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STAFF RECOMMENDATION

ON CONSISTENCY DETERMINATION

Consistency Determination No.	CD-063-10
Staff:	LJS-SF
File Date:	12/10/2010
60 th Day:	2/8/2011
75 th Day:	2/23/2011
Extended to:	4/18/2011
Commission Meeting:	4/14/2011

FEDERAL AGENCY: Bureau of Indian Affairs

PROJECT
LOCATION:

Between Highway 101 and Ocean View Drive, three miles northwest of Smith River, Del Norte County (APNs 101-110-09, 101-110-06, and 101-110-27)(**Exhibits 1 and 2**)

PROJECT
DESCRIPTION:

Placement of three parcels totaling 22.6 acres into Federal trust status for use by the Smith River Rancheria, and development of 26 single family residences and 18,000 square feet of commercial/retail/office space in five buildings.

SUBSTANTIVE
FILE DOCUMENTS:

See Pages 21 and 22

STAFF RECOMMENDATION: Objection. Motion is on Page 7

EXECUTIVE SUMMARY

The Coastal Commission received a consistency determination from the Bureau of Indian Affairs (BIA) for the transfer of three parcels of land, totaling approximately 22.6 acres and currently owned in fee title by the Smith River Rancheria (Tribe), into federal trust status with the United States as trustee on behalf of the Tribe. The Tribe proposes to construct 26 single-family residences (SFR) on 19.1 acres and 18,000 square-feet of commercial/office/retail space on 3.5 acres of the 22.6-acre project site. The proposed SFRs would be single- or two-story buildings between 1,000 and 3,000 square-feet in floor-area size. The three subject parcels are not contiguous with the Rancheria's current trust lands to the south and are located on the east (inland) side of Highway 101 approximately one-half mile north of the center of the Rancheria, which itself is located three miles northwest of the town of Smith River in Del Norte County.

The current Del Norte County General Plan land use designation for the three parcels is Rural Residential – 1 dwelling unit per two acres (RR 1/2), and the current County zoning for the parcels is Rural Residential Agriculture (RRA-2) with a minimum parcel size of two acres. The proposed commercial/office/retail land use would not be allowed under the general plan or zoning ordinance applicable to the subject parcels. The proposed residential density (29 SFRs over 19.1 acres) for the subject parcels is equivalent to three dwelling units per two acres, which is three times the density currently allowed by the general plan and zoning ordinance for the parcels. Should the subject parcels be placed into federal trust status for the Smith River Rancheria, the parcels would no longer be subject to the County's general plan or zoning designation or to other state and local government land use and development regulatory controls.

The Commission acknowledges that a formal and legal subdivision is not proposed by the BIA in this consistency determination. However, the proposed residential and commercial/retail/office structures that are a part of the consistency determination raise Coastal Act development policy questions that would be addressed by the Commission were it evaluating a multiple-lot subdivision on the three subject parcels. That is, the proposed structures hold the potential to generate impacts on coastal resources similar to those potentially generated by a formal subdivision and development of the parcels. Interconnected with the development policy issues is the potential effect of the proposed residential and commercial development on the type and quality of public views of the coastal zone along the Highway 101 corridor. The trust transfer and subsequent development (in particular, the commercial/retail buildings) would alter the pattern of rural residential development and introduce commercial structural elements into the Highway 101 viewshed that are currently found only adjacent to the Oregon state line, to the south of the project site at the center of the Rancheria, and further south adjacent to the mouth of the Smith River. While the proposed commercial and residential structures would not block scenic public views along Highway 101, they would introduce an intensity of development immediately alongside the Highway 101 view corridor that is not compatible with the current landscape scene between Lopez Creek and the Oregon border. Moreover, the scenic character of the area is an important element of the recreational value of this area.

Should all 26 SFRs be constructed, the effective parcel size in the residential development would appear to be significantly smaller than adjacent and nearby parcels in this area. The Commission believes this would establish an adverse precedent for future development of existing parcels, either by the Tribe in future fee-to-trust applications or by other property owners through changes to the County general plan and zoning ordinance. The introduction of commercial/retail/office development in this area would establish a similar adverse precedent. For these reasons, the proposed commercial/retail/office development along Highway 101 on the western edge of the project site, and the proposed density of the residential development across the balance of the project site - both of which would go forward should the subject parcels be taken into trust by the BIA for the Smith River Rancheria - are not consistent with the concentration of development and visual resource policies of the Coastal Act.

The Commission must also examine the potential coastal zone effects of placing the subject parcel into federal trust status, and the subsequent elimination of state and local government land use and development regulatory controls. Currently, there is no absolute assurance that once the subject parcels are placed into federal trust status that the proposed residential housing and commercial/retail project would be implemented. In theory, any number of alternative projects could subsequently be proposed and developed for the project site and these would not be subject to local and state regulatory development controls, including coastal development permitting under the Del Norte County LCP and any potential permit appeal authority the Commission itself might have for a project on the subject parcels. The Commission would retain its Coastal Zone Management Act federal consistency authority over the subject parcel once it is placed in federal trust status, but Commission review would only be triggered if a federal permit, authorization, or funding is needed for future proposed development on the parcel.

In order for the proposed trust transfer to be found consistent with these Coastal Act policies, the project would need to be modified as follows:

1. Revised Site Plan for Residential Development. The Bureau of Indian Affairs will prepare a revised site plan for residential development on APNs 101-110-09, 101-110-06, and 101-110-27 for Smith River Rancheria that includes no more than eleven single family residences and associated accessways/driveways off Ocean View Drive. The revised site plan will not include commercial/retail/office space development on the subject parcels. The revised site plan will include landscape buffering along Highway 101 to minimize impacts to scenic visual resources. The revised site plan will retain all currently proposed SFR design standards; avoidance, minimization, and mitigation measures to protect coastal resources on the project site; and construction and post-construction best management practices.

2. Agreement for Future Development. The Bureau of Indian Affairs will modify the project to include adoption by Smith River Rancheria, and submittal to the Executive Director for his review and concurrence, Tribal Ordinances or other equivalent mechanisms which: (1) restrict future development on the subject parcels (APNs 101-110-09, 101-110-06, and 101-110-27) to eleven single family residences; (2) include provisions that the

ordinances will not be altered without authorization by the Commission; and (3) include a waiver of sovereign immunity.

Absent such modifications, the Commission could not find the proposed project consistent with the concentration of development and scenic and visual resource policies of the CCMP (Coastal Act Sections 30250(a) and 30251).

Plant and animal field surveys were conducted in 2006 and 2009 and concluded that the parcels contain only disturbed habitat types and that no listed species are present. In addition, portions of the parcels are mowed, graded, or urbanized with asphalt pavement, landscaping, and structure and utility placement. The proposed project would not adversely affect any environmentally sensitive habitat, includes design measures and buffer areas to avoid development near two mapped swales, and includes water quality protection and mitigation measures. The project is consistent with the water quality and environmentally sensitive habitat policies of the CCMP (Coastal Act Sections 30231 and 30240).

The project area is located within the ancestral lands of the Tolowa Indians. Field surveys of the project area conducted in 2005, 2006, and 2007 concluded that no historic properties, potentially eligible historic properties, archaeological resources, or cultural resources were located on the project site. The project includes response and mitigation measures should discovery of such resources occur during construction activities. The project will not adversely affect cultural resources and is consistent with the cultural resource policy of the CCMP (Coastal Act Section 30244).

STAFF SUMMARY AND RECOMMENDATION

I. STAFF SUMMARY.

A. Project Description. The Bureau of Indian Affairs (BIA) has submitted a consistency determination for the transfer of three parcels of land, totaling approximately 22.6 acres and currently owned in fee title by the Smith River Rancheria (Tribe), into federal trust status with the United States as trustee on behalf of the Tribe (**Exhibits 1 and 2**). The Tribe proposes to construct 26 single-family homes on 19.1 acres and 18,000 square-feet of commercial/office/retail space on 3.5 acres of the 22.6-acre project site (**Exhibit 3**). The subject properties are described as follows:

- Bartley Parcel: 6.0 acres, APN 101-110-09, currently vacant
- Bridge (a.k.a. Scott) Parcel: 3.41 acres, APN 101-110-06, currently one single-family home present
- Haswell Parcel: 13.18, APN 101-110-27, currently two single-family homes present

The three subject parcels are not contiguous with the Rancheria's current trust lands to the south. The parcels are located on the east (inland) side of Highway 101 approximately one-half mile north of the center of the Rancheria, which itself is located three miles northwest of the town of Smith River on the extreme northern California coast in Del Norte County. The parcels are bounded on the east by Ocean View Drive, which runs in a north-south direction east of and parallel to Highway 101 (**Exhibits 4 and 5**). The commercial/office/retail project includes five buildings directly adjacent to, and which would take vehicle access from, Highway 101. Three of the commercial buildings would be placed on the Haswell parcel and two buildings on the Bartley parcel. Vehicle access to the 26 single-family residential structures (SFR) and the three existing SFRs would be from Ocean View Drive via two cul-de-sac drives, one serving the larger Haswell parcel and one serving the two southern parcels. Seven SFRs are proposed for the Bartley parcel, two SFRs for the Bridge parcel (in addition to the one existing SFR), and 17 SFRs for the Haswell parcel (in addition to the two existing SFRs). The proposed SFRs would be single- or two-story buildings between 1,000 and 3,000 square-feet in floor-area size. The BIA states that existing utility services in the area (e.g., water, electricity, natural gas/propane, communications) can adequately serve the proposed SFRs and commercial uses. Water would be supplied by either the Rancheria's water supply system or the Smith River Community Services District. All the proposed structures would be served by the Rancheria's newly constructed wastewater treatment system. Stormwater detention basins (each approximately 0.2 acres in size) would be constructed on the Haswell and Bartley parcels. Best management practices would be implemented during project construction to avoid adverse impacts to water quality, drainage, soils, air quality, and traffic.

The consistency determination includes a project *Environmental Assessment* (Natural Investigations Company, October 2010) which provides background information on the Rancheria:

The 190-acre Smith River Rancheria was established in 1908 as one of the three serving the Tolowa people. However, as part of the California Rancheria Act of 1958, the Smith River Rancheria was terminated. During the period of termination, the land that formerly comprised the Rancheria was allotted to individual members and as much as 40% of that land was sold to non-Indians. On December 15, 1983, the Tolowa Indians of the Smith River Rancheria was restored as a federally-recognized Indian tribe as a result of the Hardwick v. United States, a class-action suit involving 17 California Indian rancherias unlawfully terminated by the United States Bureau of Indian Affairs....

The Rancheria is a checkerboard configuration totaling 534 acres split between 45 different parcels with various trust and fee holdings. The Tribe operates a number of different facilities on Rancheria lands including administrative offices, the Lucky 7 Casino, Lucky 7 Fuel Mart, Howonquet Community Center/Headstart and Day Care Facility, elder housing, rental units, United Indian Health Services, and Community and Family Services.

The *Environmental Assessment* included an analysis of two alternatives to the proposed project and a discussion of alternatives that were eliminated from further consideration. The Reduced

Intensity Alternative (**Exhibit 6**) includes placing the three subject parcels into federal trust for the benefit of the Tribe but structural development would be reduced by approximately one-half:

. . . only 4 residential units would be developed on the Bartley parcel and no new residential units on the Bridge parcel. The commercial/retail space on the Bartley parcel would be reduced to 4,000 square feet. On the Haswell parcel, only 9 residential units would be developed, and the commercial/retail space would be reduced to 5,000 square feet.

Under the No-Action Alternative, the three parcels would not be placed into federal trust and the parcels would not be developed as described in the proposed or reduced intensity alternatives. Jurisdiction of the parcels would remain with Del Norte County and the Tribe could develop the parcels consistent with current County zoning.

The Environmental Assessment describes other project alternatives that were eliminated from further consideration by the Tribe:

The Tribe considered other locations for the development of tribal housing and commercial/retail. However, the Tribe does not own or control property that is sufficient in size and otherwise appropriate for the development of these land uses. Many other available properties, for example, do not have frontage on Highway 101; other available properties are located far outside of the Rancheria boundaries. As a result, no reasonable off-site alternatives have been identified or evaluated in greater detail in the EA.

The *Environmental Assessment* states that the proposed development project land uses:

. . . are not entirely consistent with the permitted uses of the current zoning. However, the proposed uses do not represent a significant change in planned land uses, because such land uses are not expected to result in significant conflicts with adjacent residences.

The current Del Norte County General Plan land use designation for the three parcels is Rural Residential – 1 dwelling unit per two acres (RR 1/2), and the current County zoning for the parcels is Rural Residential Agriculture (RRA-2) with a minimum parcel size of two acres. The proposed commercial/office/retail land use would not be allowed under the general plan or zoning ordinance applicable to the subject parcels. The proposed residential density (29 SFRs over 19.1 acres) for the subject parcels is equivalent to three dwelling units per two acres, which is three times the density currently allowed by the general plan and zoning ordinance for the parcels. Should the subject parcels be placed into federal trust status for the Smith River Rancheria, the parcels would no longer be subject to the County's general plan or zoning designation or to other state and local government land use and development regulatory controls.

