

Attorneys for Petitioner
IONE BAND OF MIWOK INDIANS

IONE BAND OF MIWOK INDIANS,

v.

Respondent.

PETITION FOR REVIEW

I. Introduction

The Ione Band of Miwok Indians, a federally-recognized Indian tribe ("Tribe"), hereby petitions through its counsel for review of the issuance of NPDES Permit No. CA 004965 (the "Permit") pursuant to 40 C.F.R. § 124.19. The Tribe requests that the Environmental Appeals Board ("EAB") review the Environmental Protection Agency's ("EPA") permit decision because it is based on findings of law and fact that are clearly erroneous, and because the decision involves an exercise of discretion and important policy considerations which the EAB should review. *See* 40 C.F.R. § 124.19(a). The Tribe, through its counsel, raised the issues raised herein during the public comment period, as demonstrated below.

II. The Tribe's Participation, Through Its Counsel, In The Public Comment And National Historic Preservation Act Section 106 Consultation Processes

The Tribe's participation in the consultation process for the permit conducted pursuant to the Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and the regulations in 36 C.F.R. Part 800 is discussed in part in the Fact Sheet for National Pollutant Discharge Elimination System (NPDES) Permit No. CA 004965 (hereinafter the "Fact Sheet"), at pp. 17-20, *available at* <http://www.epa.gov/region9/water/npdes/pdf/ca/tribal/BuenvaVistaFactSheetFnl-6-22-2010.pdf>.

In addition, counsel for the Tribe participated on the Tribe's behalf in a March 12, 2009 Section 106 consultation meeting held at the California State Historic Preservation Officer's ("SHPO") office in Sacramento, California. *See* Declaration of William Wood in Support of Petition for Review filed herewith, at ¶ 2 (hereinafter "Wood Dec."). Counsel for the Tribe participated in the March 25, 2009 site visit discussed at pages 39-

40 of the Buena Vista Rancheria NPDES Permit CA0049675 Final Response To Comments Document (hereinafter "Response to Comments"), *available at* <http://www.epa.gov/region9/water/npdes/pdf/ca/tribal/BuenaVistaCommResponseDocJune2010.pdf>. *See* Wood Dec. ¶ 3. Counsel for the Tribe also participated in the June 30, 2009 consultation meeting held at the SHPO's office and discussed at page 39 of the Response to Comments, and submitted comments to the EPA – on the Tribe's behalf – on the draft Historic Properties Treatment Plan on June 29, 2009. *Id.* ¶ 4, Exh. 1.

Following the June 30, 2009 consultation meeting, counsel for the Tribe submitted comments to the EPA regarding the criteria for monitors for construction of the proposed Buena Vista Rancheria casino project on July 24, 2009. *Id.* ¶ 5, Exh. 2. On October 16, 2009, counsel for the Tribe submitted comments to the EPA on the draft NPDES permit, the draft Historic Properties Treatment Plan, and the draft Memorandum of Agreement regarding the project. *Id.* ¶ 6, Exh. 3. These comments and the other comments submitted by counsel for the Tribe are part of the administrative record. *Cf.* 40 C.F.R. §§ 124.18 and 124.17(b); *see also* Response to Comments at p. 3 (noting that the Tribe's comments on the draft permit, draft Historic Properties Treatment Plan, and draft Memorandum of Agreement were submitted by "William Wood, Holland & Knight"); Wood Dec. Exh. 4.

On January 9, 2010, counsel for the Tribe sent a letter to the Advisory Council on Historic Preservation ("ACHP"), on which John Tinger, United States Environmental Protection Agency, Region IX, NPDES Permits Branch, was copied, requesting that the ACHP become involved in the Section 106 consultation process for the proposed Buena Vista Rancheria casino project. *See* Wood Dec. ¶ 7, Exh. 5. On April 20, 2010, the

ACHP sent a response letter to counsel for the Tribe. *See* Wood Dec. ¶ 7, Exh. 6. This correspondence between counsel for the Tribe and the ACHP is discussed on page 51 of the Response to Comments.

Despite counsel for the Tribe's above-discussed participation in the Section 106 consultation and public comment processes for the issuance of the Permit, and even though counsel for the Tribe requested notice of the final permit decision, counsel for the Tribe did not receive notice of the final Permit decision until August 6, 2010. *See* Wood Dec. ¶¶ 8-9, Exh. 7. On information and belief, counsel for the Tribe was inadvertently omitted from the distribution list for notice of the issuance of the Permit. *See id.* ¶ 9. For these reasons, the Tribe respectfully requests that the EAB accept the Tribe's petition although it is filed outside of the 30-day period set forth in 40 C.F.R. § 124.19(a).

III. The EPA Erred In Concluding That Entire Project Site Is Not Part Of A Single Traditional Tribal Cultural Property That Is Eligible For Listing On The National Register Of Historic Places, And In Determining The Adverse Effects Of The Proposed Project

Although the EPA concluded that "the entire area in which the[] three [identified historic roundhouses at the Buena Vista Rancheria] are situated is ... a Native American pre-European archaeological deposit[,]" and that "all of these resources are considered loci or features of a single large site[,]" *see* Historic Properties Treatment Plan Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project (hereinafter "HPTP") at p. 10,¹ the EPA found that only two areas of the site are eligible for listing on the National Register of Historic Places. *See id.* at pp. 8-9; Response to Comments at p. 42.

¹ The Historic Properties Treatment Plan is attached as Exhibit 8 to the Declaration of William Wood filed herewith.

In its comments on the draft permit, HPTP, and MOA, the Tribe stated its position that

the entire area of the Buena Vista Rancheria is included within a larger, single site that is eligible for listing on the National Register ... as a Traditional Tribal Cultural Property and under the criteria in 36 C.F.R. Part 800 This site extends outside the Rancheria's boundaries to include the Buena Vista Peaks and a spring adjacent to the northeast end of the Rancheria which is affiliated with the Village of Upüsüni.

Wood Dec., Exh. 3, at p. 1. This comment is noted on page 41 of the Response to Comments (comment 18c(i)). *See also* Response to Comments p. 37 (comment 18a(iii)) ("The sites affected from the casino represent a 'single archaeological site with several specific sites located within the larger site and are eligible under multiple criteria'").

