zone (e.g., expanding the City of Crescent City's treatment plant). The Commission staff's concern was raised in part because, as the BIA had already noted, Crescent City is in the process of undertaking improvements to its sewage system to address an 8+ year old Cease and Desist Order issued by the Regional Water Quality Control Board regarding the inadequacy of its existing sewage treatment plant. The BIA had also previously acknowledged that proposed (or currently anticipated) improvements to the plant, if they are implemented, may not be on-line when the resort is ready for occupancy (and the Draft EIS discussed alternative means the Rancheria could use if the City was unable to provide the capacity)(Exhibits 16 & 18).

While the Draft EIS contained a letter from the City expressing confidence it would be able to serve the project (Exhibit 17), that letter does not describe how this would occur. The Commission staff therefore stated:

...it is not clear at this point what the City's plans are for allocating this capacity, and, in fact, whether the City intends to allocate some or all of it to the proposed resort. We therefore request clarification on both the timing and the availability of this capacity for the proposed resort.

In response to these information requests, the BIA states that:

- (1) Crescent City is upgrading its sewage capacity by improving its outfall and expanding wastewater pre-treatment;
- (2) City of Crescent City projects that it will have sufficient capacity to serve the proposed development; and
- (3) City of Crescent City sewage issues are not the BIA's responsibility and not part of the proposed action.

The BIA states:

Sewer and Water Infrastructure. Revisions to the Preliminary DEIS have been made to address the Commission's concerns. The DEIS includes the following description: "The City of Crescent City is upgrading its wastewater treatment plant to accommodate additional capacity at a level sufficient to meet the needs of the Tribe. Construction of the outfall project, which will increase capacity, will be completed in the fall of 2005. Other improvements for the wastewater treatment plant have a design deadline of August 2005 (Levi, pers. comm., 2005). In addition, the City is working with a local industry to further treat industrial discharges to free up capacity at the wastewater treatment plant through the enactment of a wastewater pre-treatment ordinance (City of Crescent City, 1993). One of the main industrial contributors, Rumiano, began a pretreatment unit in April 2005, which has freed biological load at the wastewater treatment plant." With the Rumiano pretreatment unit, outfall project, and other improvements, the City projects that it will have the capacity to treat wastewater from the casino and will be consistent with Sections 30250 and 30254 of the Coastal Act.

Additionally, please note that changes to the City wastewater infrastructure are not part of the BIA's federal action, which is confined to the trust acquisition. The City of Crescent City, as the wastewater service provider, will obtain the project approvals needed to construct upgrades to its wastewater treatment plant. Typically, the BIA does not require final design and permitting of a project prior to the decision on trust acquisition. We believe the City of Crescent City's projects should not be considered in the BIA's Consistency Determination.

The Commission is not requesting that the BIA apply for improvements that may be needed to the City's sewer system. Rather, the Commission is requesting that the BIA: (a) identify the adequacy of the existing infrastructure to serve the proposed development; (b) estimate, to the degree possible, changes/upgrades that may be needed to the system, to the degree possible given existing information; (c) analyze whether any needed upgrades can be accomplished without excessively inducing additional growth in the coastal zone; (d) describe the sizes and locations of the on-site sewer lines and pump stations to establish that they will be appropriately designed and located to minimize impacts; and (e) document how the City has or will generate adequate sewer capacity for the resort, and intends in fact to allocate such capacity to the resort (or if it does not, propose alternative means to provide the capacity).

Without this information, and as initially submitted, the Commission was concerned about the adequacy of lacks sufficient information to find that the project ~~would be located within, contiguous with, or in close proximity to, an existing developed area able to accommodate it, and where adequate public services exist, where it will not have significant adverse effects, either individually or cumulatively, on coastal resources, and where it will not induce development in the coastal zone that would be consistent with Chapter 3 of the Coastal Act, and thus whether the project would be consistent with the public services and concentration of development policies (Sections 30250 and 30254) of the Coastal Act.~~

In addition, the BIA asserts that the City, not the BIA, is responsible for addressing sewage infrastructure issues. While it is true that the City would need to obtain any necessary permits for its facilities, this fact does not obviate the need for the BIA to analyze the project's effects on the City's sewage treatment system, in terms of determining whether capacity is available, and if it is not, what changes (and effects) would be induced by the additional demand from the project. While the Commission notes that under the Coastal Act (Sections 30250 and 30254), where infrastructure capacity is limited, it should be reserved for priority uses, and while the project can be considered a priority use as a visitor serving facility, the BIA nevertheless needs to document whether and how limited public services will be able to accommodate the resort, and if new improvements would be needed to the sewer system, how they can be implemented without resulting in growth-inducing impacts on the coastal zone.

