

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



W14a

March 28, 2018

To: Coastal Commissioners and Interested Parties

From: Alison Dettmer, Deputy Director
Mark Delaplaine, Manager, Energy, Ocean Resources, and Federal Consistency Division

Subject: **Coastal Commission review of plans submitted by Elk Valley Rancheria, in compliance with Consistency Determination CD-054-05 (Bureau of Indian Affairs), for Elk Valley Rancheria Resort-Casino, near Crescent City, Del County**

I. Background

On September 14, 2005, the Commission conditionally concurred with Consistency Determination CD-054-05, which was submitted by the Bureau of Indian Affairs (BIA). The proposed “action” submitted was both for: (1) placement of the land (a 203.5 acre “Martin Ranch” Parcel, one mile southeast of Crescent City, Del Norte County) into Trust for the Elk Valley Rancheria (Rancheria); and (2) subsequent development of an Elk Valley Rancheria Resort-Casino on that parcel. During the public hearing, the Commission, the BIA, and the Rancheria worked out an agreement for review of future project components; that agreement was memorialized in the condition adopted by the Commission. The following passages from the Commission’s Adopted Findings for its original decision (**Exhibit 14**) outlines the concerns the Commission had identified prior to and during the hearing, and the manner of the resolution:

Prior to the Commission public hearing, the Commission staff identified the following, mostly informational, concerns:

1. The BIA has not included visual simulations or other descriptive analysis reflecting the effect that the very large commercial complex will have on a scenic, rural, predominantly undeveloped public view from Highway 101.
2. The BIA states that vegetative screening and low-intensity lighting will be used, but the BIA has not provided any standards, landscaping plans, or analysis of how effecting vegetative screening will be (including how long it will take for vegetation to mature).

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

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

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

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

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

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

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

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

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

...

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

After the Commission's action in 2005, the Rancheria submitted a letter dated October 18, 2005 (**Exhibit 15**) to the Commission staff, with an attached Tribal Ordinance as discussed above, that included, among other things, a limited waiver of sovereign immunity, a process for Commission review of future activities, a dispute resolution process (which, if needed, could involve non-binding mediation by the BIA).

On January 26, 2018, and based on these agreements and understandings, the Rancheria submitted plans for the Casino, Parking Lot, and related infrastructure and improvements (**Exhibits 2 and 4-13**). As stated in the last indented paragraph above, the staff is bringing this matter back to the Commission (in a manner enabling public comment), prior to agreeing with the plans.

The Rancheria's cover letter is attached as **Exhibit 2**. **Exhibits 5-13** contain the plans, renderings, and other information most relevant to consideration of coastal resource impacts. The submittal accompanying the cover letter included detailed Architectural Plans, Visual Renderings, Lighting Plans, Landscaping Plans, Hydrological Plans and Reports, and Infrastructure and Utility Plans.

On March 8, 2018, the Commission staff requested additional information regarding these plans and submittals (**Exhibit 3**). In this letter the Commission staff requested information to assist in the review of visual, wetlands, habitat, lighting, signage, future project elements (i.e., project components not part of this phase of the proposal), hydrological monitoring, use of native vegetation, and details about the local hearing/workshop the Rancheria held in Crescent City on February 22, 2018. The Rancheria responded to the staff's information requests, in a letter dated March 23, 2018 (**Exhibit 4**). The Rancheria also noted that no coastal resource concerns were raised during the local hearing/workshop it conducted.

The following discussion summarizes the statements and commitments included in the Rancheria's response letter:

- 1) The Rancheria remains committed to the hydrological marsh monitoring of the Crescent City Marsh which is being conducted in cooperation with the U.S. Fish and Wildlife Service. Its agreements with the Fish and Wildlife include a "reopener" clause (which could lead to the need for remedial action), in the event any future monitoring shows the Marsh's hydrology is being affected in a manner not previously anticipated.
- 2) Because the two wetland areas crossed by the access road off Humboldt Rd. are outside the coastal zone, the Rancheria does not intend to perform a Coastal Act-defined wetland delineation (i.e., to use Coastal Act wetland criteria, as opposed to Army Corps, criteria, which requires the presence of all 3 wetland factors to define wetlands). Nevertheless, the Rancheria commits to using bottomless U-shaped culverts at the two wetland; the Rancheria states:

The Tribe believes that the use of a bottomless culvert strikes the appropriate balance between using a full pipe culvert and bridging the watercourses. That balance includes potential for avoidance or minimization of fill as well as the economic feasibility of the proposed design alternatives. Further, the proposed action is consistent with the proposed activity that was publicly disclosed in 2005 and determined consistent with the Coastal Act by the Coastal Commission.