In response, the EPA stated that is "respectfully disagrees with these comments and believes ... that it properly identified and took into consideration the importance and significance of the site" Response to Comments p. 37. The EPA further stated:

EPA determined and the SHPO concurred that ... the proposed construction area[] does not have any intact or potentially eligible cultural resources and confirmed that it was for this reason that this area was not included within the recorded site areas for either the Buena Vista Peaks or the Upüsüni Village. Accordingly, while EPA agrees that much of the reservation land forms a traditional cultural property, there are no physical or direct effects from the undertaking on historic properties in the proposed construction area since there are no intact or potentially eligible cultural resources in that area. Additionally, EPA, as part of the assessment of adverse effects process, determined that the proposed project would not substantially impair the use of either property for traditional cultural practices based on the following: (1) the proposed project does not, in itself, restrict access to either of the historic properties; (2) the proposed project would not physically damage either historic property; (3) the proposed project will not alter existing access routes to the Peaks; and (4) the project will not block visual connection between the two properties.

Response to Comments p. 42; *see also id.* p. 38.

Similarly, the HPTP states that

EPA in consultation with SHPO has determined that site Ca-Ama-411/H and the Buena Vista Peaks are both eligible for listing on the [National Register], and that these properties constitute closely associated traditional cultural properties, and that both would be adversely effected [sic] by construction and operation of the Buena Vista Gaming and Entertainment Facility.... The presence of the ... facility will cause an impact to the contributing elements of *the traditional cultural property* (a visual impact between Ca-Ama-411/H and the Buena Vista Peaks affecting the integrity of the setting, design, feeling and association) and this effect cannot be fully mitigated. No direct impacts to archaeological deposits have been identified or are anticipated.

HPTP at p. 13 (emphasis added). This statement in the HPTP, however, undermines the EPA's claim that the area of the Rancheria where the facility is proposed to be built is not part of a single property that in its entirety is eligible for listing on the National Register.

Moreover, even under its analysis of the site as consisting of three properties of which only two are eligible for listing on the National Register, the EPA is incorrect in finding that the proposed project would not restrict access to either of the two properties it deemed eligible for listing, that the project would not alter existing access routes to the Buena Vista Peaks, and that the project would not block the visual connection between the Upüsüni Village area (CA-Ama-411/H) and the Peaks. *See* Response to Comments pp. 38, 42. *See also* HPTP p. 14 ("[T]he project will not change access to the Buena Vista Peaks or intrude upon the route of travel between the Cemetery and the Peaks.").

Indeed, these findings are contradicted by statements the EPA makes elsewhere in the administrative record. On page 19 of the Fact Sheet, for example, the EPA states that it "has determined that the undertaking may result in visual intrusions ... that may affect the character and use of historic and cultural properties." And although the EPA claims that the proposed facility would not restrict access to the Buena Vista Peaks and would not alter existing access routes to the Peaks, it would block access to the Peaks via the

historical aboriginal path of access from the North, from the area that is identified as CA-Ama-411/H.

In its comments to the EPA, the Tribe repeatedly expressed its concerns about the adequacy of the EPA's efforts to identify and evaluate the site and stated its position that the entire Buena Vista site is eligible for listing on the National Register. Under the Section 106 implementing regulations, 36 C.F.R. § 800.4(c)(1), agencies are to give particular acknowledgment to the special expertise of Indian tribes in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them. *See* Wood Dec., Exh. 5 p. 5. The EPA failed to do so here, and as a result erred in concluding that only the areas encompassing the Buena Vista Peaks and CA-Ama-411/H are eligible for listing on the National Register – and that the area in the central portion of the Rancheria where the development is proposed is not. The EPA also erred in determining the adverse effects of the proposed project on the Buena Vista site.

IV. The EPA Failed To Conduct And/Or Require Proper Archaeological Testing Of The Site, Particularly In The Area Where The Facility Is Proposed

As noted in the Response to Comments, "EPA determined ... that the area located between the ... Peaks and the Upüsüni Village, where the Tribe proposes to construct its project, does not have any intact or potentially eligible cultural resources and confirmed that this central portion of the APE is not included within the recorded site area for either the Buena Vista Peaks or the Upüsüni Village." Response to Comments p. 38; *see also id.* p. 42. The EPA also found that "the proposed project would not physically damage either [the Peaks or CA-Ama-411/H]." *Id.* at pp. 38, 42. *See also* HPTP p. 13 ("No direct impacts to archaeological deposits have been identified or are anticipated.").

But it is possible that the proposed facility would – and it is almost certain that it will – physically damage the portion of the historic property that is between the Peaks and CA-Ama-411/H where the casino is proposed to be built. Although the EPA claims that no direct impacts to archaeological deposits have been identified or are anticipated, it is also evident that the EPA has not conducted the appropriate archaeological studies in the area where the casino structure is proposed. *See* HPTP p. 16 ("The Tribe *shall* retain the services of a professional qualified archaeological firm to conduct a geographical study within the footprint area of the proposed project.") (emphasis added); *id.* p. 17 ("The presence or absence of archaeological materials *will be determined*") (emphasis added); *id.* p. 20 ("[I]t is ... possible that previously unidentified cultural resources could be discovered during the project construction process.").² Without conducting these studies, it is impossible to conclude – as the EPA has attempted to do – that there will be no direct impacts to archaeological deposits or cultural resources in the middle portion of the Buena Vista site where the casino is proposed. The Tribe raised this issue in its comments on the draft permit, draft HPTP, and draft MOA. *See* Wood Dec., Exh. 3 p. 4. *Cf.* Response to Comments p. 48 (quoting Tribe's comments). Thus it is impossible

In addition, the EPA admits that "no archaeological testing has been conducted to define the eastern boundary of the [Buena Vista] site[,]" HPTP p. 10, and thus the EPA cannot properly claim that it has evaluated the full extent of the site. *See id.* ("The village site may extend to the east, outside of the Buena Vista Rancheria") *Cf.* Wood Dec.,

² Although the EPA claims that "intensive archaeological resource field investigations ... have already been performed" in the proposed construction and project area, *see* HPTP p. 20, the Tribe disputes this assertion.

Exh. 3 p. 1 ("This site extends outside the Rancheria's boundaries to include ... a spring adjacent to the northeast end of the Rancheria").

V. The EPA Failed To Properly And Fully Consider Off-Site Impacts And Downstream Impacts

As noted in the Tribe's comments on the draft permit, draft HPTP, and draft MOA, the EPA failed to properly examine the proposed project's potential impacts to cultural sites outside the Rancheria, including impacts to cultural sites due to the widening of roads to accommodate traffic flows for the casino. *See* Wood Dec., Exh. 3 p. 4; *see also* Response to Comments p. 43 (comment 18d) (quoting Tribe's comments). The EPA's response is simply that "EPA determined ... that there are no historic properties that would be impacted by potential road widening or by discharges from the wastewater treatment facility." Response to Comments pp. 43-44.