B. Federal Agency's Consistency Determination. The BIA has determined the project consistent to the maximum extent practicable with the California Coastal Management Program (CCMP).

II. Staff Recommendation.

The staff recommends that the Commission take the following action:

Motion: I move that the Commission **concur** with the BIA's consistency determination CD-063-10 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 (following the staff's recommendation) 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 with Consistency Determination:

The Commission hereby **objects** to the consistency determination made by the BIA for the proposed project, finding that: (1) the project is not consistent with the California Coastal Management Program; and (2) the project is not 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. Procedure if the Commission finds that the proposed activity is inconsistent with the CCMP.

Section 930.43(a) of the federal consistency regulations (15 CFR § 930.43(a)) requires that, if the Commission's objection is based on a finding that the proposed activity is inconsistent with the CCMP, the Commission must identify measures, if they exist, that would bring the project into conformance with the CCMP. That section states that:

(a) In the event the State agency objects to the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the objection and supporting information. The State agency response shall describe: (1) How the proposed activity will be inconsistent with specific enforceable policies of the management program; and (2) The specific enforceable policies (including citations).(3) The State agency should also describe alternative measures (if they exist)

which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the management program. Failure to describe alternatives does not affect the validity of the State agency's objection.

As described below in the Concentration of Development/Scenic and Visual Resources section of this report, the proposed project is not consistent to the maximum extent practicable with the CCMP. Pursuant to the requirements of Section 930.43 of the federal regulations implementing the CZMA (in Title 15 of the Code of Federal Regulations), the Commission is responsible for identifying measures, if they exist, that would bring the project into compliance with the CCMP. The Commission believes that it would be possible to bring this project into compliance with the CCMP if the BIA were to implement the following measures:

1. Revised Site Plan for Residential Development. The Bureau of Indian Affairs will prepare a revised site plan for residential development on APNs 101-110-09, 101-110-06, and 101-110-27 for Smith River Rancheria that includes no more than eleven single family residences and associated accessways/driveways off Ocean View Drive. The revised site plan will not include commercial/retail/office space development on the subject parcels. The revised site plan will include landscape buffering along Highway 101 to minimize impacts to scenic visual resources. The revised site plan will retain all currently proposed SFR design standards; avoidance, minimization, and mitigation measures to protect coastal resources on the project site; and construction and post-construction best management practices.

2. Agreement for Future Development. The Bureau of Indian Affairs will modify the project to include adoption by Smith River Rancheria, and submittal to the Executive Director for his review and concurrence, Tribal Ordinances or other equivalent mechanisms that: (1) restrict future development on the subject parcels (APNs 101-110-09, 101-110-06, and 101-110-27) to eleven single family residences; (2) include provisions to ensure that the ordinances will not be altered without authorization by the Commission; and (3) include a waiver of sovereign immunity.

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” (CZMA Section 307(c)(1)). This standard allows a federal activity that is not fully consistent with the CCMP to proceed, but only if compliance with the CCMP is “prohibited [by] existing Federal law applicable to the Federal

agency's operations.”¹ The BIA did not provide any documentation to support a maximum extent practicable argument in its consistency determination or in any subsequent documents. Therefore, there is no basis to conclude that existing law applicable to the Federal agency prohibits full consistency.

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: (1) the Federal agency has concluded that under the "consistent to the maximum extent practicable" standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§930.32(a) and 930.39(a)), or (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.

¹

15 CFR Section 930.32.

IV. Findings and Declarations:

The Commission finds and declares as follows:

A. Concentration of Development/Scenic and Visual Resources. The Coastal Act provides the following:

Section 30250(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. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels.

Section 30251. 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.

As described previously in this report, the BIA proposes to place the three subject parcels into federal trust status for the benefit of Smith River Rancheria. Once placed into trust status, the parcels would no longer be subject to state or local government land use and development regulatory controls. After the subject parcels are placed into federal trust status, Smith River Rancheria then proposes to construct on the three parcels 26 single family residences (SFR; three existing SFRs would remain as well) and 18,000 square-feet of commercial/office/retail space in five buildings fronting Highway 101. There is no current proposal to subdivide the three parcels into smaller parcels for each of the proposed residential and commercial structures.

The subject parcels owned in fee title by the Smith River Rancheria are currently subject to the development policies of the North Coastal Subarea – Area 1 Planning Unit of the Del Norte County Local Coastal Program (LCP). The project *Environmental Assessment* states that the current Del Norte County General Plan and LCP land use plan land use designation for the three parcels is Rural Residential - 1 dwelling unit per two acres (RR 1/2):

Rural Residential (RR) – This category is intended to maintain the character of rural areas and minimize the services required by smaller lot development. The primary use of these lands is single-family residential (one unit per specified minimum parcel). Uses permitted within residential areas include single-family residences, the keeping of horses for use by

the owner, light agricultural activities, and accessory buildings appropriate to residential uses (Del Norte County General Plan, Coastal Element, pg. 330).

The *Environmental Assessment* next states that the Del Norte County zoning designation and the LCP implementation plan designation for all three parcels is “Rural Residential Agriculture” (RRA-2; a minimum parcel size of two acres) and includes this excerpt from County Zoning Ordinance:

Rural Residential (RRA) – This district classification is designed for the orderly development of rural homesites in the one to five acre category, to encourage a suitable environment for family life for those who desire rural residential land. Since there is a limited area within the county which is suitable for rural residential land, this district is intended to protect rural residential uses against encroachment by other uses which may be in conflict therewith (Del Norte County Code Section 21.17.010). Principal permitted uses include: one-family residences, animal husbandry, and agricultural uses (Del Norte County Code Section 21.17.020).

The above citation of Section 21.17.010 which is included in the project *Environmental Assessment* is incomplete; the balance of that section is essential in order to fully understand the basis for the current zoning designation of the subject parcels:

The provisions of this section, therefore, shall be liberally interpreted to apply to rural residential and agricultural pursuits and related services, to the end that no other use shall be permitted and no regulation shall be deemed or construed to interfere with any normal accessory use conducted in conjunction therewith. It is the intention of this section to prevent the further subdividing of rural residential land into lot sizes which might threaten the rural quality of areas zoned RRA and changes of zone from RRA to another classification are to be made only where such uses are in accord with the General Plan or an adopted specific plan.

The project area is located within the Ocean View Drive specific area of the LCP, which extends from the Oregon state line southward past the project site and down to the mouth of the Smith River. The LCP states that residential development is rural in character and concentrated in the southern portion, eastern midpoint, at Gilbert Creek, and at the state line. Intensive agriculture is concentrated between Highway 101 and Ocean View Drive in the northern area and limited small parcel hobby farming occurs on larger rural residential lots across the area.

Because the Commission is reviewing the proposed trust transfer and subsequent development plan through a federal consistency determination, the standard of review is the Chapter 3 policies of the Coastal Act and not the aforementioned policies of the Del Norte County LCP. However, because this LCP has been certified by the Commission and incorporated into the California Coastal Management Program, it can provide guidance to the Commission in applying Chapter 3 policies in light of local circumstances. The “one residential unit per two acres” standard in the LCP for the Rural Residential lands in the project area is not the Commission’s standard of

review for the proposed project but provides useful guidance to the Commission as it examines the project's consistency with Sections 30250(a) and 30251 of the Coastal Act.

The *Environmental Assessment* for the proposed project provides the following analysis of project compatibility with existing and planned land uses:

The Proposed Action would result in the development and operation of office/retail space and residential housing. The office/retail centers and residential housing would be developed on the three parcels, which are currently zoned Rural Residential Agriculture by Del Norte County. The Rural Residential Agriculture zone designation does not specifically permit or exclude the proposed uses, but does encourage low density rural residential housing and associated non-commercial agricultural activities. As such, the proposed uses do not represent a significant adverse change in allowable land uses. Adjacent existing land uses are single-family homes to the north, east, and south, and a trailer park to the west. The proposed land uses are not expected to result in significant adverse conflicts with adjacent land uses. The office/retail centers would be operated during the day, and would not be a significant source of traffic or noise. The Tribe is currently in discussions with Del Norte County to update the County General Plan designation and zoning for the Project parcels to be consistent with the Tribe's land use master plan and intended uses for these parcels.

. . . No significant conflicts with the Local Coastal Plan policies have been identified. Additionally, as identified above, the proposed facilities would be constructed according to County ordinances. No significant conflicts with Del Norte County Land Use Plans would occur.

The BIA additionally states in its consistency determination that the proposed buildings would be located adjacent to existing residences and trailer parks, the majority of adjacent parcels are already developed, and the project is therefore consistent with Section 30250(a). The BIA states in its consistency determination that the subject parcels are designated by the Del Norte County LCP as Rural Residential Agriculture, that the proposed commercial/retail space is not specified under existing County zoning, that residential structures would be built at the same "1 house/acre or 1 house/half-acre" density that exists on other parcels in the project area, and that the proposed land uses are not entirely consistent with permitted uses of the current zoning. The BIA contends that the only potential impacts from the proposed developments would arise from the need for public utilities and services and increased wastewater production, but that all public utilities have the capacity and ability to serve the proposed developments and all wastewater would be diverted to the Tribe's new wastewater treatment plant. The BIA concludes that:

. . . the major reasons for restricting development in this zoning classification have been addressed and mitigated. The proposed land uses are not expected to result in significant conflicts with adjacent residences. The proposed facilities will be constructed in compliance with County ordinances. Zoning standards including building setbacks and heights would be followed, thereby reducing the potential for land use conflicts. Thus, implementation of the Proposed Action is consistent with the land use element of the LCP.

The Commission disagrees with several of the above conclusions made by the BIA in its consistency determination and *Environmental Assessment*:

- The BIA states that the Rural Residential Agriculture zone designation does not specifically permit or exclude the proposed commercial and residential uses. In fact, that designation on the subject parcels allows for only one residential structure per two acres of land and no commercial uses, and Section 21.17.010 specifically states that no uses other than rural residential and agricultural uses shall be permitted.
- The BIA states that the proposed uses do not represent a significant adverse change in allowable land uses. In fact, the proposed commercial/office/retail land use is currently not allowed on the subject parcels, and the proposed density of SFR development is three times the density currently allowed by the County's general plan and zoning ordinance.
- The BIA states that no significant conflicts with the Local Coastal Plan policies have been identified. In fact, as noted above, the proposed land uses are in direct conflict with the LCP land use designations for the subject parcels.
- The BIA states that the proposed residential structures would be built at the same “1 house/acre or 1 house/half-acre” density that exists on other parcels in the project area. However, the BIA did not provide in its consistency determination or *Environmental Assessment* any parcel information or density calculations to support this contention. Nor do existing conditions establish the standard for what future development is allowable.
- The BIA states that the major reasons for restricting development in this zoning classification have been addressed and mitigated. In fact, just because there may be adequate public utilities to serve the proposed uses and that buildings will be constructed according to County standards does not mean that the project is fully consistent with the general plan and zoning ordinances, which currently restrict development on the subject parcels. Moreover, preceding environmental analyses prepared for the wastewater treatment facility did not identify effluent flows originating from either the Bridge parcel (APN 101-110-06) or from future commercial development on any of the three subject parcels.

A significant Coastal Act development issue that is raised by the proposed trust transfer, residential development, and commercial/office/retail development is whether this latter development and the proposed density of the residential development are consistent with Section 30250(a)'s language governing the location of new development and land divisions. The Commission acknowledges that a formal and legal subdivision is not proposed by the BIA in this consistency determination. Twenty-nine new legal residential parcels and two or more new legal commercial/retail/office parcels would not be created as a result of the trust transfer. However, the proposed residential and commercial/retail/office structures that are also a part of the consistency determination raise equivalent development policy questions that would be addressed by the Commission were it evaluating a multiple-lot subdivision on the three subject

parcels. That is, the proposed structures hold the potential to generate impacts on coastal resources similar to those potentially generated by a formal subdivision of the parcels. As a result, the Commission will analyze the proposed residential and commercial structures for their consistency with Section 30250(a).

Interconnected with the intensity and concentration of development policy issues is the potential effect of the proposed residential and commercial development on the type and quality of public views of the coastal zone along the Highway 101 corridor. The consistency determination states that:

The dominant features in the project area viewshed are the Highway 101 corridor, residences and trailer parks, the forested hills to the east, and the ocean horizon to the west . . . The project parcels border a local coastal plan visual resource inventory area – “Oregon border to the mouth of the Smith River”, which designates view corridors on the entire Ocean View Drive and State Route 101 north of Indian Road to the Oregon border (Del Norte County 1983) . . . From the perspective of motorists traveling on U.S. 101, the views of the Project Area from this highway corridor are considered short-term in nature, due to the high travel speeds of the motorists, and the proposed buildings do not block the view of the ocean because they are on the landward side of US 101.

The *Environmental Assessment* for the project states that:

Implementation of the Proposed Action could have a potentially significant impact on visual resources because it involves changes to the land form, removal of trees, and placement of office/retail centers and housing units, and because various policies protect visual resources in the region. The State’s California Scenic Highway Program and the County’s Scenic Highways Element of the General Plan are both intended to preserve and protect scenic highway corridors from changes that would diminish the aesthetic value of lands adjacent to highways.