To address these concerns, during the hearing the BIA agreed to modify the project to include procedural mechanisms for further staff review of specific plans, including detailed project plans and roads, sewer and water infrastructure plans, as discussed on pages 6-7. This "modification" (to which the Elk Valley Rancheria also agreed), was incorporated into the project as part of the BIA's submittal. The Tribe agreed in concept to a waiver of sovereign immunity for this project; and as conditioned (see page 7), such a waiver would be provided. With these agreements, combined with the condition, the Commission finds that the necessary mechanisms are in place to enable the Commission to find the project, as conditioned, to be

consistent with the public services and concentration of development policies (Sections 30250 and 30254) of the Coastal Act.

C. Public Views. Section 30251 of the Coastal Act provides:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

The resort and casino buildings would be visible from Highway 101, a major coastal access thoroughfare, and in an area designated as highly scenic in the County's Local Coastal Program. Given the site topography, the project would be within the direct line of sight from Highway 101, and, according to the DEIS, would include a 40,000 sq. ft. casino, a restaurant/conference facility, a 156-room hotel, large areas of impervious surfaces (mostly parking), and 112,000 cubic yards of grading, all to be located in what is currently a rural, scenic, relatively undeveloped viewshed. While most of the development would be outside the coastal zone, its effects on public views from Highway 101, and its consistency with the character of the sparsely developed area, could be significant. Accordingly, the Commission staff has requested that the BIA:

... analyze the project's visual impact from Highway 101 (ideally, including a visual simulation of the view from the highway), and if it would be visible from the shoreline and/or any public parks or other public viewpoints in the coastal zone in nearby areas, its impact from those public locations. The analysis should discuss: (a) any measures intended to screen the resort from these public locations (including, if vegetative screening is proposed, the length of time needed for the vegetation to mature and provide adequate screening); (b) revegetation efforts for slopes disturbed during construction; (c) impacts of any signs along Highway 101 (or otherwise visible from public areas) advertising the resort; (d) any above-ground water storage tanks needed⁵, including the degree to which any such tanks would be screened by the resort, and/or by existing vegetation or proposed vegetative screening; and (e) effects on community character. The analysis should include the effects of lighting at night. While the DEIS

⁵ The DEIS indicates the possible need for an up to 500,000-700,000 gallon storage tank; however its location is not depicted.

states that exterior lights would be designed to be shielded to shine only internally and not affect outlying areas, it may not have addressed lighting such as from windows. The consistency determination should describe the visibility of all night-time lighting (including any advertising signs along Highway 101), and perhaps should consider agreeing to defined criteria of residual light outside the project footprint.⁶ The visual/community character analysis should be based on the Sections 30251 and 30253) of the Coastal Act (although the night-lighting discussion may also be applicable to biological impacts).

In response to these information requests, the BIA states that:

- (1) Caltrans has not designated this portion of Highway 101 as a scenic highway;
- (2) view considerations in the coastal element focus on views west of Highway 101 (and the project is east of Highway 101);
- (3) the project is mostly outside the coastal zone;
- (4) the project's visual impacts would not be significant;
- (5) the water storage tank will be screened by landscaping;
- (6) the existing barn and pasture will partly obscure the project's visual impacts;
- (7) measures discussed in the Draft EIS would reduce visual impacts, including: (a) downcast lighting; (b) vegetative screening; (c) low sodium light bulbs; (d) fast growing grasses; (e) sensitive architecture; and (f) use of earth tones; and
- (8) a recent court case limits the Commission's authority outside the coastal zone.