VI. The EPA Erred In Finding That The Proposed Project Would Not Physically Damage The Area Identified As CA-Ama-411/H

As noted above, the EPA concluded that the proposed project, including its construction, would not physically damage the area identified as CA-Ama-411/H. *See* Response to Comments pp. 38, 42. Presumably, this conclusion is based in part on the condition in the HPTP that "construction personnel, vehicles and equipment cannot enter the boundaries of CA-Ama-411/H." HPTP p. 16. *See also id.* ("[N]o construction personnel, vehicles or equipment are allowed within the restricted area."). In its comments on the draft permit, draft HPTP, and draft MOA, the Tribe questioned whether, given the small size and narrow shape of the Rancheria, construction equipment and personnel – and the impacts therefrom – could indeed be excluded from the CA-Ama-411/H area. *See* Wood Dec., Exh. 3 p. 2. *Cf.* Response to Comments p. 44

(comment 18e(ii)) (quoting Tribe's comments). The EPA did not respond to this comment or address this issue in its Response to Comments.

VII. Conclusion

For all of the reasons set forth above, the Tribe respectfully requests that the EAB grant its petition for review of the issuance of NPDES Permit No. CA 004965.

Dated: August 13, 2010

Respectfully submitted,

s/ William Wood
William Wood (Cal. Bar # 248327)
Attorneys for Petitioner
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Los Angeles, California 90071-2040
Telephone (213) 896-2400
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I, William Wood, declare as follows:

1. I am over the age of 18 and not a party to this action. I am counsel for the Ione Band of Miwok Indians ("Tribe") in this action. I have personal knowledge of the facts set forth herein unless otherwise stated and can and will competently testify thereto if called upon to do so. This Declaration is made in support of the Tribe's Petition for Review of the issuance of NPDES Permit No. CA 004965 (the "Permit").

2. On March 12, 2009, I participated on behalf of the Tribe in a Section 106 consultation meeting for the Permit held at the California State Historic Preservation Officer's ("SHPO") office in Sacramento, California.

3. On March 25, 2009, I participated on behalf of the Tribe in a site visit to the Buena Vista Rancheria conducted as part of the Section 106 consultation process for the Permit.

4. On June 30, 2009, I participated on behalf of the Tribe in a consultation meeting held at the SHPO's office in Sacramento, California. In preparation for this meeting, I submitted comments on behalf of the Tribe on the draft Historic Properties Treatment Plan Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project. A copy of the e-mail whereby I submitted these comments to John Tinger, United States Environmental Protection Agency, Region IX, NPDES Permits Branch, is attached hereto as Exhibit 1.

5. On July 24, 2009, I submitted comments on behalf of the Tribe to John Tinger regarding the criteria for monitors for construction of the proposed Buena Vista Rancheria casino project. A copy of the e-mail whereby I submitted these comments to Mr. Tinger is attached hereto as Exhibit 2.

6. On October 16, 2009, I submitted comments on behalf of the Tribe to John Tinger on the draft NPDES permit, the draft Historic Properties Treatment Plan, and the draft Memorandum of Agreement for the proposed Buena Vista Rancheria casino project. A copy of the e-mail whereby I submitted these comments to John Tinger and the comments themselves are attached hereto as Exhibit 3. A copy of the e-mail from John Tinger to me acknowledging receipt of these comments and stating that "[y]our comments will be entered into the record and will be considered in the final decision on the permit and MOA[]" is attached hereto as Exhibit 4.

7. On January 9, 2009, I submitted a letter on behalf of the Tribe to the Advisory Council on Historic Preservation ("ACHP"), requesting that the ACHP become involved in the Section 106 consultation process for the proposed Buena Vista Rancheria casino project. A copy of this letter, on which John Tinger was copied, is attached hereto as Exhibit 5. A copy of the letter the ACHP sent me in response, dated April 20, 2010, is attached hereto as Exhibit 6.

8. On August 6, 2010, I first received notice that the NPDES Permit for the Buena Vista Casino Wastewater Treatment Plant. Attached hereto as Exhibit 7 is a copy of the e-mail from John Tinger to me forwarding a copy of the electronic notification for the Permit. I am not included among the original recipients of this electronic notification.

9. On August 11, 2010, I spoke with John Tinger, who informed me that he had intended to include me on the electronic notification for the Permit. During this conversation, Mr. Tinger acknowledged that he and I had previously discussed my wish to receive notice of the final permit decision for the Buena Vista Casino Wastewater Treatment Plant.

10. Attached hereto as Exhibit 8 is a copy of the Historic Properties Treatment Plan Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project ("HPTP"). I received the HPTP from John Tinger on August 11, 2010 via e-mail, a copy of which is attached hereto as Exhibit 9.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this 13th day of August, 2010, at Los Angeles, California.

/s William Wood
William Wood, Declarant

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EXHIBIT 1

Ione Band of Miwok Indians v. United States Environmental Protection Agency
NPDES Permit No. CA 0049675 – Buena Vista Casino Wastewater Treatment Plant

Exhibit 1 to Declaration of William Wood in Support of Petition for Review

Wood, William (LAX - X52511)

From: Wood, William (LAX - X52511)
Sent: Monday, June 29, 2009 4:01 PM
To: 'Tinger.John@epamail.epa.gov'
Cc: 'gdenton@surewest.net'; 'bebluesky@softcom.net'; 'Pam Baumgartner'; Wood, William (LAX - X52511)
Subject: lone Band of Miwok Indians Initial Comments on Buena Vista Draft HPTP
Attachments: lone - Ltr to John Tinger (EPA) re Buena Vista Site.PDF

Dear Mr. Tinger,

Attached are the lone Band of Miwok Indians' initial comments on the draft Historic Properties Treatment Plan Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project. Please contact me with any questions at this e-mail or the address or telephone number below.

Respectfully,
Bill

William Wood | Holland & Knight LLP
633 West 5th Street, 21st Floor | Los Angeles, CA 90071-2040
Direct 213 896 2511 | Main 213 896 2400 | Fax 213 896 2450


 Please consider the biosphere before printing this email.