Notwithstanding the proposed construction of commercial/retail development along the east side of Highway 101, the consistency determination concludes that:

The Tribe intends that this Proposed Action will be as compatible as possible to existing State and County visual resource requirements. Toward this end, adequate design measures are included to avoid visual/aesthetic effects to neighboring properties. The office/retail building design and architecture will be similar to other Tribal facilities, where the exterior design will blend into the natural environment, and use such elements as green metal roofing, post and beam architecture, and cedar-shake siding. Other design features include minimal alteration of natural landforms, underground utility placement (or least conspicuous placement); limited use of signage; shielding of lighting; and emphasis on native species for landscaping. Because of mitigation incorporated into the project’s design, no adverse effects on visual resources from Project implementation are anticipated. Because the Proposed Action considers and protects, to the degree possible,

the scenic and visual qualities of the coastal area, it is consistent with the visual resources element of the LCP.

In contrast, the Visual Resources Inventory of the Del Norte County LCP describes the viewshed characteristics in the proximity of the three subject parcels as follows:

The visual resources between Pyramid Point and the Oregon border are dominated by ocean vistas and related scenery such as offshore rocks, sea cliffs, coastal vegetation and marine life. Views of upland topography and forestlands, together with agricultural land uses, are also available within the regional viewshed.

Both Highway 101 and Ocean View Drive are important scenic corridors offering open and fairly continuous panoramas of marine and upland resources.

Additionally, the visual inventory map for the “Oregon Border to the Mouth of the Smith River” segment identifies the frontages of the parcels along both Highway 101 and Ocean View Drive as being within “view corridors.”

The proposed placement of the three subject parcels into Federal trust status for the Smith River Rancheria (Tribe) would facilitate the Tribe’s plans to: (1) introduce commercial/retail/office land uses and structures along the east side of Highway 101 in a rural area of the coastal zone that currently is not zoned for and is currently devoid of such uses; and (2) construct 26 single-family residences (in addition to retaining three existing SFRs) that would introduce an intensity of residential development not currently present in this area and not in conformance with the current zoning or character of the area. The trust transfer would allow the Tribe to avoid the current Del Norte County general plan and zoning elements that would prevent both the proposed commercial use and the intensity of residential development.

In addition, the trust transfer and subsequent development (in particular, the commercial/retail buildings) would introduce commercial structural elements into the Highway 101 viewshed that are currently found only adjacent to the Oregon state line, to the south of the project site at the center of the Rancheria, and further south adjacent to the mouth of the Smith River. Moving north along Highway 101 from the mouth of the Smith River, the traveler passes through a visitor-serving commercial zone stretching from the Ship Ashore resort area, through the Rancheria and its administrative office buildings, and up to the Tribe’s Lucky 7 casino complex just south of Lopez Creek (**Exhibits 2 and 7**). Once north of Lopez Creek, the area dramatically changes to a low-density rural residential and agricultural area with open views of the Pelican Beach shoreline and the northern Smith River coastal terrace up to the Oregon state line (**Exhibit 8**). With the exception of the White Rock Resort at the very northern end of this stretch, there are currently no highway frontage commercial uses in this area.

Lopez Creek currently serves as a natural boundary between: (1) the commercial, administrative/government, and residential development found on the Tribe’s trust and fee lands within the Rancheria boundary, and other private development near the Smith River to the south; and (2) the more rural residential and agricultural lands to the north and extending to the Oregon border

(Exhibit 8). The proposed development by the Tribe that would occur subsequent to the fee-to-trust transfer of the subject parcels to the BIA would significantly alter the pattern of development in this area of the coastal zone. Should the proposed project be developed, travelers along Highway 101, whether driving in motor vehicles, riding bicycles, or walking along the highway shoulder, would notice a striking modification to the rural landscape north of Lopez Creek, one clearly out of character with the type and scale of existing development in this section of the coastal zone.

The Commission finds that the proposed commercial/retail/office development along Highway 101 on the western edge of the project site, and the proposed density of the residential development across the balance of the project site - both of which would go forward should the subject parcels be taken into trust by the BIA for the Smith River Rancheria - are not consistent with the concentration of development and visual resource policies of the Coastal Act. The proposed uses of the parcels are not in character with the existing rural residential and agricultural land uses and densities north of Lopez Creek. While the proposed commercial and residential structures would not block scenic public views along Highway 101, the proposed development would affect scenic public views along Ocean View Drive which, as noted above, is identified as a scenic corridor in the LCP. In addition, the proposed development would introduce an intensity of development immediately alongside the Highway 101 view corridor that is not compatible with the current landscape scene between Lopez Creek and the Oregon border. Moreover, the scenic character of the area is an important element of the recreational value of this area.

While acknowledging that no legal subdivision is proposed, the Commission notes that should all 26 SFRs be constructed, the effective parcel size in the residential development would appear to be significantly smaller than adjacent and nearby parcels in this area. The Commission believes this would establish an adverse precedent for future development of existing parcels, either by the Tribe in future fee-to-trust applications or by other property owners through changes to the County general plan and zoning ordinance. The introduction of commercial/retail/office development in this area would establish a similar adverse precedent. The proposed development density is contrary to the Commission's historic actions in this part of Del Norte County - including certification of the Local Coastal Program - to protect the existing rural nature of the landscape from increased development density, the public views along the Highway 101 travel corridor, and the unique character of the coastal terrace in this area. The Commission received several email communications from an adjacent resident expressing concerns over the project, in particular the proposed density of development and its potential impact on Roosevelt elk that frequent the subject parcels **(Exhibit 11)**.

The Commission acknowledges that the approval of the Tribe's new wastewater treatment facility came with the understanding that it would be sized to accommodate future development of Tribal properties in the area. In fact, the Tribe could develop the subject parcels with single family residences at a density consistent with the County's general plan and zoning ordinances (currently eleven SFRs), use the existing capacity of the treatment facility to serve those units, and provide needed housing for Tribal members.

The Commission must also examine the potential coastal zone effects of placing the subject parcel into federal trust status, and the subsequent elimination of state and local government land use and development regulatory controls. Currently, there is no absolute assurance that once the subject parcels are placed into federal trust status that the proposed residential housing and commercial/retail project would be implemented. In theory, any number of alternative projects could subsequently be proposed and developed for the project site and these would not be subject to local and state regulatory development controls, including coastal development permitting under the Del Norte County LCP and any potential permit appeal authority the Commission itself might have for a project on the subject parcels. The Commission would retain its Coastal Zone Management Act federal consistency authority over the subject parcel once it is placed in federal trust status, but Commission review would only be triggered if a federal permit, authorization, or funding is needed for future proposed development on the parcel. The Commission has historically expressed concerns during its review of proposed transfers of parcels to federal trust status over the need to obtain assurances that any future development plans for parcels placed in trust will undergo federal consistency review to the extent provided for in the NOAA federal consistency regulations. (See CD-054-05, Bureau of Indian Affairs, placement of Martin Ranch parcel into trust for Elk Valley Rancheria, and development of Elk Valley Rancheria Resort and Casino, Del Norte County.)

Conclusion and Recommendation.

For the reasons discussed above, the Commission determines that the proposed trust transfer is not consistent with the concentration of development and scenic and visual resource policies of Sections 30250(a) and 30251 of the Coastal Act, and that in order for the proposed trust transfer to be found consistent with these Coastal Act policies, the project would need to be modified as follows:

1. Revised Site Plan for Residential Development. The Bureau of Indian Affairs will prepare a revised site plan for residential development on APNs 101-110-09, 101-110-06, and 101-110-27 for Smith River Rancheria that includes no more than eleven single family residences and associated accessways/driveways off Ocean View Drive. The revised site plan will not include commercial/retail/office space development on the subject parcels. The revised site plan will include landscape buffering along Highway 101 to minimize impacts to scenic visual resources. The revised site plan will retain all currently proposed SFR design standards; avoidance, minimization, and mitigation measures to protect coastal resources on the project site; and construction and post-construction best management practices.

2. Agreement for Future Development. The Bureau of Indian Affairs will modify the project to include adoption by Smith River Rancheria, and submittal to the Executive Director for his review and concurrence, Tribal Ordinances or other equivalent mechanisms that: (1) restrict future development on the subject parcels (APNs 101-110-09, 101-110-06, and 101-110-27) to eleven single family residences; (2) include provisions to ensure that the ordinances will not be altered without authorization by the Commission; and (3) include a waiver of sovereign immunity.

Absent such modifications, the Commission could not find the proposed project consistent with the concentration of development and scenic and visual resource policies of the CCMP (Coastal Act Sections 30250(a) and 30251).

B. Water Quality and Environmentally Sensitive Habitat. The Coastal Act provides the following:

Section 30231. 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 30240.

(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 *Environmental Assessment* for the proposed project states that all three parcels have seen some level of historic grading, that no significant water features occur on any of the subject parcels, and the parcels are not located within a 100-year or 500-year flood zone. Vegetation and animal field surveys were conducted in 2006 and 2009 and concluded that the subject parcels contain only disturbed habitat types (annual grassland/pasture, developed/ruderal, and urban forest) and that no listed species are present. In addition, portions of the parcels are mowed, graded, or urbanized with asphalt pavement, landscaping, and structure and utility placement (**Exhibit 9**).

The *Environmental Assessment* reports that a jurisdictional waters delineation was performed in July 2010 (**Exhibit 10**). This delineation concluded that no isolated wetlands are on the Haswell parcel, and describes the following swale features on the Bridge and Bartley parcels:

- *Bridge Parcel: a seasonal wetland, an earthen ditch, 15 feet in length, average width of 3 feet, 45 square feet (0.001 acre). This earthen ditch receives runoff from road surfaces and uplands, and impounds it long enough to sustain hydrophytes and for hydric soils to develop. However, flow from this seasonal pool then flows westward and diffuses into a*

pasture of annual grasses. Any indications of a channel or concentrated flow are lost in the pasture, and hydrophytes are absent.

- *Bartley Parcel: an ephemeral wetland, an earthen ditch, 60 feet in length, average width of 2 feet, 120 square feet (0.002 acre). This earthen ditch receives runoff from road surfaces and uplands, and impounds it long enough to sustain hydrophytes and for hydric soils to develop. This wet ditch then flows southward 400 feet, where it joins with a northbound ditch, then flows under Highway 101 via a 48" plastic corrugated pipe, then flows into a grated drain and drop inlet, which then takes this runoff westward 700 feet via a buried pipe under a pasture, which then discharges to the beach (Pacific Ocean).*

The proposed development could potentially affect the two aforementioned seasonal swales on the Bridge and Bartley parcels. In addition to the water quality protection measures discussed above, the consistency determination states that the project design was modified to avoid these features by creating a 75-foot development-free buffer zone and moving all project structures and paved surfaces outside of this zone.

The *Environmental Assessment* states that the proposed development of the subject parcels would involve major grading, excavation, and stockpiling, that such disturbance can increase erosion by water and wind, and could create a potentially significant impact upon receiving waterbodies and adjacent lands. Because the construction footprint is larger than one acre,

. . . such construction is regulated by the Clean Water Act under the National Pollution Discharge Elimination System. The Tribe and its designated general contractor must enroll under the USEPA's General Storm Water Discharge Permit for Construction Activities (No. CAR10000IF) prior to initiation of construction. In conjunction with enrollment under this Permit, A Storm Water Pollution Prevention Plan, Erosion Control Plan, and a Hazardous Materials Management/Spill Response plan must be created and implemented during construction to avoid or minimize the potential for erosion, sedimentation, or accidental release of hazardous materials. Construction Best Management Practices are also required. Implementation of these measures would reduce potential construction-related impacts to water quality to a less than significant level.

Potential impacts on water quality after completion of the proposed residential and commercial development is also examined in the *Environmental Assessment*:

Development of the Proposed Action could adversely impact surface water resources by increasing impermeable surfaces, which could result in increases in stormwater volume and velocity that could add incrementally to flood hazards or channel instability downstream. On both the Haswell parcel and the Bartley parcel, stormwater detention basins would be constructed, each approximately 0.2 acres in size. These detention facilities would ensure that post-Project stormwater flows would equal pre-Project flows.

During operation of the Proposed Action, parking lots and access roads would collect petroleum products and other pollutants that are typically concentrated in paved areas and

then transported to receiving water bodies during storm events. This is a potentially significant water quality impact. Mitigation measures have been identified in Section 5.0 to ensure that surface waters would not be adversely affected. Measures include the development and maintenance of vegetated buffers and swales that biologically attenuate pollutants, locating impervious surfaces as far away from natural drainages as possible, and installing and maintaining grease/oil water separators, or media filters to capture and filter stormwater pollutants.

All the proposed structures would be connected to the Rancheria's new wastewater treatment facility:

. . . a Membrane Bioreactor (MBR) facility that produces a high quality effluent that meets California Department of Health standards for the reuse of tertiary treated wastewater (Title 22). The treated effluent is disposed through a new leachfield pursuant to Waste Discharge Requirements set by the North Coast Regional Water Quality Control Board . . .