The BIA states:

Visual Impact. The portion of Highway 101 adjacent to the southwest portion of the property is not classified by Caltrans as a Scenic Highway. Visual considerations contained in the Coastal element pertain primarily to views west of Highway 101,

⁶ For example, in the Commission's review of the Department of Homeland Security's (DHS') Border Fence project at the U.S./Mexican border, the lighting was to be directionally shielded away from biologically sensitive areas (i.e., outside the immediate project footprint, where it was to be no lighter than the light from a full moon, which was defined as 0.1 foot candles of illumination, based on coordination between DHS and the U.S. Fish and Wildlife Service).

toward the Pacific Ocean and not the upland areas to the east. In addition, the proposed development is located outside the coastal zone with the foreground portion of the parcel, within the coastal zone, remaining undeveloped. We do not believe the proposed project will result in significant impacts to the visual character of the coastal zone. Views from Highway 101 toward the proposed resort development would contain the predominant foreground view of the grazing pasture, barn and spruce covered outcropping partially obscuring the resort buildings. The proposed parking structure is planned below the Phase 3 Events Center and would not affect views of passing vehicles on Highway 101. The proposed 500,000 to 700,000 gallon domestic water storage tank will be an at-grade reservoir and located upgradient, to the east of the resort complex buildings. The reservoir will be obscured by landscaping.

*Further, in *Sierra Club v. California Coastal Commission*, the California Supreme Court, issued an opinion on May 19, 2005, in support of the Commission's extensive findings that it did not have permit authority or jurisdiction over proposed development outside the coastal zone for a project which straddled the coastal zone boundary. The Commission's concerns as to lighting from windows within the resort appear to be beyond Commission's jurisdiction. Nonetheless, the DEIS recognizes potential visual impact, and impacts from proposed lighting, and has identified mitigation measures in Section 5.0. These measures include: the use of native building materials, sensitive architecture, and earth and forest tone paint to blend with visual/community character, use of native trees as a screen between the housing subdivision along Roy Avenue and placed strategically within the development to provide an established appearance to the resort development, downcast lighting, low-pressure sodium bulbs, minimal removal of existing vegetation and use of fast growing annual and perennial grasses. With the visual impact mitigation measures identified in the DEIS, the proposed project will be consistent with Sections 30251 and 30253 of the Coastal Act.*

The Commission's concerns over the ~~deficiencies in these BIA initial submittal~~ were responses are as follows:

The BIA has not include visual simulations or other descriptive analysis reflecting the effect the proposed large commercial resort complex will have on a scenic, rural, predominantly undeveloped public view from Highway 101.

The BIA states that vegetative screening and low-intensity lighting will be used, but the BIA has not provided any standards, landscaping plans, grading plans, or analysis of how effecting vegetative screening will be (including how long it will take for vegetation to mature).

The BIA has not described or discussed the visual impact/clutter from signs along Highway 101 (or other public roads in the coastal zone). It would be unusual for a resort complex of this size and in this location to not include any information and/or advertising signs informing travelers on Highway 101 of the existence and location of the complex.

As discussed on page ~~2419~~-20, although noting it would be widened, the BIA has not described the access road improvements; therefore the Commission is unable to determine whether they would be visible from and/or alter visual impacts from Highway 101, and/or whether any grading and landform alteration would be needed, and if so, whether it would be minimized.

~~Without this information, the Commission lacks sufficient information to find the project has been or will be designed to protect views to and along the ocean in a scenic coastal area, will minimize visual impacts, will minimize grading and landform alteration, and will be consistent with the character of the surrounding area, and thus whether the project would be consistent with the public view policy (Section 30251) of the Coastal Act.~~

~~In addition, the BIA relies on an inapplicable court case to assert that the case limits the Commission's ability to review activities outside the coastal zone. The case the BIA cites involves state law permit authority. The proposed action is being reviewed under federal law (the Coastal Zone Management Act), which clearly authorizes the Commission to review coastal zone effects from federal agency activities outside the coastal zone.~~

To address these concerns, during the hearing the BIA agreed to modify the project to include procedural mechanisms for further staff review of specific plans, including detailed project plans and building plans, as discussed on pages 6-7. This "modification" (to which the Elk Valley Rancheria also agreed), was incorporated into the project as part of the BIA's submittal. The Tribe agreed in concept to a waiver of sovereign immunity for this project; and as conditioned (see page 7), such a waiver would be provided. With these agreements, combined with the condition, the Commission finds that the necessary mechanisms are in place to enable the Commission to find the project, as conditioned, to be consistent with the public view protection policy (Section 30251) of the Coastal Act.

D. Agriculture. Section 30241 of the Coastal Act provides:

The maximum amount of prime agricultural land shall be maintained in agricultural production to assure the protection of the areas, agricultural economy, and conflicts shall be minimized between agricultural and urban land uses through all of the following:

(a) By establishing stable boundaries separating urban and rural areas, including, where necessary, clearly defined buffer areas to minimize conflicts between agricultural and urban land uses.