EXHIBIT 2

Ione Band of Miwok Indians v. United States Environmental Protection Agency
NPDES Permit No. CA 0049675 – Buena Vista Casino Wastewater Treatment Plant

Exhibit 2 to Declaration of William Wood in Support of Petition for Review

Wood, William (LAX - X52511)

From: Wood, William (LAX - X52511)
Sent: Friday, July 24, 2009 3:44 PM
To: 'Tinger.John@epamail.epa.gov'
Cc: 'asami.joann@epa.gov'; 'Matt Franklin'; 'Pam Baumgartner'; 'gdenton@surewest.net'; Wood, William (LAX - X52511)
Subject: lone Band of Miwok Indians Comments re Monitors for Buena Vista Rancheria Casino Project
Attachments: lone - Ltr to John Tinger (EPA) re Monitors re HPTP re Buena Vista Site.PDF

Dear Mr. Tinger,

Attached is a letter with the lone Band of Miwok Indians' comments regarding monitors for the Buena Vista Rancheria casino project.

Please feel free to contact me with any questions or concerns.

Respectfully,
Bill

William Wood | Holland & Knight LLP
633 West 5th Street, 21st Floor | Los Angeles, CA 90071-2040
Direct 213 896 2511 | Main 213 896 2400 | Fax 213 896 2450


 Please consider the biosphere before printing this email.

EXHIBIT 3

Ione Band of Miwok Indians v. United States Environmental Protection Agency
NPDES Permit No. CA 0049675 – Buena Vista Casino Wastewater Treatment Plant

Exhibit 3 to Declaration of William Wood in Support of Petition for Review

Wood, William (LAX - X52511)

From: Wood, William (LAX - X52511)
Sent: Thursday, October 15, 2009 7:35 PM
To: 'Tinger.John@epamail.epa.gov'
Cc: Matt@ionemiwok.org; gdenton@surewest.net; 'Pam Baumgartner'; Wood, William (LAX - X52511)
Subject: lone Band of Miwok Indians' Comments on Draft NPDES Permit, Draft HPTP, and Draft MOA for Proposed Buena Vista Casino
Attachments: lone Band of Miwok Indians Ltr to John Tinger EPA 10-15-09.pdf

Dear Mr. Tinger,

Attached is a letter with the lone Band of Miwok Indians' Comments on the Draft National Pollutant Discharge Elimination System Permit, Draft Historic Properties Treatment Plan, and Draft Memorandum of Agreement for the Proposed Buena Vista Casino on the Buena Vista Rancheria.

As noted in the attached letter, the Tribe will not be signing on to the MOA as a concurring party.

Please do not hesitate to contact me at (213) 896-2511 with any questions.

William Wood | Holland & Knight LLP
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Direct 213 896 2511 | Main 213 896 2400 | Fax 213 896 2450

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William Wood
(213) 896-2511
william.wood@hklaw.com

October 15, 2009

VIA E-MAIL AND FIRST CLASS MAIL

John Tinger
United States Environmental Protection Agency
Region IX
NPDES Permits Branch
75 Hawthorne Street
San Francisco, CA 94105

Re: Comments on Draft NPDES Permit and Draft MOA and Draft HPTP for the
Proposed Buena Vista Casino

Dear Mr. Tinger:

I write on behalf of the Ione Band of Miwok Indians ("Tribe") to provide these comments on the draft National Pollutant Discharge Elimination System (NPDES) permit ("Draft NPDES Permit") and draft Historic Properties Treatment Plan ("Draft HPTP") and draft Memorandum of Agreement ("Draft MOA") for the proposed Buena Vista Casino on the Buena Vista Rancheria.

The Tribe previously commented on the Draft HPTP by my letter to you dated June 29, 2009 (the "June 29 Letter"), and the comments herein reflect many of comments provided in the June 29 Letter, as the Tribe has not seen a revised Draft HPTP or Draft MOA subsequent to the June 30 meeting at the California Office of Historic Preservation in Sacramento, California. (The Tribe's comments are therefore directed at, and reference, the Draft HPTP provided to the Tribe on June 4, 2009.)

As noted in the June 29 Letter, the Tribe's position is that the entire area of the Buena Vista Rancheria is included within a larger, single site that is eligible for listing on the National Register of Historic Places as a Traditional Tribal Cultural Property and under the criteria in 36 C.F.R. Part 800 implementing Section 106 of the National Historic Preservation Act ("NHPA"). This site extends outside the Rancheria's boundaries to include the Buena Vista Peaks and a spring adjacent to the northeast end of the Rancheria which is affiliated with the Village of Upüsüni.

While the Tribe appreciates that the Upüsüni Village designation has been expanded to include the Buena Vista Rancheria Cemetery and the third roundhouse and Oliver residence as

loci of CA-Ama-411/H, *see* Draft HPTP at pp.10-11, the Tribe's position remains that the entire site is eligible for listing on the National Register. The Tribe therefore respectfully disagrees with the conclusion in the Draft HPTP, at pages 9-10, that only the areas encompassing the Buena Vista Peaks and CA-Ama-411/H are eligible for listing on the National Register – and that the area in the central portion of the Rancheria where the development is proposed is not. Given that a geological study "within the footprint of the proposed project" (presumably the middle area of the Buena Vista Rancheria) was still being contemplated as recently as June 2009, *see* Draft HPTP at p.17, the Tribe has concerns about the adequacy of the identification efforts which led to the conclusion that the middle part of the Rancheria is not eligible for inclusion on the National Register.

The Tribe's position is also that no casino should be built on the site, and that no water discharge or wetlands fill permit should be issued for a casino there, because building the proposed casino, parking garage, and infrastructure would cause irreparable damage to the integrity of the site. The proposed project would not only have negative auditory and visual impacts on the site; it would cause a physical separation between the Buena Vista Peaks and the other areas of the site. If the proposed casino and related infrastructure is built, there is no appropriate way to mitigate its impacts on the integrity of the site. The proposed project would not just "diminish" or "degrade" the integrity of the site or cause a "departure from the historic layout of Upüsüni and its visual connection with the peaks [,]" as the Draft HPTP suggests (at pages 12 and 13). It would destroy the site's integrity. The Tribe also doubts whether, given the small size and narrow shape of the Rancheria, impacts from construction could be limited to the area designated as CA-Ama-411/H, despite the Draft HPTP's claim that "[p]roject construction personnel, vehicles and equipment shall be barred from entering within the known boundaries of CA-Ama-411/H" Draft HPTP at p.16.