The Commission agrees with the BIA that the proposed project would not adversely affect any environmentally sensitive habitat, includes design measures and buffer areas to avoid development near two mapped swales, and includes water quality protection and mitigation measures. Therefore, the Commission finds that the project is consistent with the water quality and environmentally sensitive habitat policies of the CCMP (Coastal Act Sections 30231 and 30240).

C. Cultural Resources. Section 30244 of the Coastal Act provides:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

The project area is located within the ancestral lands of the Tolowa Indians. The *Environmental Assessment* examines the presence and significance of cultural and historical resources on the subject parcels, and states that available archival literature and primary records were reviewed in an effort to locate and identify any previously documented information on the project area. These search efforts indicated that portions of the project area were previously surveyed and that no historic, cultural, or archaeological resources were identified. However, a significant Tolowa village site and cemetery were documented within one-half mile of the project site. Field surveys of the project area conducted in 2005, 2006, and 2007; no subsurface testing was undertaken. This work concluded that no historic properties, potentially eligible historic properties, archaeological resources, or cultural resources were located in the project area.

The *Environmental Assessment* next examined the potential impact on cultural resources from the proposed project:

Significant portions of the three Project parcels have been disturbed by previous development and grading, thereby reducing the potential for cultural resources to remain on

the Project Area. However, previously unknown cultural resources could be present within the project area with no surface manifestation. Potential cultural resources that could exist within the project APE [area of potential effect] include shell midden deposits, firecracked rock, objects or features associated with traditional Tolowa occupation and use of the area, and historic objects or features associated with historic land use and agriculture. Destruction of cultural resources due to construction activities would be a potentially significant impact.

The *Environmental Assessment* concludes with the following proposed mitigation measures to protect cultural resources:

During Project construction, ground disturbing activities could uncover previously unidentified cultural resources – a potentially significant impact. Any inadvertent discovery of any historic resources in future project implementation is subject to the requirements of 36 CFR 800.13 (post-review discoveries). Any such discovery will require the immediate cessation of all construction activities, and the notification of the Smith River Rancheria THPO [Tribal Historic Preservation Officer] and the designated official archaeologist for the BIA. Appropriate mitigation, as recommended by the THPO and/or archaeologist, shall be implemented.

Pursuant to Native American Graves Protection and Repatriation Act of 1990, if skeletal remains or bones of unknown origin are found during construction, all work will stop in the vicinity of the find and the County Coroner will be contacted immediately. If the remains are determined to be Native American, the coroner should notify the THPO, who will then notify the person that is the most likely descendant. The most likely descendant will work with the Tribe or contractor to develop a program for re-interment of the human remains and any associated artifacts. No additional work will take place within the immediate vicinity of the find until the identified appropriate actions have been implemented. Implementation of these mitigation measures would reduce ground disturbing impacts to a less than significant level.

The Commission concurs with the BIA that the subject parcels do not contain significant cultural resources and that protections for an unanticipated discovery of such resources would be implemented during project construction. Therefore, the Commission finds that the proposed project will not adversely affect cultural resources and is consistent with the cultural resource policy of the CCMP (Coastal Act Section 30244).

Substantive File Documents:

1. *Smith River Rancheria: Bartley, Bridge, and Haswell Parcels Fee-to-Trust Project Environmental Assessment*, October 2010 (Natural Investigations Company)

2. CD-077-06 (Bureau of Indian Affairs, placement of five-acre parcel into Federal trust for Big Lagoon Rancheria, and development of three single-family residences on the parcel, Humboldt County)
3. CD-054-05 (Bureau of Indian Affairs, placement of Martin Ranch parcel into Federal trust for Elk Valley Rancheria, and development of Elk Valley Rancheria Resort and Casino, Del Norte County)
4. ND-037-02 and ND-069-02 (Bureau of Indian Affairs, placement of six parcels near Requa into trust status for the Yurok Tribe, Del Norte County)
5. ND-064-00 (Bureau of Indian Affairs, placement of four parcels into trust status for the Smith River Rancheria, Del Norte County)
6. ND-035-00 (Bureau of Indian Affairs, placement of five parcels into trust status for the Smith River Rancheria, Del Norte County)
7. ND-060-99 (Bureau of Indian Affairs, placement of one parcel into trust status for the Smith River Rancheria, Del Norte County)
8. Del Norte County Local Coastal Program: North Coastal Subarea – Area 1 Planning Unit
9. *Smith River Rancheria Environmental Programs: Wastewater Treatment, Disposal, and Reuse Assessment*, May 2002 (Winzler and Kelly Consulting Engineers)
10. *Smith River Rancheria Wastewater Treatment and Disposal Project*, February 15, 2008 (Winzler and Kelly Consulting Engineers)
11. NoFLA 1-DNC-08-099 (County of Del Norte, Coastal Variance V0803C and Coastal Use Permit UP0818C for Smith River Rancheria Offsite Wastewater Disposal System)

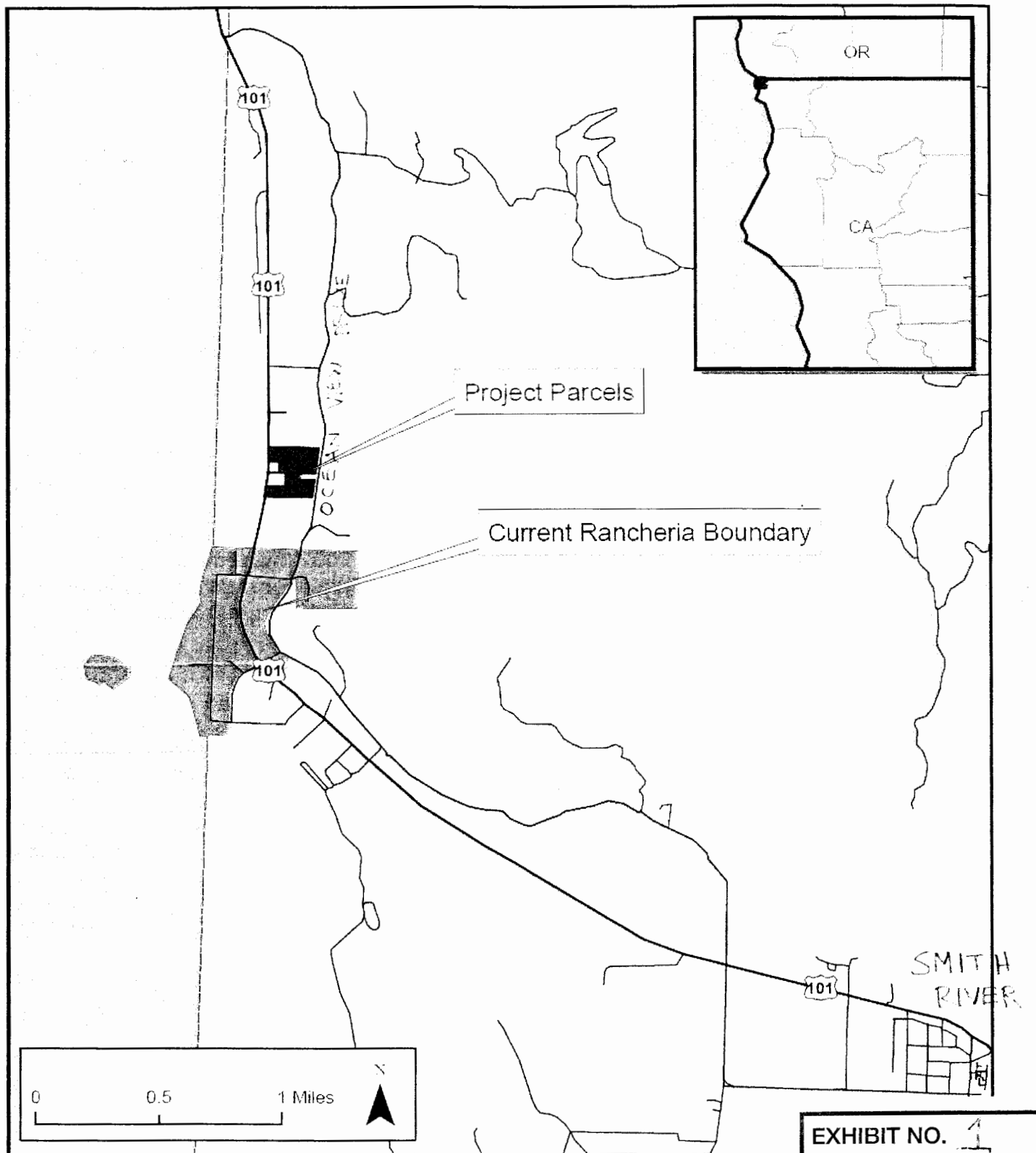


Figure 1-1. Location of Project Area



Aerial view from mouth of the Smith River north to Project Site

EXHIBIT NO. 2
APPLICATION NO.
CD-063-10

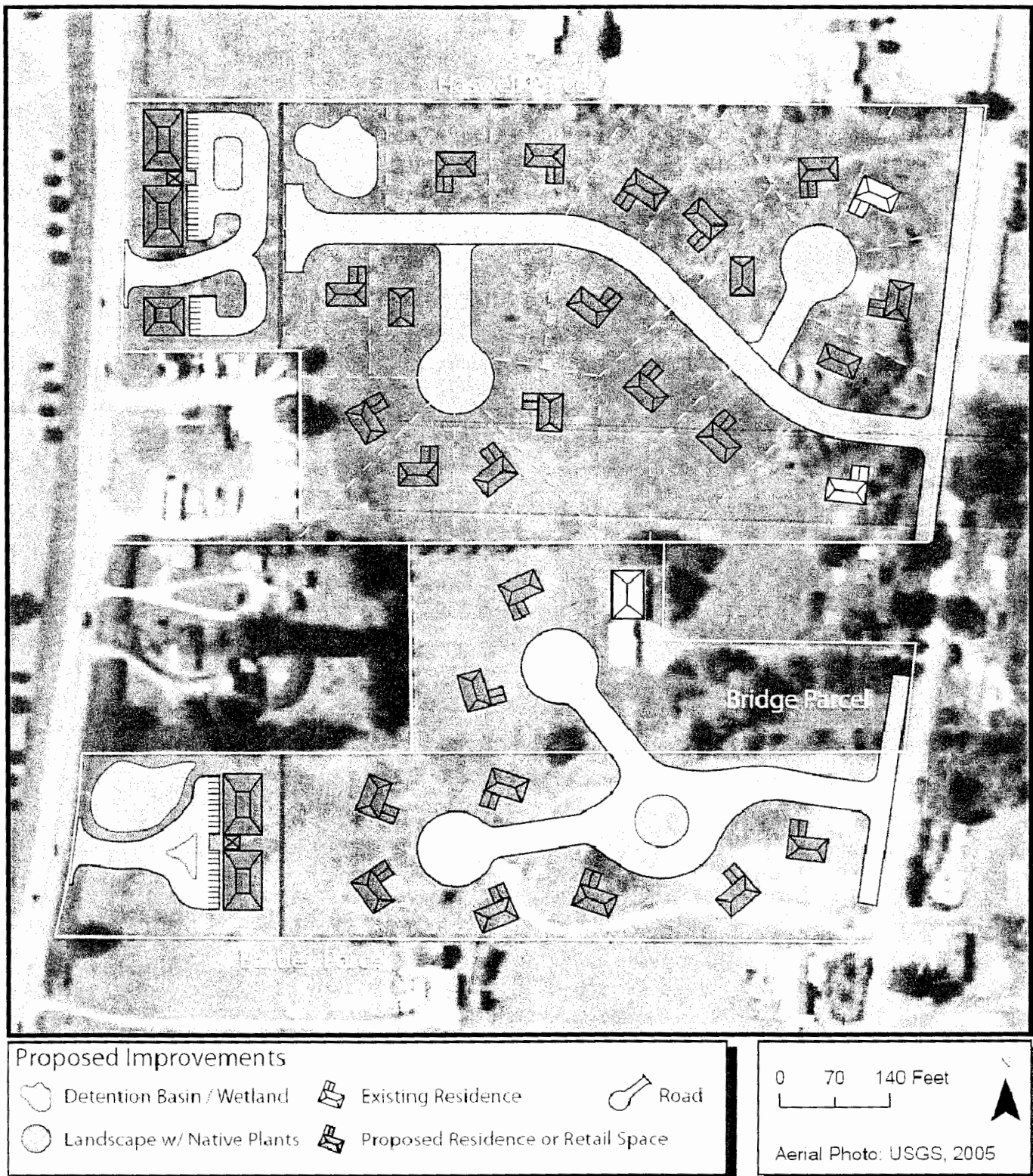
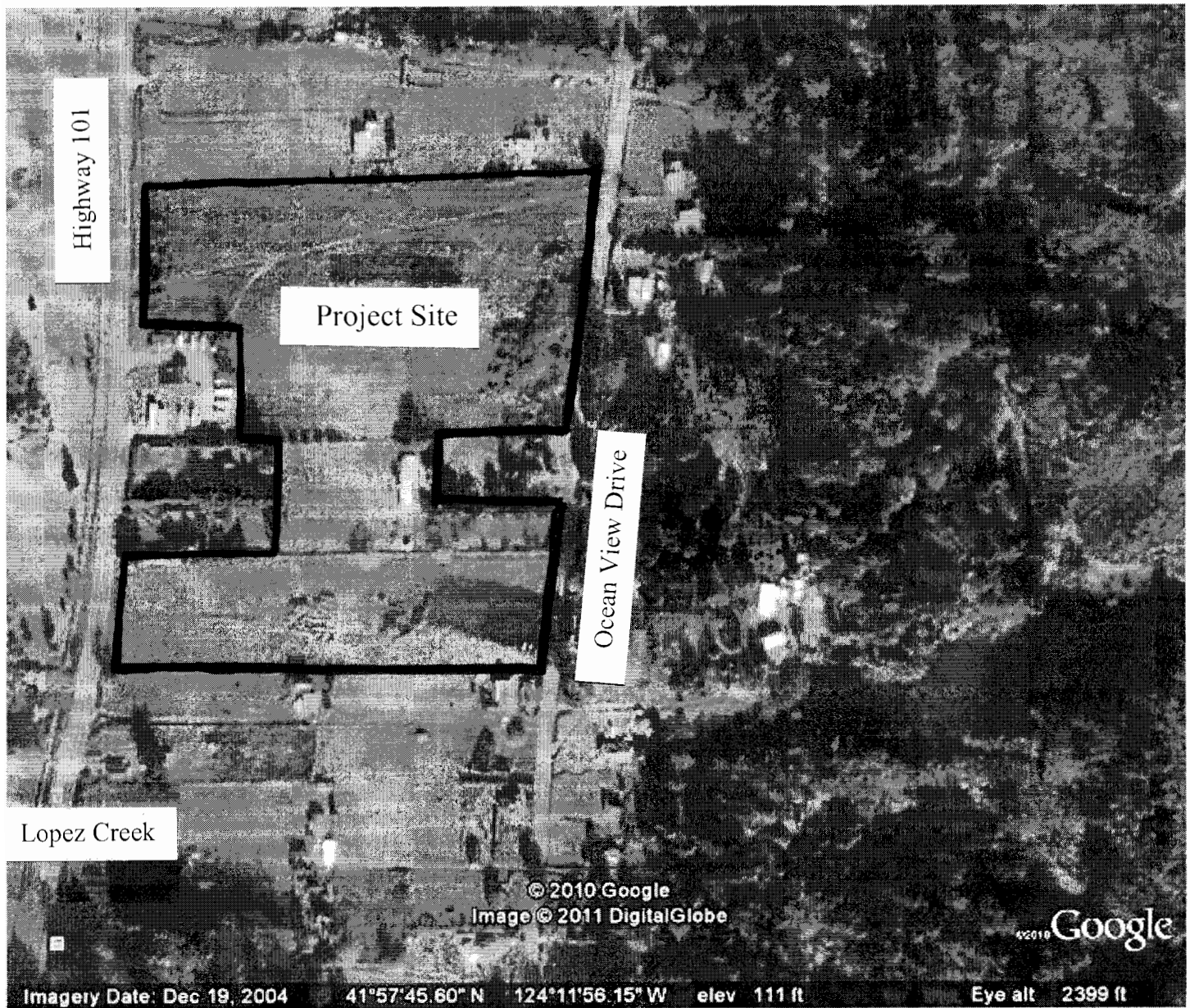