- 3) A wetland mitigation plan is attached, and “The proposed action is consistent with the proposed activity that was publicly disclosed in 2005 and determined consistent with the Coastal Act by the Coastal Commission.”
- 4) Concerning night lighting (depicted on **Exhibit 9**): “The Tribe intends to utilize downward case, low-intensity lighting in outdoor lights. Regarding night time lighting visible from windows, it would be no brighter than residential lighting visible in the surrounding community. Further lighting details are described in the response letter **Exhibit 4**, pp. 5-7). This description includes:
- 5) To relieve any concerns the Coastal Commission might have regarding the overall lighting design, the intent is to design the lighting such that the project will not create an overall glow in the sky but will be tastefully lighted to enhance the overall guest experience and to limit any negative impacts on the surrounding area.
- 6) The Rancheria commits to the staff’s request for native stock plants being used whenever feasible for landscaping.
- 7) The Rancheria’s plans, which include solar panels on one of the roofs, is a “placeholder” (i.e., not currently proposed). If and when solar panels “become a reality, the Tribe will review potential placement and glare issues.”
- 8) The Rancheria reiterates its commitments to coordinating further with the Commission concerning future project components (such as the hotel, and signage).

The Commission staff believes that with the information and responses provided by the Rancheria: (1) the project’s visual, wetland, habitat, hydrological, public services, and other impacts would be minimized to the extent feasible and have not changed in a manner inconsistent with the Commission’s previously adopted findings; (2) the project remains consistent with the applicable Coastal Act policies; (3) no supplemental consistency determination is necessary at this time; and (4) the Rancheria remains committed to monitoring (and if necessary, remediation) and other measures designed to assure the hydrological integrity of the Crescent City marsh; and (5) the Rancheria remains committed to providing similar review opportunities for project components not yet designed. As noted above, the Commission staff committed at the time of the Commission’s original action to bring this matter back to the Commission in a public hearing, before finalizing any responses to the Rancheria.

II. Procedures

When the Commission reviews federal consistency determinations, the applicable procedure for reviewing subsequent activities is that contained in 15 CFR Section 930.45, which provides that:

§ 930.45 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the management program.

(b) The State agency may request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a Federal agency activity, including those activities where the State agency's concurrence was presumed, which was:

(1) Previously determined to be consistent to the maximum extent practicable with the management program, but which the State agency later maintains is being conducted or is having an effect on any coastal use or resource substantially different than originally described and, as a result, is no longer consistent to the maximum extent practicable with the enforceable policies of the management program; ...

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation or OCRM mediation services provided for in subpart G of this part.

Based on the agreement between the Commission and the Rancheria discussed above, the question of whether the activity “remains consistent with the CCMP” or “is no longer consistent with the CCMP” is more properly viewed as a matter between the Commission and the Rancheria, which have agreed to coordinate and work together in good faith to attempt to resolve any mutual differences that might arise concerning the continuing consistency of the project with the resource protection policies of the Coastal Act.

If after the public hearing commissioners raise any concerns regarding whether the proposed project remains consistent with the resource protection policies of the Coastal Act, Commission staff will coordinate with the Rancheria to attempt to resolve those concerns. If Commission staff and the Rancheria are unable to resolve those concerns, staff will schedule another hearing before the Commission.

III. Related Commission Action

In a related matter, on May 16, 2014, the Commission conditionally approved and concurred a combined coastal development permit (on appeal from the County's action) and consistency certification (A1-DNC-012-021/CC-0001-14) submitted by the Elk Valley Rancheria for improvements to Humboldt Rd., which traverses the western boundary of the Martin Ranch parcel.

EXHIBITS

- Exhibit 1 – Location Map
- Exhibit 2 – Elk Valley Rancheria Letter/Submittal of Plans and Specifications
- Exhibit 3 – CCC Staff Request for Additional Information
- Exhibit 4 – Elk Valley Rancheria Response
- Exhibit 5 – Project Description
- Exhibit 6 – Visual Renderings – Views from Highway 101 and Humboldt Rd.
- Exhibit 7 – Visual Renderings - Exterior
- Exhibit 8 – Visual Renderings - Interior
- Exhibit 9 – Visual Renderings – Parking Lot and Other Night Lighting
- Exhibit 10 – Elevation Plans
- Exhibit 11 – Room Layout
- Exhibit 12 – Wetlands/Sensitive Habitats
- Exhibit 13 – Drainage Plans
- Exhibit 14 – Original Commission Findings (with original Exhibits 1-12)
- Exhibit 15 – Tribal Ordinances Adopted After the Commission's Conditional Concurrence