The Tribe continues to have questions about the determination of the areas encompassed by the direct and indirect Area(s) of Potential Impact ("APE"), and about the definition of "undertaking" found in the Draft HPTP. The draft Memorandum of Agreement circulated at the March 12, 2009 meeting at the SHPO's office states that the APE has been divided into a Direct APE and Indirect APE and references an Attachment 1 depicting them, but no attachment was, to my knowledge, presented. (Nor do I recall seeing or being provided with any such depiction.) It is therefore difficult for the Tribe to evaluate fully the statement on page 12 of the Draft HPTP that the "the proposed undertaking will adversely affect CA-Ama-411/H (Upüsüni Village) and the Buena Vista Peaks located within the indirect APE, due to the introduction of visual, atmospheric or audible elements that may diminish the integrity of the properties significant historic features." It also makes it difficult to evaluate the claim that "[n]o direct impacts to these or other historic properties would occur [as a result of the project]." HPTP at p.13.

The Proposed Fact Sheet, National Pollutant Discharge Elimination System (NPDES) Permit, No. CA 0049675 accompanying the August 5, 2009 Notice of Proposed Action (the "Proposed Fact Sheet") notes that the EPA "identified the geographic areas that the undertaking may directly or indirectly cause alterations in the character or use of historic properties to determine the area of potential effect (APE). EPA's determination of the scope of the APE is

based on an understanding of the proposed project and an understanding of the historic properties of traditional religious and cultural importance." Proposed Fact Sheet at p.16. However, the Proposed Fact Sheet, like the Draft MOA and Draft HPTP, does not specifically identify the APE or explain how or why (i.e., on what basis and through what process) the APE was divided into a Direct APE and Indirect APE.

The Proposed Fact Sheet also notes that "[i]n addition to the direct APE, EPA determined that the undertaking may indirectly cause alterations in the character or use of historic properties (indirect APE) based on the traditional cultural properties that have been documented through identification efforts. Specifically, EPA has determined that the undertaking may result in visual intrusions and may introduce auditory elements that may affect the character or use of historic and cultural properties. EPA has determined that the geographic areas where the undertaking may indirectly affect historic properties." *Id.* at p.17. Presumably, the Draft HPTP and Draft MOA will attempt to mitigate these "alterations" and/or "intrusions." The Tribe, however, has concerns regarding the adequacy of mitigation and the discussion of mitigation in the Draft HPTP (noted in this letter, the June 29 Letter, and elsewhere), as do others.

At the June 30 meeting, for example, representatives from the California Office of Historic Preservation ("SHPO") raised concerns about the adequacy of mitigation for the disruption of access between and among the various loci (or areas) of the site. They also noted that any supposed boundary lines between the different areas of the site are invisible and that impacts to the site must be analyzed on the whole. And they also called for a more thorough discussion in the Draft HPTP of the site as a Traditional Tribal Cultural Property, and a discussion of the integrity of the site (including its setting, association, and location) and how the integrity would be impacted by the proposed project. These comments from the SHPO are similar to some of the concerns expressed by the Tribe in the June 29 Letter and elsewhere, but as the Tribe has not seen a Draft HPTP more recent than the one it received on June 4, it is impossible for the Tribe to determine whether and to what extent these concerns have been or are being addressed.

Also as noted in the June 29 Letter, the Tribe has concerns about the process through which a NHPA Section 106 consultation that began as part of an application for a water discharge permit and was supposed to look at potential downstream impacts on historical and cultural resources (see your letter of December 18, 2008 to the SHPO on which the Tribe was copied) is now evaluating "visual, atmospheric, and audible" impacts from the entire proposed casino project. Whereas the April 10, 2009 letter from the SHPO to you dealt with an "undertaking" that consists of the issuance of a National Pollutant Discharge Elimination System ("NPDES") permit for a wastewater treatment plan, the "undertaking" examined in the Draft HPTP is defined (at page 1) as the "the Buena Vista Rancheria of Me-Wuk Indians Gaming and Entertainment Facility Project" and "entails the construction of a gaming facility, a multi-level parking structure, a wastewater treatment facility, signs and lighting, and other features." Draft HPTP at p.12. The Proposed Fact Sheet notes that the EPA has "determined that the proposed project is an 'undertaking,' as defined in 36 C.F.R. § 80.16(y)[,]" but it does not define the "undertaking."

If a Section 106 consultation is to include an examination of all of the impacts caused by the proposed casino and related infrastructure on the Buena Vista Rancheria, it should at the very least examine the proposed project's potential impacts to cultural sites outside of the Rancheria (in addition to the Buena Vista peaks). As stated in previous correspondence, the Tribe is concerned that construction of the proposed project could result in the widening of roads that would impact cultural sites at Jackson Valley Road and Martell Land and at Highway 88 and Buena Vista Road. See E-mail from Doug Denton, Chair, Ione Band of Miwok Indians Cultural Committee, to you dated March 8, 2009. The Draft HPTP, at page 12, mentions auditory impacts from increased traffic, but it does not address the potential impact of increased traffic to cultural sites located outside the Rancheria boundaries.

The Tribe has specific concerns about the impacts of the proposed project – and its construction – on the cemetery and cemetery access. Although the proposed project's impacts on the cemetery are not discussed in the description section of the Draft HPTP, cemetery access is addressed in its mitigation section. The Tribe is particularly concerned about this issue since representatives for the Tribe understood the EPA's counsel to say at the March 12, 2009 consultation at the SHPO's office that the EPA was not going to be involved with the project for more than a few months after the issuance of a water discharge permit, and that the agency did not want to be involved with cemetery access issues or ensuring that cemetery access was not impeded. At the June 30 meeting, counsel for the EPA indicated that she did not think (and representatives from the United States Army Corps of Engineers agreed) that any provisions regarding cemetery access should be in the Historic Properties Treatment Plan or Memorandum of Agreement, but the Tribe has not seen a more recent Draft HPTP or Draft MOA and does not know if and how these issues have been or are being addressed.

The Draft HPTP provides on page 14 that "[t]he [Buena Vista] Tribe shall make a good faith effort to provide reasonable access to the cemetery located on the Buena Vista Rancheria for descendants and family of interred ancestors"; that "[t]he [Buena Vista] Tribe shall identify and maintain a driveway that will provide access from Coal Mine Road leading to the Cemetery entrance"; that "[a]ccess to the cemetery will be made available to descendants and family of interred ancestors by contacting the [Buena Vista] Tribe during regular business hours[]"; and that "[e]xcept during the Spring Grave Cleaning, the [Buena Vista] Tribe is solely responsible for the maintenance and upkeep of the entire cemetery." The Draft HPTP also discusses "enhancement" of the cemetery. Draft HPTP at p.15.