(b) By limiting conversions of agricultural lands around the periphery of urban areas to the lands where the viability of existing agricultural use is already severely limited by conflicts with urban uses or where the conversion of the lands would complete a logical and viable neighborhood and contribute to the establishment of a stable limit to urban development.

(c) By permitting the conversion of agricultural land surrounded by urban uses where the conversion of the land would be consistent with Section 30250.

(d) By developing available lands not suited for agriculture prior to the conversion of agricultural lands.

(e) By assuring that public service and facility expansions and nonagricultural development do not impair agricultural viability, either through increased assessment costs or degraded air and water quality.

(f) By assuring that all divisions of prime agricultural lands, except those conversions approved pursuant to subdivision (b), and all development adjacent to prime agricultural lands shall not diminish the productivity of such prime agricultural lands.

Section 30241.5 provides:

(a) If the viability of existing agricultural uses is an issue pursuant to subdivision (b) of Section 30241 as to any local coastal program or amendment to any certified local coastal program submitted for review and approval under this division, the determination of "viability" shall include, but not be limited to, consideration of an economic feasibility evaluation containing at least both of the following elements:

(1) An analysis of the gross revenue from the agricultural products grown in the area for the five years immediately preceding the date of the filing of a proposed local coastal program or an amendment to any local coastal program.

(2) An analysis of the operational expenses, excluding the cost of land, associated with the production of the agricultural products grown in the area for the

five years immediately preceding the date of the filing of a proposed local coastal program or an amendment to any local coastal program.

For purposes of this subdivision, "area" means a geographic area of sufficient size to provide an accurate evaluation of the economic feasibility of agricultural uses for those lands included in the local coastal program or in the proposed amendment to a certified local coastal program.

(b) The economic feasibility evaluation required by subdivision (a) shall be submitted to the commission, by the local government, as part of its submittal of a local coastal program or an amendment to any local coastal program. If the local government determines that it does not have the staff with the necessary expertise to conduct the economic feasibility evaluation, the evaluation may be conducted under agreement with the local government by a consultant selected jointly by local government and the executive director of the commission.

Section 30242 provides:

All other lands suitable for agricultural use shall not be converted to nonagricultural uses unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with Section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands.

In addition, in weighing land use priorities, Section 30222 of the Coastal Act provides:

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

According to the BIA, the property is zoned primarily for agricultural use and is currently used for "grazing and residential uses." As noted on page 97, the County's Local Coastal Program appears to contemplate other public or quasi-public uses on the site, where it states:

The [subject] parcel ...shall be identified for an agricultural use as an interim use. Should the parcel be developed for a public or quasi-public use, such as a community education center this area may be used for low intensive uses related to the public or quasi-public use in conformance with the local coastal program.

It difficult to contemplate characterizing this project as a low-intensity use; at the same time, the LCP only applies to the coastal zone, and the resort complex would be outside the coastal zone. Because of the potential for the fairly intensive development to conflict with agricultural uses of the coastal zone portion of the site, and because under Section 30222, agriculture is accorded higher priority than visitor serving uses, the Commission staff requested that the BIA analyze the project's effects on continued agricultural use and viability for the coastal zone portion of the site. The Commission staff also requested that the BIA analyze the effect of placing the coastal zone portion of the site (along with the rest of the parcel), because once land is placed in trust, it is then considered excluded from the coastal zone, reducing state law-based regulatory protections currently in place (e.g., the County's permit authority under its Local Coastal Program). While the Commission would retain some federal consistency jurisdiction in the event any wetland fill were proposed (which would be triggered by the need for a U.S. Army Corps of Engineers permit, and/or any federal funding or other assistance by the BIA), the Commission and the local government would have a reduced ability to regulate development adjacent to those wetlands (e.g., the ability to require adequate buffers would no longer be available through the permit process), or to prevent conversion from agriculture to lower priority uses. The Commission staff therefore requested that the BIA describe any mechanisms in place that would serve to assure the continued protection agriculture, wetlands, and other coastal resources from any future development within what is now the coastal zone portion of the parcel.