Figure 2-1. Project Boundaries and Proposed Site Plan

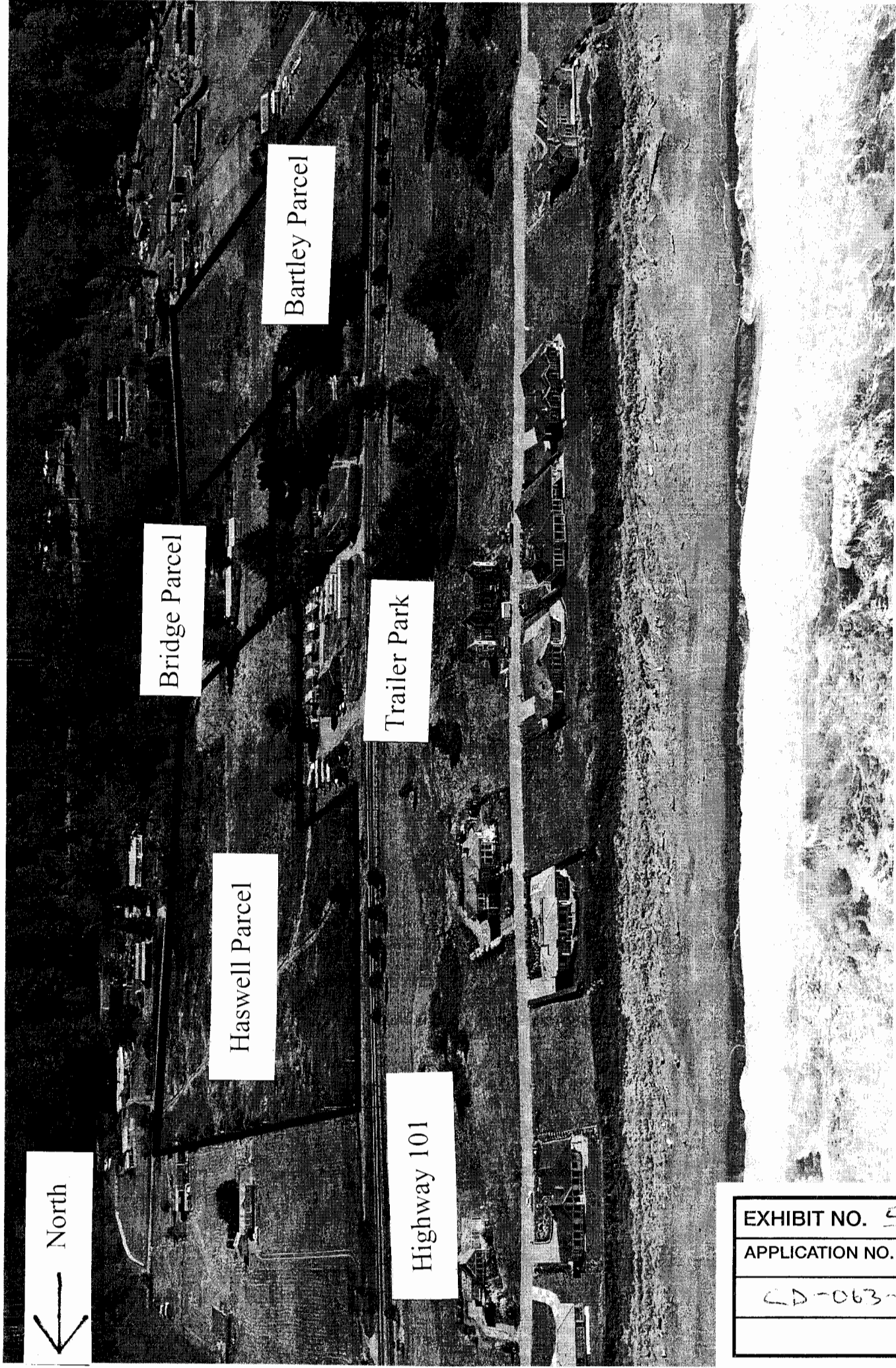


Aerial view of Project Site

EXHIBIT NO. 4

APPLICATION NO.