And the Draft HPTP claims on page 19 that "[a]lthough no known historic properties would be directly impacted by construction or operation of the project it is possible that previously unknown archaeological deposits, including human remains and funerary objects, could be discovered during ground-disturbing activities." It states twice that "[d]espite the intensive archaeological resource field investigations that have already been performed prior to project construction, it is nonetheless possible that previously unidentified cultural resources could be discovered during the project construction process." HPTP at pp. 20, 22.

As noted, the Tribe understands the EPA's position, as articulated through its counsel at the March 12 SHPO meeting, to be that the agency will not be involved in overseeing the implementation of the proposed Historic Properties Treatment Plan or the proposed Memorandum of Agreement after the NPDES permit is issued. The Tribe's concerns about the impacts to the cemetery and unanticipated discoveries are thus heightened, especially since the Draft HPTP provides at pages 21 and 23, respectively, that the EPA is to be responsible for notifying the SHPO and other interested persons about discoveries of potentially significant finds during construction or of human remains.

By my letter to you dated July 24, 2009, the Tribe provided comments regarding, among other things, the selection and use of monitors for the proposed project should it go forward over the Tribe's objections. The Tribe hopes the suggested criteria for monitors set forth there will be incorporated in the Historic Properties Treatment Plan.

The Tribe also hopes that the EPA will formally invite the Advisory Council on Historic Preservation ("ACHP") to participate in the Section 106 consultation for the proposed project. The SHPO's April 10, 2009 letter suggested that you invite the ACHP to participate in the consultation. While the Proposed Fact Sheet notes, at page 16, that the EPA contacted the ACHP, the Tribe has not seen evidence of the EPA's formally communicating with the ACHP or inviting the ACHP to participate in the ongoing Section 106 consultation. And while, as noted in the Proposed Fact Sheet (at pages 17-18), the EPA requested and received the SHPO's concurrence in the EPA's determination of the APE, the EPA's determination regarding the site's eligibility (or the eligibility of particular areas of the site) for listing on the National Register of Historic Places, and the EPA's determination that the undertaking will adversely affect historic properties, the Tribe notes that the EPA has not issued a formal finding of no adverse effect as required under 36 C.F.R. § 800.5(c) accompanied by the documentation required under 36 C.F.R. § 800.11(e).

Lastly, the Tribe notes that the Proposed Fact Sheet, at page 19, states that the EPA expects that the Tribe will be a concurring party to the Memorandum of Agreement. However, the Tribe will not be signing on as a concurring party to the MOA.

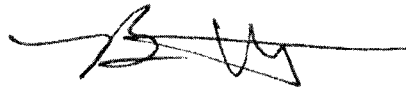
The Tribe thanks you for considering its comments on the Draft NPDES Permit, Draft HPTP, and Draft MOA. As the Tribe has stated previously, it is not opposed to the Buena Vista Rancheria of Me-Wuk Indians' establishing and operating a gaming project. The Tribe is, however, opposed to a casino and related infrastructure being built at the site as proposed.

John Tinger
October 15, 2009
Page 6

Should you have any questions, please do not hesitate to call me at (213) 896-2511 or e-mail me at william.wood@hkaw.com.

Respectfully,

HOLLAND & KNIGHT, LLP

A handwritten signature in black ink, appearing to read 'W. Wood', written over a horizontal line.

William Wood

cc: Matthew Franklin, Chairman
Ione Band of Miwok Indians

8899548_v3

EXHIBIT 4

Ione Band of Miwok Indians v. United States Environmental Protection Agency
NPDES Permit No. CA 0049675 – Buena Vista Casino Wastewater Treatment Plant

Exhibit 4 to Declaration of William Wood in Support of Petition for Review

Wood, William (LAX - X52511)

From: Tinger.John@epamail.epa.gov
Sent: Friday, October 16, 2009 11:00 AM
To: Wood, William (LAX - X52511)
Cc: gdenton@surewest.net; Matt@ionemiwok.org; Pam@ionemiwok.org; Wood, William (LAX - X52511)
Subject: Re: lone Band of Miwok Indians' Comments on Draft NPDES Permit, Draft HPTP, and Draft MOA for Proposed Buena Vista Casino

Thank you, Bill,

Your comments will be entered into the record and will be considered in the final decision on the permit and MOA.

John

John Tinger
U.S. EPA Region IX
NPDES Permits Branch
(415) 972-3518

From: <william.wood@hklaw.com>
To: John Tinger/R9/USEPA/US@EPA
Cc: <Matt@ionemiwok.org>, <gdenton@surewest.net>, <Pam@ionemiwok.org>, <william.wood@hklaw.com>
Date: 10/15/2009 07:36 PM
Subject: lone Band of Miwok Indians' Comments on Draft NPDES Permit, Draft HPTP, and Draft MOA for Proposed Buena Vista Casino

Dear Mr. Tinger,

Attached is a letter with the lone Band of Miwok Indians' Comments on the Draft National Pollutant Discharge Elimination System Permit, Draft Historic Properties Treatment Plan, and Draft Memorandum of Agreement for the Proposed Buena Vista Casino on the Buena Vista Rancheria.

As noted in the attached letter, the Tribe will not be signing on to the MOA as a concurring party.

Please do not hesitate to contact me at (213) 896-2511 with any questions.

William Wood | Holland & Knight LLP
633 West 5th Street, 21st Floor | Los Angeles, CA 90071-2040
Direct 213 896 2511 | Main 213 896 2400 | Fax 213 896 2450

8/13/2010

To ensure compliance with Treasury Regulations (31 CFR Part 10, Sec. 10.35), we inform you that any tax advice contained in this correspondence was not intended or written by us to be used, and cannot be used by you or anyone else, for the purpose of avoiding penalties imposed by the Internal Revenue Code.