In response to these information requests, the BIA states that:

- (1) the project will not preclude continued agriculture on the site;
- (2) the casino will create the economic means for the Elk Rancheria to implement a resource management program to protect wetlands and views, and control non-native vegetation;
- (3) current grazing activities on the ranch are marginally economic and detrimental to the wetlands;
- (4) although 96 acres of the 203.5 acres site constitute "prime and unique farmland," (as defined by NRCS), they are not considered to be "of Statewide and local importance;" and
- (5) the only proposed improvements on agricultural portion of the property are relatively minor access road improvements.

The BIA states:

Agriculture. As noted, the Coastal Zone portion of the property is zoned for agricultural use and currently used for grazing purposes. No development, other than proposed access road improvements, is proposed for the Coastal Zone portion of the property. Continued agricultural use of the Coastal Zone portion of the property would not be precluded. Construction of the proposed resort complex would provide the economic means to support the implementation of a resource management program designed to control weed and invasive non-native vegetation. The resource management program would also protect existing wetlands and foreground views to the ocean from the proposed resort. The current grazing use on the property is only marginally economical and may contribute to degradation of habitat and wetlands should the operation be expanded for increased viability.

Our consistency determination was based on the Coastal Act's agricultural policies, specifically Sections 30241 and 30242, prime agricultural land and maintenance in agricultural production as well as conversion of lands suitable for agricultural use. The NRCS, through their Farmland Conversion Impact Rating, determined that 96 acres of the total 203.5 acres proposed fee-to-trust land acquisition are considered prime and unique farmland. None of the 96 acres were considered of Statewide and local important farmland. Since the only development in the Coastal Zone is the proposed access road improvements, a de minimis amount of farmland would be converted.

Additionally, our consistency determination recognizes the Coastal Act land use hierarchy, in Section 30222, where agriculture and coastal dependent uses are accorded higher priority than visitor-serving uses as no such uses are planned in the Coastal Zone portion of the property.

The deficiencies in these BIA responses are as follows:

~~Although it references a future resource management plan that the Elk Rancheria intends to prepare, the BIA has not provided any such plans, any timetables for implementation, any standards they would contain, or any mechanism for Commission (or its staff) review.~~

~~As discussed on page 19-20 (and again on pp. 25-26), although noting it would be widened, the BIA has not described the access road improvements; therefore the Commission is unable to determine whether the improvements would minimize effects on agricultural operations.~~

The project will not displace agriculture in the coastal zone, as it is primarily located outside the coastal zone. Moreover, as the BIA notes, habitat and wetland protection under the Elk Valley Rancheria's to-be-prepared resource management plan may lead to reductions in

agricultural activity. To maximize the Commission's ability to assure protection of either or both agricultural and habitat concerns, during the hearing the BIA agreed to modify the project to include procedural mechanisms for further staff review of specific project plans (as discussed on pages 6-7), and to provide that the Elk Valley Rancheria waive sovereign immunity (as discussed on page 7). As conditioned (see page 7), such a waiver would be provided. In addition, any future development on the site may require further consistency review (e.g., any activity including federal funding or authorization); also, the Rancheria's Tribal Compact with the State may afford further protections for the land. Finally, the "reopener" clause of the federal consistency regulations remains available and has been specifically acknowledged by the BIA and Elk Valley Rancheria in the project modification, which includes the statement that:

Subject to applicable law the Commission also retains the ability to require additional consistency review if the project no longer remains consistent with the California Coastal Management Program.

The Commission interprets the phrase "subject to applicable law" to include, but not be limited to, the provisions of 15 CFR §930.45 (see footnote #3, on page 21 above).

With these agreements, the condition, and the above considerations, the Commission finds that the necessary mechanisms are in place to enable the Commission to find the project, as conditioned, to be consistent with the agricultural resource protection policies (Sections 30241 and 30242) of the Coastal Act.

Without this information, the Commission lacks sufficient information to find the project has been or will be designed to protect agricultural viability (and other coastal zone resources, including balancing agricultural and habitat conflicts) on the coastal zone portion of the site, and thus whether the project would be consistent with the agricultural protection policy (Sections 30241 and 30242) of the Coastal Act.

VI. SUBSTANTIVE FILE DOCUMENTS

1. Administrative Draft EIS, Elk Valley Rancheria, Martine Ranch Fee-To-Trust Project, Bureau of Indian Affairs, April 2005.
2. Coastal Development Permit 1-05-003, City of Crescent City, Construction of 24 inch diameter effluent outfall line, approved by the Commission May 13, 2005.