CD-063-10



← North

Haswell Parcel

Bridge Parcel

Bartley Parcel

Trailer Park

Highway 101

EXHIBIT NO. 5
APPLICATION NO.
CD-063-10

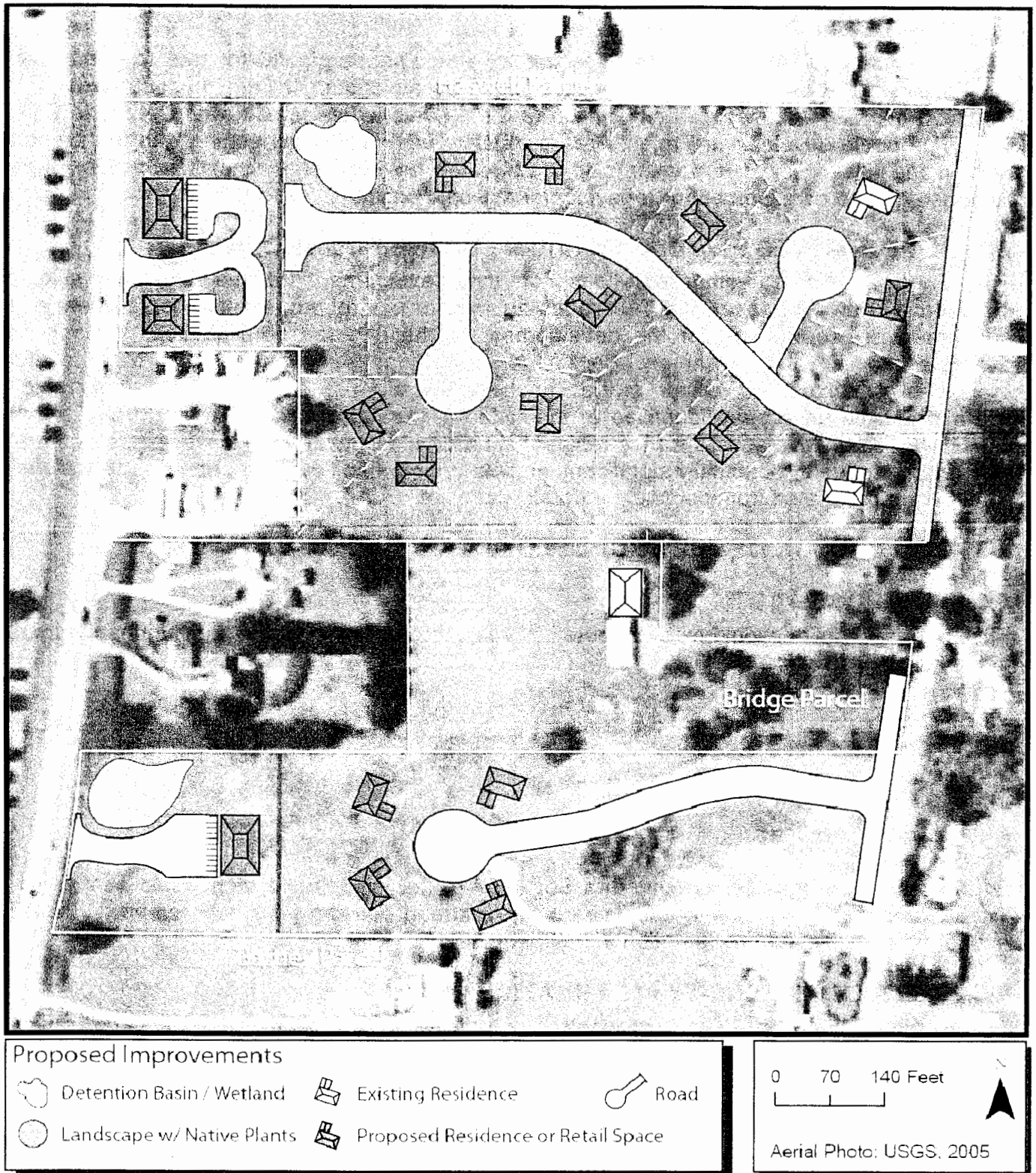


Figure 2-2. Reduced Intensity Site Plan

EXHIBIT NO. 6

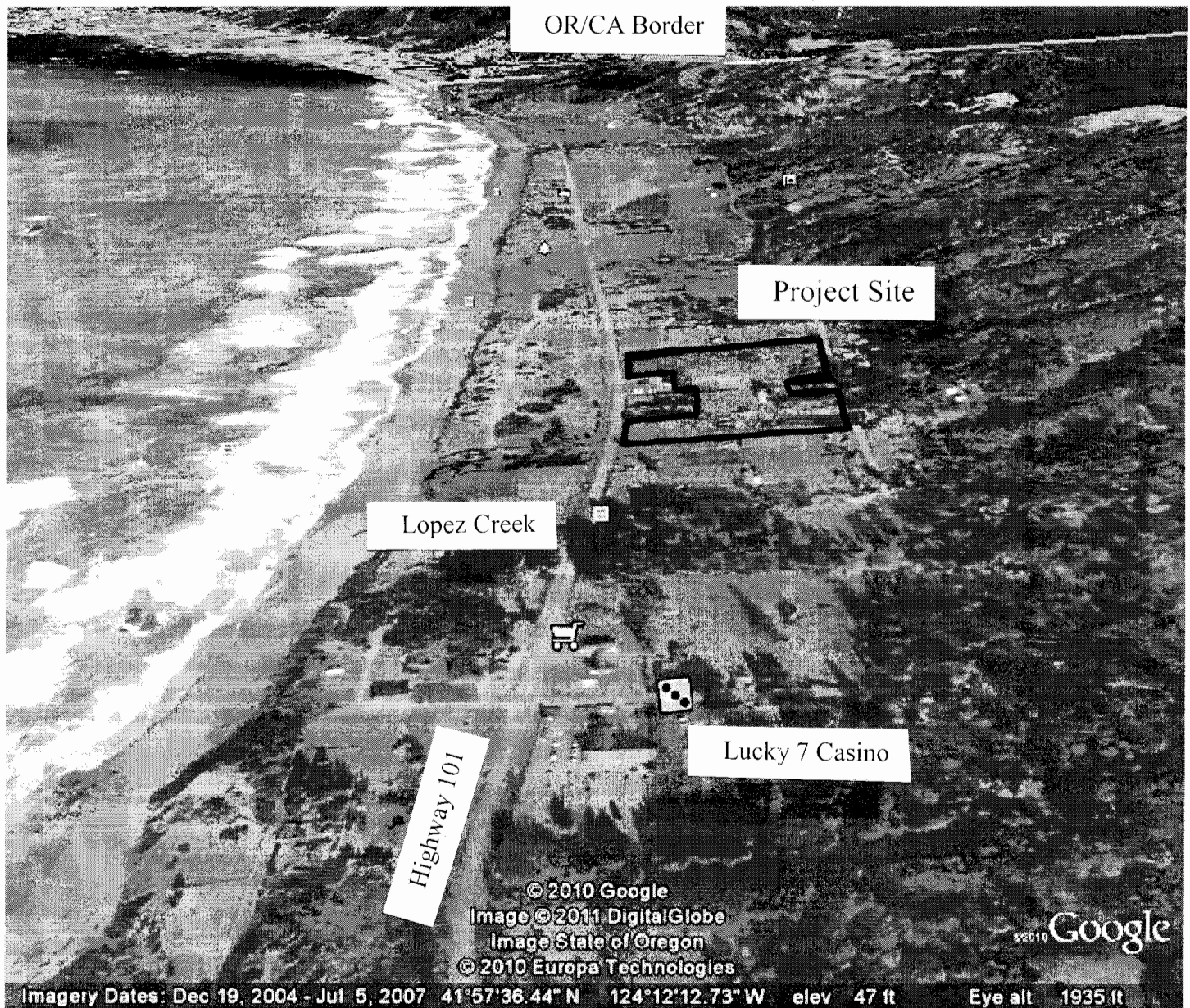
APPLICATION NO.

LD-063-10



Aerial view from Lucky 7 Casino north past Project Site

EXHIBIT NO. 7
APPLICATION NO.
CD-063-10



Oblique aerial view from Lucky 7 Casino north past Project Site
to the Oregon/California border

EXHIBIT NO. 8
APPLICATION NO.
CD-063-10

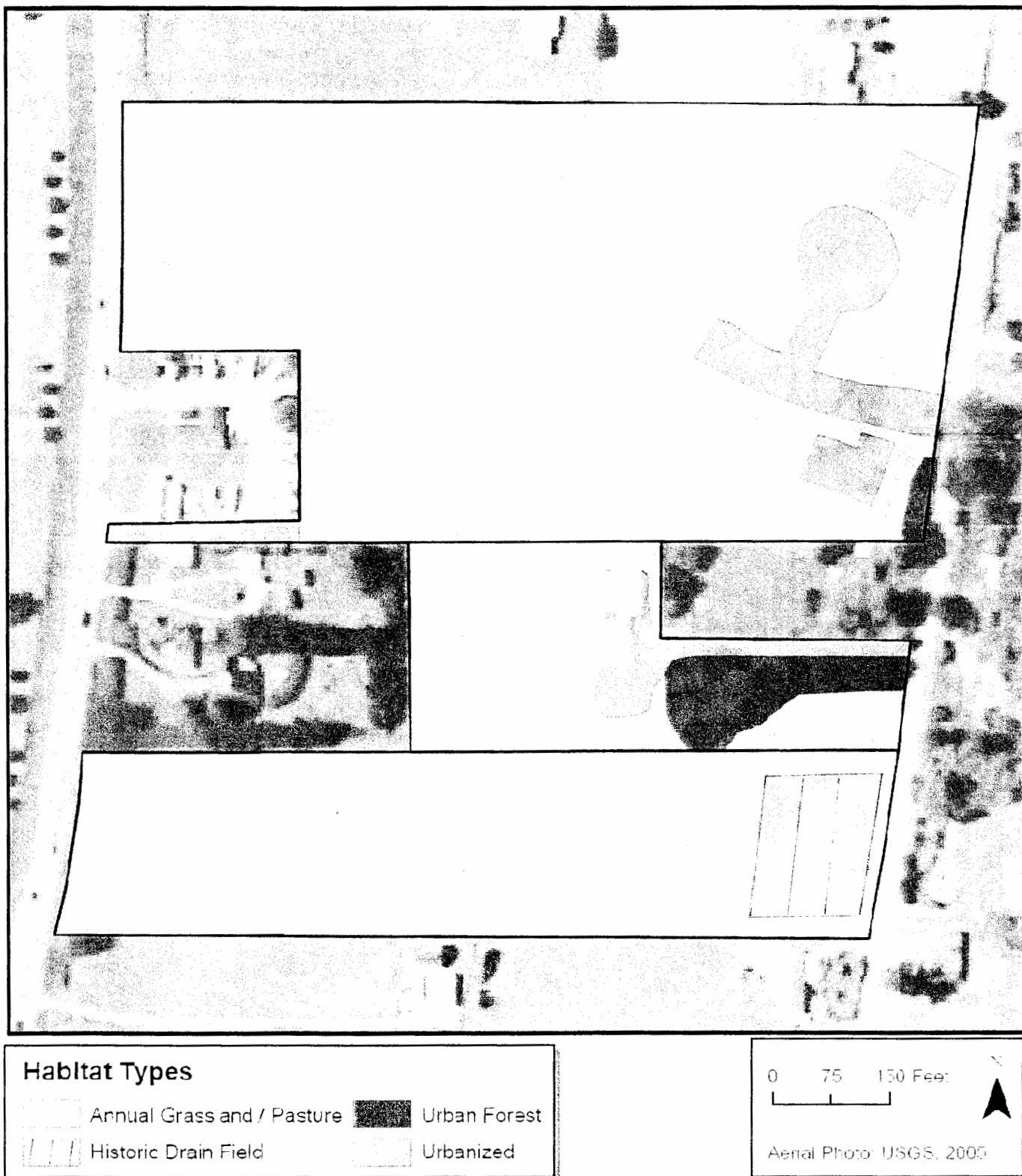


Figure 3-5. Vegetation Communities / Wildlife Habitats within the Project Area

EXHIBIT NO. 9

APPLICATION NO.

CD-063-10

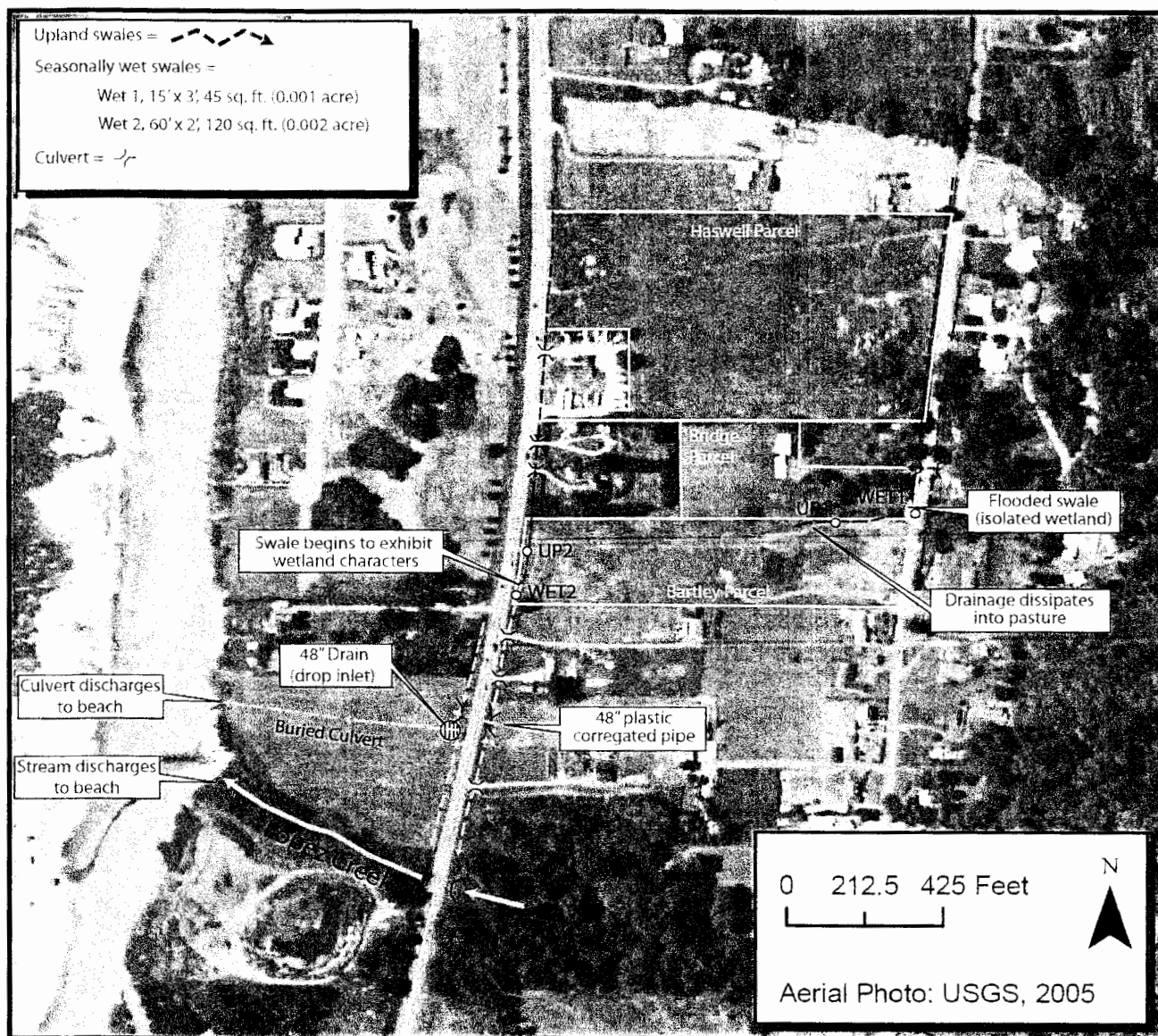


Figure 3-6. Delineation Map of Potentially Jurisdictional Waters

EXHIBIT NO. 10

APPLICATION NO.

CD-063-10

Larry Simon

From: ron hibler
Sent: Monday, February 07, 2011 12:02 PM
To: Larry Simon
Subject: CD-063-10
Attachments: Picture 033.jpg; Picture 037.jpg; Picture 509.jpg; Picture 511.jpg; Picture 240.jpg; Picture 219.jpg; Camera 245.jpg

As per our conversation via telephone on 2/7/2011, I am sending the attached photos of a herd of Roosevelt Elk which frequents the Bartley and Bridge lots which are involved in the matter before the Coastal Commission known as CD-063-10. The lots are identifiable by the structures included in the photos. The elk herd uses the lots for resting and feeding and as a corridor to lots further north and south. It is my recollection that I have observed the elk on these lots nearly every month of the year during one year or another, throughout the last eight years.

I do not take photos every time I see the elk on the lots, but I have attached multiple photos taken on different dates over the last eight years as proof that the elk are using the lots regularly for feeding and mating. The herd strength varies each year from about 44 to 67 in number. As demonstrated in the photos, houses built on lots in conformance with current zoning designations appear to have no negative effects on the elk herd and their migrations. I have observed that tourists and/or visitors who are driving, walking or riding bicycles, often stop to enjoy viewing the herd. I have also observed that the herd is sensitive to vehicles or people who get too close to the herd.

It is my opinion that allowing increased housing structures or businesses in excess of the current zoning designations will have an extremely negative effect on the native Roosevelt elk herd.

The attached photos are identified as:

Photo #245 was taken by me on 12/5/2003
 Photo #219 was taken by me on 11/21/2006
 Photo #240 was taken by me on 11/28/2006
 Photo #511 was taken by me on 11/17/2009
 Photo #509 was taken by me on 11/17/2009
 Photo #037 was taken by me on 2/5/2011
 Photo #033 was taken by me on 2/5/2011

If you have any questions or need further input, contact me at

Ronald Hibler

Smith River, CA 95567

EXHIBIT NO. 11
APPLICATION NO.
CD-063-10

Larry Simon

From: ron hibler
Sent: Wednesday, February 23, 2011 3:08 PM
To: Larry Simon
Subject: RE: CD-063-10
Attachments: Picture 061.jpg; Picture 063.jpg; Picture 064.jpg; Picture 066.jpg

Sorry for the omission. I hope the photos came through this time.