NOTE: This e-mail is from a law firm, Holland & Knight LLP ("H&K"), and is intended solely for the use of the individual(s) to whom it is addressed. If you believe you received this e-mail in error, please notify the sender immediately, delete the e-mail from your computer and do not copy or disclose it to anyone else. If you are not an existing client of H&K, do not construe anything in this e-mail to make you a client unless it contains a specific statement to that effect and do not disclose anything to H&K in reply that you expect it to hold in confidence. If you properly received this e-mail as a client, co-counsel or retained expert of H&K, you should maintain its contents in confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.[attachment "Ione Band of Miwok Indians Ltr to John Tinger EPA 10-15-09.pdf" deleted by John Tinger/R9/USEPA/US]

EXHIBIT 5

Ione Band of Miwok Indians v. United States Environmental Protection Agency
NPDES Permit No. CA 0049675 – Buena Vista Casino Wastewater Treatment Plant

Exhibit 5 to Declaration of William Wood in Support of Petition for Review

Holland & Knight

633 West Fifth Street | Los Angeles, CA 90071 | T 213.896.2400 | F 213.896.2450
Holland & Knight LLP | www.hklaw.com

William Wood
(213) 896-2511
william.wood@hklaw.com

January 8, 2010

VIA E-MAIL AND UPS

Mr. Reid Nelson
Director, Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue, NW, Suite 803
Old Post Office Building
Washington, DC 20004

Re: Request to Become Involved in Section 106 Consultation for Draft NPDES
Permit for the Proposed Buena Vista Casino; Request to Obtain a Determination
of Eligibility

Dear Mr. Nelson:

We are counsel to the Ione Band of Miwok Indians ("Tribe") and write on behalf of the Tribe to request that the Advisory Council on Historic Preservation ("ACHP" or "Council") become involved in the National Historic Preservation Act Section 106 consultation process conducted by the Environmental Protection Agency for a National Pollutant Discharge Elimination System permit for the proposed Buena Vista Casino on the Buena Vista Rancheria. The Tribe also asks that the Council request the Environmental Protection Agency ("EPA") obtain a determination of eligibility for the Buena Vista site.

The Tribe attaches great importance to the Buena Vista site, and the Tribe's cultural and historical affiliation with the Buena Vista site is well-documented in anthropological reports, photographs, and historical records. The site, which is the location of a historic Miwok village, includes a tribal cemetery, an Indian ball field, three historic roundhouse areas, springs, a rock shelter, and the Buena Vista Peaks. Most of the site is encompassed by the Buena Vista Rancheria, but the Buena Vista Peaks and a spring affiliated with the village are outside the Rancheria's boundaries.

Oral histories and preliminary archaeological studies indicate that the Buena Vista site may be among the longest continually inhabited places in California, with a human presence and residency dating from more than 9,000 years ago through to the late 1900s and the present. People identified as living at Buena Vista in one of the earliest federal censuses of Indians in the area (prepared in 1905 and 1906) were base-roll members of or descendants of base-roll

members of the Ione Band of Miwok Indians; almost all of the people known to be buried in a cemetery at Buena Vista are base-roll members or relatives of base-roll or present-day members of the Tribe; and Ione Tribal members have continuously visited and used the site. The Tribe can provide you with documentation regarding the history of and the Tribe's association with the site, areas of which are recorded in the California Historic Resources Information System.

Some background regarding the proposed Buena Vista Casino project is helpful. In 1999, the Buena Vista Rancheria of Me-Wuk Indians of California entered into a tribal-state gaming compact with the State of California. Separately, the Buena Vista Rancheria of Me-Wuk Indians of California entered into a management agreement with a gaming developer. Both the tribal-state compact and the management agreement contemplated the establishment and operation of a casino on the Buena Vista Rancheria – i.e., at the Buena Vista site. Both agreements were entered into by Donnamarie Potts, as Spokesperson for the Buena Vista Rancheria of Me-Wuk Indians.

Because the management agreement required approval of the National Indian Gaming Commission ("NIGC"), the NIGC initiated Section 106 consultation in connection with its review of the proposed casino project. As part of this consultation, the NIGC solicited the views of the California State Historic Preservation Officer ("SHPO"). During the course of the consultation, a leadership dispute arose regarding the representation of the Buena Vista Rancheria of Me-Wuk Indians, and the project and the related Section 106 consultation stalled.

In 2004, the leadership dispute was resolved, and an amended tribal-state compact was executed between the State of California and the Buena Vista Rancheria of Me-Wuk Indians. This amended compact was signed by Donnamarie Potts as the Outgoing Chairperson of the Buena Vista Band of Me-Wuk Indians, and by Rhonda L. Morningstar Pope as the Incoming Chairperson of the Buena Vista Band of Me-Wuk Indians. At or around the same time, the proposed casino project was revived. Under the amended compact, a Tribal Environmental Impact Report ("TEIR") was prepared to examine the off-site impacts of the proposed project. However, the TEIR does examine impacts to cultural resources on the Rancheria. Nor did the TEIR process involve consultation under Section 106 of the National Historic Preservation Act.

In December 2005, the EPA noticed a proposed National Pollutant Discharge Elimination System ("NPDES") permit under Section 402 of the Clean Water Act for a wastewater treatment plant associated with the proposed casino project at Buena Vista. As part of the permitting process, the EPA initiated Section 106 consultation in 2007 regarding the impacts that the proposed project would have on historic and cultural resources. An initial consultation meeting was held on May 1, 2007. Representatives from the Tribe participated in this meeting.

On October 2, 2008, Douglas E. Eberhardt, Chief of the NPDES Permits Office for U.S. EPA Region IX, sent a letter to the SHPO seeking the SHPO's input on the EPA's efforts to identify historic properties, determination of the project's area of potential effects ("APE"), and assessment of effects on historic properties. In this October 2, 2008 letter, a copy of which is enclosed as Attachment A, the EPA set forth its determination that no historic properties within

the direct APE of the project construction zone or intersection improvements associated with the project; that one cultural resource (CA-AMA-650) located within the direct APE is not eligible for listing on the National Register of Historic Places; that two cultural resources within the indirect APE, CA-AMA-411/H (Upüsüni Village) and the Buena Vista Peaks, constitute historic properties; and that the project would adversely affect CA-AMA-411/H (Upüsüni Village) and the Buena Vista Peaks.

In late 2008, the EPA evaluated what impact the increased flow from the proposed wastewater treatment plant might have on historic resources located downstream of the proposed plant. On December 18, 2008, Mr. Eberhardt informed the SHPO of the EPA's conclusion that the proposed project did not have the potential to impact historic resources that may be located in the streambed downstream of the proposed wastewater treatment plant. As he had in his October 2, 2008 letter, Mr. Eberhardt again requested the SHPO's input regarding whether the APE for the project had been adequately defined; whether efforts to identify historical and cultural properties were adequate; whether CA-AMA-411/H (Upüsüni Village) and the Buena Vista Peaks constitute historic properties; whether CA-AMA-650 does not constitute a historic property; and whether the undertaking would adversely affect CA-AMA-411/H (Upüsüni Village) and the Buena Vista Peaks. A copy of this December 18, 2008 letter is enclosed as Attachment B.