I have been wanting to relate to you an event that took place about 10 years ago when the tribe bought the parcels in question. There was a hearing with the Del Norte County Planning Commission where the tribe wanted to rezone the lots. They would not tell anyone what they had planned for the lots and we were afraid that they were wanting to construct an above ground waste water treatment facility or build business construction in the residential neighborhood. All of the interested landowners showed up at the hearing out of concern and to get answers. The board members asked the tribe's lawyer to speak first and outline the plans of the tribe for clarification. The lawyer refused to speak and said she would only speak after everyone else spoke. The board agreed and we were forced to go first. We didn't know what to say because we had no idea what was proposed by the tribe and so we spoke about our concern that the tribe might do anything it wanted with the land if the rezoning was approved. After we all spoke, the lawyer got up and told the board and us that the tribe didn't have to tell us anything and they could do whatever they wanted. Period. She then sat down and the meeting was adjourned.

I noted that in your current report, the Coastal Commission raised the concern that if the properties were placed in trust, the tribe could then go against the Commission's wishes due to the trust status. According to the event I described above, that is a very true concern and I appreciate the Commission's recommendation to retain a say in the use of the land even if it does go into trust. As I mentioned before, I think the Commission has done a good job in asking the right questions and I appreciate your concerns for the people of Smith River and California.

Ron Hibler

Subject: RE: CD-063-10
Date: Wed, 23 Feb 2011 11:20:17 -0800
From: lsimon@coastal.ca.gov
To:

Your email did not include the photo attachments or links.

Larry Simon
Federal Consistency Coordinator
Energy, Ocean Resources and Federal Consistency Division
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA 94105
(415) 904-5288
lsimon@coastal.ca.gov
www.coastal.ca.gov

From: ron hibler

EX-11

3/22/2011

Sent: Sunday, February 20, 2011 5:03 PM
To: Larry Simon
Subject: CD-063-10

I don't know if you wanted these or not, but I took some more photos of elk while they were bedded down on the Haswell Parcel today, 2/20/2011. The street sign in photos 61, 63 and 64 is TA-KWIS-CHU. Photo 66 is self evident of its location and direction. The elk are laid down at the water level of the photo all across the shot. 19 houses on that property would pretty much choke the elk out. Good luck.

If you have any questions or need further input, contact me at

Ronald Hibler

Smith River, CA 95567

EX-11

3/22/2011

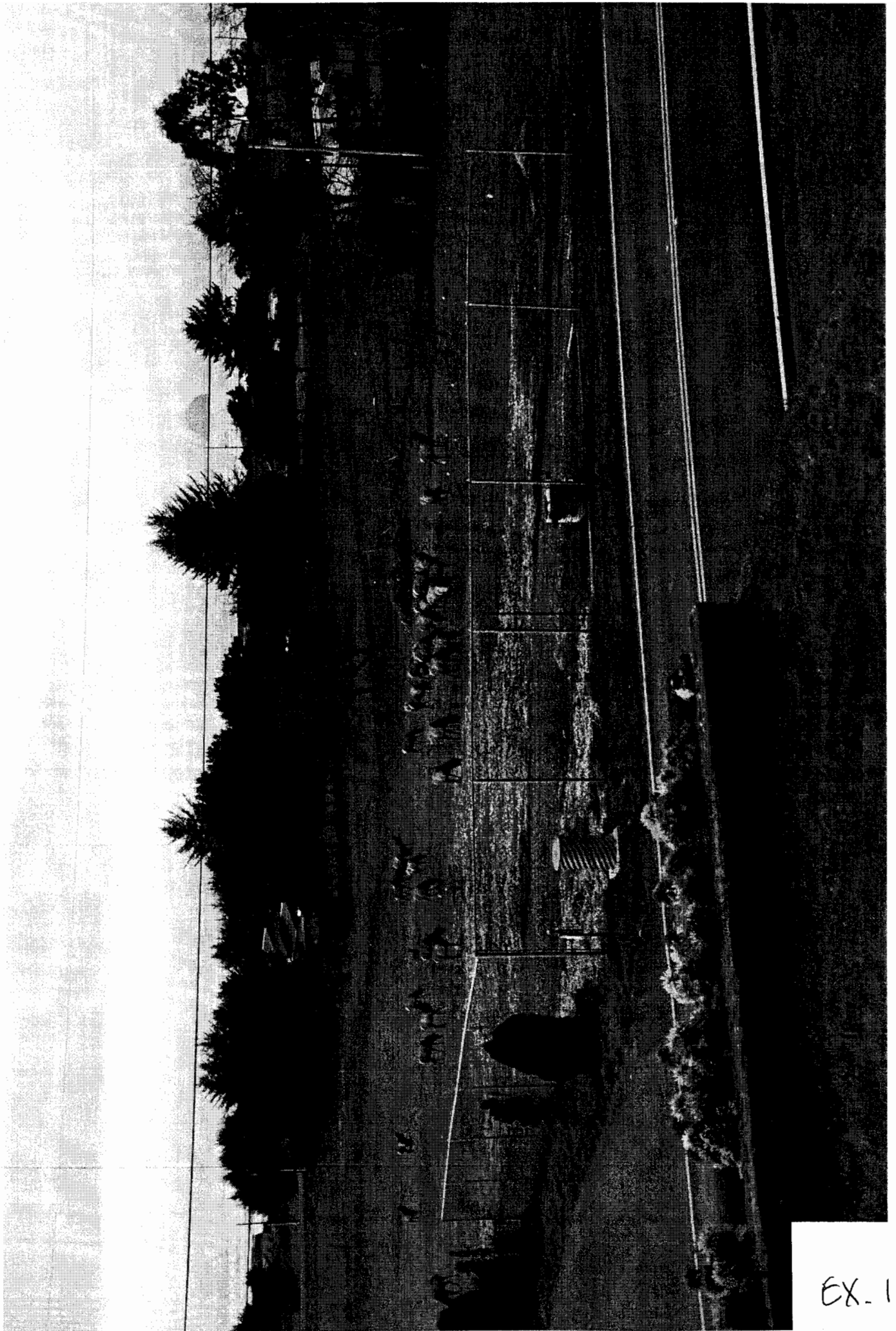


Photo #037, taken 2/5/2011

View to the northwest from near the southeast corner of the project area.

EX-11

Th 6a

Agenda Number Th 6a
Application Number CD-063-10

Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

BIA testimony for Smith River Fee to Trust Commercial/Residential Development

My name is Larry Blevins and I work at the Pacific Region, Bureau of Indian Affairs (BIA) in Sacramento as an environmental protection specialist. My comments are in regards to the Coastal Commission (CC) Consistency Determination (CD) Staff Recommendation Objection letter.

The CC Staff letter partially disagrees with the BIA's Consistency Determination, stating that the project as proposed would be inconsistent with the scenic and visual resource policies of the CCMP (Coastal Act Sections 30250(a) and 30251). To achieve consistency, staff recommends revising the site plan to include no commercial development and only eleven single family residences. Staff also recommends that the Tribe sign an agreement with a waiver of sovereign immunity agreeing not to develop the site beyond eleven residences without the agreement of the CC. The BIA stands by its Consistency Determination and disagrees that the staff's recommendations are necessary to achieve consistency. Furthermore, the BIA is not able to require the Tribe to sign the recommended agreement with a waiver of sovereign immunity.

1. Consistency with Section 30250(a). Coastal Act Section 30250(a) states that new residential, commercial, or industrial development shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it.

As stated in the BIA's Consistency Determination and in the October 2010 Environmental Assessment (EA), the proposed development would be located in close proximity to existing developed areas able to accommodate it. Both commercial and residential developments are located nearby the project site. This includes a commercial gas station located approximately 1,500 feet away and residential development that surrounds the site on all sides. The nearby residential development includes development at substantially higher densities than the proposed development (approximately 1.4 units per acre), including an adjacent trailer park with a density of approximately 13.4 units per acre. The CC staff letter correctly states that existing conditions do not "establish the standard for what future development is allowable." However, existing development has a direct correlation on a determination of consistency with Section 30250(a), specifically this Section's requirement that development be located near developed areas able to accommodate it. The staff also discounts the ability to provide services to the site, stating that "just because there may be adequate public utilities to serve the proposed uses and that buildings will be constructed according to County standards does not mean that the project is fully consistent with the general plan and zoning ordinances..." Again, however, the ability to provide services to the site, including critical wastewater treatment capacity has a direct relation on a determination of consistency with Section 30250(a), specifically this Section's requirement that the new

development occur in areas able to accommodate it. In addition, as noted in the EA, the ability to serve the development resolves one of the main reasons for restricting development in the local land use regulations.

Thus, the BIA has demonstrated that the proposed project is located in close proximity to existing developed areas able to accommodate it and is therefore consistent with Section 30250(a). A significant portion of the CC staff report is spent on challenging the project's consistency with local zoning ordinances. However, even the staff report acknowledges that the standard of review is the policies of the Coastal Act and not the policies of the Del Norte County LCP or other local land use policies. Although the LCP can provide guidance to the CC in applying the Coastal Act in light of local circumstances, strict adherence to the local zoning ordinance should not be a substitute for a determination of consistency with the Coastal Act. This is especially relevant in this case where the proposed development would not be located on subdivided lots for individual profit but on one trust property for the benefit of the Tribe. Thus, standards for developable units per lot, for instance, do not apply to this development.

2. *Consistency with Section 30251.* Coastal Act Section 30251 states "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."

Again, in arguing that the project is inconsistent with Section 30251, staff focuses on technical inconsistencies with the local zoning ordinance instead of whether or not the project is consistent with the Coastal Act. As noted in the EA and the BIA's Consistency Determination, the project would not obstruct views of the ocean and would be visually compatible with the character of the surrounding area, which as noted before, includes commercial development and substantial residential development (including a trailer park). In addition, the development is required by the EA to blend into the natural environment, including minimal alteration of natural land forms, underground utility placement, and use of earthtone building materials.

3. *Agreement for Future Development.* CC staff recommends that the BIA modify the project to include adoption by Tribe, and submittal to the Executive director for his review and concurrence, Tribal Ordinances or other equivalent mechanisms that:

1. Restrict future development to eleven single family residences;
2. Include provisions that the ordinances will not be altered without authorization by the Commission.
3. Include a waiver of sovereign immunity.

In order to honor the trust responsibilities and best interests of the tribe, the BIA cannot negotiate these adoptions for Tribal Ordinances.

I would like to thank the Coastal Commission for allowing BIA testimony and I am submitting it for the record.



Th 6a

Smith River Rancheria

140 Rowdy Creek Rd, Smith River, CA 95567-9525
Ph: (707) 487-9255 Fax: (707) 487-0930

Kara Brundin
Miller
Chairperson

Denise Padgett
Vice Chairperson

Sharyne R. Harper
Council Secretary

Joel Bravo
Treasurer

Marian Lopez
Council Member

Loren Bommelyn
Council Member

Dr. Joseph
Giovannetti
Council Member

Russ Crabtree
Tribal
Administrator

Agenda Number Th 6a
Application Number CD-063-10

Position: In Favor of the Project

April 9, 2011

California Coastal Commission
Attn: Larry Simon
45 Fremont Street, Suite 2000
San Francisco, CA 94105

SMITH RIVER RANCHERIA TESTIMONY FOR THE BARTLEY, BRIDGE, AND HASWELL PARCELS FEE-TO-TRUST PROJECT

SUMMARY FACTS

- Proposed housing density is consistent with surrounding density
- The Project will set a positive precedent for growth
- The Project will have a positive effect on aesthetics
- The Project will enhance coastal tourism
- The Tribe has adequate land planning regulations in place

*Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
Our Heritage Is Why We Are Strong*

DEMONSTRATION OF HOW PROPOSED LAND USE IS CONSISTENT WITH THE COASTAL ACT

Proposed housing density is consistent with existing housing density

- Proposed housing density is mid-range of existing housing density

The County's primary reason for limiting building density is sewage disposal problems

- The Tribe spent \$ 5 million to build a municipal sewage treatment plant

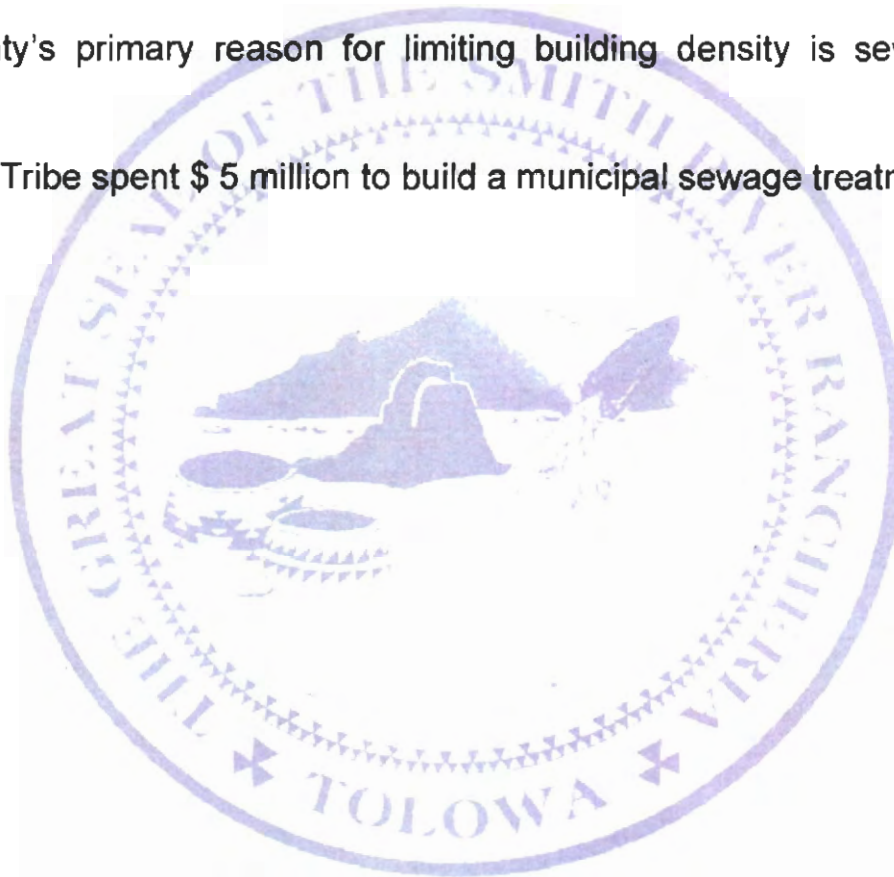


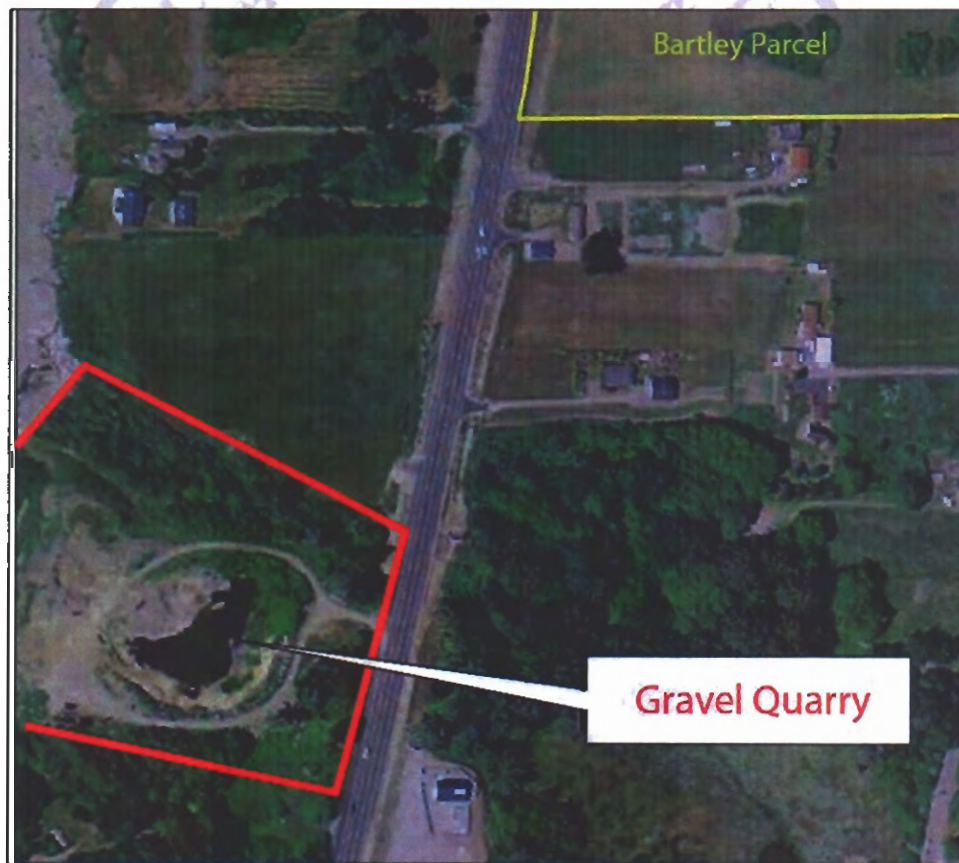


Figure 1. Housing Density in the Vicinity Varies from 0.2 to 13.4 units/acre

The precedent for Commercial Development has already been set:

- The Bartley Parcel is only 1,500 feet from the nearest commercial parcel (gas station)
- The Bartley Parcel is only 300 feet from a quarry/rock-crushing operation !
- The Project will provide visitor-serving facilities.

The County and the Commission allowed a company to build a Quarry on the beachfront



*Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
Our Heritage Is Why We Are Strong*

Smith River Rancheria must provide housing for hundreds of its members !

- Zoning policies intended for Caucasian vacation homes are inappropriate for Indian communities
- Density = Community
- the Bartley/Bridge/Haswell project Is Not a for-profit housing development

Commission staff would have you believe that the study area has a low housing density



This is not low housing density!

Proposed housing density is consistent with the range of existing housing density:

- The proposed housing density is not the most intensive density in the vicinity
- County has not been consistent in its regulation of subdivisions and resulting housing density
- Densities of 2 to 4 houses per acre are common
 - plus a trailer park (13.4 units per acre)

***Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
Our Heritage Is Why We Are Strong***

CCC Staff claim that the viewshed is natural and attracts tourism, but...

- 90% of the viewshed is row crop agriculture (on east side of Hwy 101)
 - not in a "natural state" as CCC staff claim
 - not a "tourist attraction" as CCC staff claim



Agriculture does not attract tourism



The County and the Commission allowed trailer parks and quarries to be built:

Trailer parks don't attract tourism

Quarries don't attract tourism

*Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
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THE PROJECT WILL HAVE A POSITIVE EFFECT ON AESTHETICS OF THE REGION

TRIBAL ARCHITECTURE DEFINES THE REGION



Examples of Tribal Architecture: "Lost Coast Lodge" Architectural Style

*Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
Our Heritage Is Why We Are Strong*



View looking northeast of Highway 101 corridor, then the BartleyParcel, and the hills beyond.



View looking northeast of the same photo of the Bartley Parcel. An architectural rendering of the retail / commercial building and native landscaping has been added to the photo.

Figure 2.



View looking east of Highway 101 corridor, then the Haswell Parcel, and the hills beyond.



View looking east of the Highway 101 corridor and the Haswell Parcel. An architectural rendering of the retail / commercial building has been added to the photo.
Figure 3.

THE PROJECT WILL ENHANCE COASTAL TOURISM

Construction of Project buildings will have a positive effect on tourism

- not an adverse effect as Commission staff claim

The proposed retail space includes visitor-serving facilities such as:

- Visitor center
- Restaurant
- Convenience store

THE TRIBE HAS ADEQUATE LAND PLANNING REGULATIONS IN PLACE

The Tribe has policies and laws in place to promote orderly and responsible development

Smith River Rancheria Planning Elements:

- approved Master Plan
- approved 5-year Strategic Plan
- Tribal Land Ordinance 08-02
- Tribal Zoning Map
- Planning Board
- Mission: *Promotion of orderly and responsible development*

FEDERAL POLICY

Indian nations have the right to establish policies to control their lands and resources and to maintain high standards of environmental quality for tribal communities.

Smith River Rancheria Tribal officials are dedicated stewards with culturally-based knowledge in best practices and insight regarding the difficult tasks of managing, preserving and protecting their homelands.

The federal government as trustee has limited responsibilities in managing trust lands and resources that are compatible with tribal government goals, objectives and principles.

Like state and local governments, tribal governments have enacted comprehensive zoning laws to control development and to ensure consistency in reservation land use.

SOVEREIGNTY HAS ALWAYS EXISTED

Native American tribes existed as sovereign governments long before European settlers arrived in North America.

Treaties signed with European nations (and later the United States) in exchange for land guaranteed the tribes' continued recognition and treatment as sovereign nations.

Historically, state governments have been hostile to the concept of recognizing and dealing with tribes as sovereign governmental entities.

Under the Constitution of the United States and numerous treaties, the federal government undertook to protect tribes from states, who have often coveted our lands and assets, and sought to impose their will on native tribes and their people.

Moreover, sovereignty includes the right of people to determine how land is to be used for the common good.

COURTS HAVE LONG RECOGNIZED INDIAN SOVEREIGNTY

In 1831, the Supreme Court decided in *Cherokee Nation vs. Georgia* that Indian Nations had the full legal right to manage their own affairs, govern themselves internally and engage in legal and political relationships with the federal government and its subdivisions.

Tribal sovereignty in the United States refers to the inherent authority of indigenous tribes to govern themselves within the borders of the United States of America. The federal government recognizes tribal nations as "domestic dependent nations" and has established a number of laws attempting to clarify the relationship between the federal, state, and tribal governments.

The Constitution and later federal laws grant to tribal nations more sovereignty than is granted to states or other local jurisdictions, yet do not grant full sovereignty equivalent to foreign nations, hence the term "domestic dependent nations".

Native American sovereignty and the Constitution

The United States Constitution specifically mentions the relationship between the United States federal government and Native American tribes three times:

Article I, Section 2, Clause 3 states that "Representatives and direct Taxes shall be apportioned among the several States ... excluding Indians not taxed."

Article I, Section 8 of the Constitution states that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes", determining that Indian tribes were separate from the federal government, the states, and foreign nations;] and The Fourteenth Amendment, Section 2 amends the apportionment of representatives in Article I, Section 2 above.

"Regulate", historically means "facilitate". Therefore, the Congress of these United States was to be the facilitator of commerce between the states and the tribes.

Agenda Number Th6a
Application Number CD-063-10

Bommelyn Construction
155 Henry Lane
Crescent City Ca. 95531

My Position: In Favor of the Project

April 8, 2011

California Coastal Commission
Attn: Larry Simon
45 Fremont Street, Suite 2000
San Francisco, CA 94105

RECEIVED

APR 11 2011

CALIFORNIA
COASTAL COMMISSION

RE: Comment Letter on the Bartley, Bridge, Haswell Parcels Fee-to-Trust Project for the California Coastal Commission Hearing on Consistency Determination

Greetings Commissioners,

This is a comment letter in support of the Bartley, Bridge, Haswell Parcels Fee-to-Trust Project.

My construction company is 100% Indian owned and operated as well as all of the partners are members of the Smith River Rancheria. With the local economy in the shape it is in it is very difficult for a small company to stay in business. We feel very fortunate to be able to continue to be productive. As tribal members we feel it is very important that these projects continue to move forward, not only would it provide tribal members jobs to help stimulate the economy, it would also provide much needed housing opportunities for our people. I have listed below a few points of interest that will also be affected.

- Smith River Rancheria must provide housing for hundreds of its members.
- Del Norte County has 9% unemployment rate. This project will create jobs.
- The Project will enhance coastal tourism. The proposed retail space includes visitor-serving facilities (e.g. visitor center, restaurant, convenience store).
- Construction of Project buildings will have a positive effect on aesthetics; Tribal architecture defines the region.
- The Tribe has policies and laws in place to promote orderly and responsible development

Sincerely,



Larry Simon

Th 6a

From:

Sent: Sunday, April 03, 2011 3:00 PM

To: Larry Simon

Subject: Proposed Smith River Project

Dear Sir,

I am writing to you as a resident of Smith River living next to the proposed Bridgeport project. This proposal seems to be against everything the coastal commission was put in place to monitor. Our northern coast should not be cluttered with business and other buildings on this piece of land.

As a working artist I have enjoyed elk, hawks and herons to name a few of the wild life I see on a daily basis. I feel blessed to live in such a place of beauty. The buildings they are proposing to construct will put an end to nature as we know it now. I have many visitors from around the country that come to enjoy, photograph and paint. Giving permission to continue this plan gives question to what rules you adhere to. If they are allowed to continue with this plan it will change the visual composition of this area forever.

I realize that change is inevitable but it is my hope that you will take these things into consideration and adhere to guidelines that are now in place in this county.

Sincerely,

Nan Marie Wineinger

Smith River, California 95567

These are pictures of my neighbors in my yard and next door.



Larry Simon**Th 6a**

From: _____
Sent: Sunday, April 03, 2011 3:26 PM
To: Larry Simon
Subject: Consistency Determination #CD-063-10

Dear Mr. Simon,

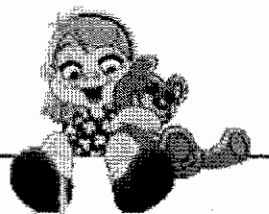
When my husband and I purchased our property here in 1987, we had searched throughout the corridor from Eureka to the Oregon border for a home site that was as different as possible from the city and commercial atmosphere of Washington D.C., where we had lived the previous ten years. When we drove up 101 from the little town of Smith River, we were enchanted by the peaceful pastures and lily fields, uncluttered views of the pacific coast, and the rugged but beautiful backdrop of the forest and hills. In the twenty five years we have lived here we have enjoyed the peace and solitude of our home, as well as the delightful sight of the elk, fox, and other wildlife and felt secure that this area would remain a low density residential pastoral community.

Although we know that change is inevitable we have always believed that growth would develop slowly while under the control of the county and within the environmental protection of the coastal commission. I am therefore in support of the modifications recommended by the coastal commission concerning this project.

Sincerely,

Barbara Neal

Smith River, California 95567



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