On April 10, 2009, the SHPO's office wrote to Mr. Eberhardt, commenting that the SHPO concurred that the APE had been properly determined and that the efforts to identify historic properties were adequate. The SHPO also concurred that the two historic properties identified in the indirect APE, the Upüsüni Village (CA-AMA-411/H) and the Buena Vista Peaks, are both eligible for listing on the National Register of Historic Places under criterion A and that the Upüsüni Village is also eligible under criterion D. The SHPO further concurred that CA-AMA-650 is not eligible for listing on the National Register, and concurred that the undertaking would adversely affect CA-AMA-411/H (Upüsüni Village) and the Buena Vista Peaks. In this letter, the SHPO encouraged the EPA to notify the ACHP of the finding of adverse effect, provide the ACHP with appropriate documentation, and invite the Council to participate in the Section 106 consultation. A copy of the April 10, 2009 SHPO letter is enclosed as Attachment C.

In the interim, the EPA as the lead agency (together with the Army Corps of Engineers, which is considering an application for issuance of a permit under Section 404 of the Clean Water Act) held a consultation at the SHPO's office in Sacramento on March 12, 2009 regarding impacts of the undertaking on historic and cultural resources, potential mitigation of these impacts, and a draft Memorandum of Agreement ("MOA") concerning the mitigation of impacts that was circulated by the EPA on January 9, 2009. A copy of this draft MOA is enclosed as Attachment D. On March 25, 2009, a site visit was held at the Buena Vista site so that the EPA, Army Corps, SHPO and others could gain a better understanding of the proposed undertaking's potential impacts. Representatives from the Tribe participated in both the March 12 meeting and the March 25 site visit.

On June 4, 2009, the EPA circulated to the Tribe and other parties a copy of the draft Historic Properties Treatment Plan ("HPTP") for the Buena Vista project, and a meeting was held at the SHPO's office in Sacramento on June 30, 2009 to discuss the draft HPTP. The Tribe submitted comments to the EPA on the draft HPTP in advance of the meeting. Also, on July 24, 2009, the Tribe submitted comments to the EPA regarding the criteria to be used for monitors at the Buena Vista.

The Tribe has not seen a draft of either the MOA or HPTP that is more recent than those circulated by the EPA on January 9, 2009 and June 4, 2009, respectively, but both the draft HPTP and MOA are mentioned in the Notice of Proposed Action for the issuance of the NPDES permit that was released by the EPA on August 5, 2009, enclosed as Attachment E, and in the Proposed Fact Sheet for the proposed permit, enclosed as Attachment F. The Tribe submitted comments on the draft NPDES permit, draft HPTP and draft MOA on October 15, 2009. The comment period for the comments on the draft permit, NOA and HPTP has closed, and the EPA is currently in the process of formulating its final permit decision.

The Tribe hereby requests, for the reasons explained below, that the Advisory Council formally participate in the ongoing Section 106 consultation being conducted by the EPA. *See* 36 C.F.R. § 800.6(a)(1)(ii) ("[A]n Indian tribe ... may at any time independently request the Council to participate in the consultation."). The Tribe hopes that the Council can work with the EPA and Army Corps, the Tribe, and other consulting parties to avoid the adverse effects of the proposed project. The Tribe also asks that the Council request the EPA to obtain a determination of eligibility for the entire Buena Vista site. *See* 36 C.F.R. § 800.4(c)(2). Moreover, the Tribe requests that the Advisory Council encourage the EPA and Army Corps to delay the issuance of any permit or any permit decision for the proposed project until a determination of eligibility has been obtained and until the Advisory Council has had the opportunity to prepare its formal comments to the heads of the EPA and Army Corps (and to consult with the agencies, other consulting parties, and the public) so that these comments can be considered by the agencies in reaching a final decision.

Identification of Historic Properties; Request for Determination of Eligibility

As noted in the Tribe's comments to the EPA, the Tribe's position is that the area of the Buena Vista Rancheria where the project is proposed is included within a larger, single site that is eligible for listing on the National Register of Historic Places as a Traditional Tribal Cultural Property and under the criteria in 36 C.F.R. Part 800 implementing Section 106 of the National Historic Preservation Act ("NHPA"). This site extends outside the Rancheria's boundaries to include the Buena Vista Peaks and a spring adjacent to the northeast end of the Rancheria which is affiliated with the Village of Upüsüni.

The EPA has determined, and the SHPO has concurred, however, that only the areas encompassing the Buena Vista Peaks and CA-AMA-411/H are eligible for listing on the National Register. Although the Upüsüni Village designation has been expanded to include the Buena Vista Rancheria Cemetery and the third roundhouse and Oliver residence as loci of CA-

AMA-411/H in the Draft HPTP (see pp.10-11 thereof),¹ the Tribe's position remains that the entire Buena Vista site is eligible for listing on the National Register. The Tribe therefore respectfully disagrees with the conclusion at pages 9-10 of the Draft HPTP and in the above-mentioned correspondence between the EPA and the SHPO that only the areas encompassing the Buena Vista Peaks and CA-Ama-411/H are eligible for listing on the National Register – and that the area in the central portion of the Rancheria where the development is proposed is not.

As noted above, the California SHPO in April 2009 concurred with the EPA that the Upüsüni Village (CA-AMA-411/H) and the Buena Vista Peaks are both eligible for listing on the National Register of Historic Places, and that CA-AMA-650 is not eligible for listing. The SHPO determined that both CA-AMA-411/H and the Buena Vista Peaks under Criterion A were eligible under and that CA-AMA-411/H is also eligible under Criterion D. In its October 2, 2008 letter, the EPA determined that that CA-AMA-411/H was eligible for listing under Criterion A, Criterion B, and Criterion C.

The Section 106 regulations require agency officials to acknowledge that Indian tribes possess special expertise in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them. *See* 36 C.F.R. § 800.4(c)(1). The Tribe's position is that the entire Buena Vista site is eligible for listing on the National Register as a single Traditional Cultural Property consisting of and linking the Buena Vista peaks, the cemetery, the village site, the Indian ball field, the springs and other areas. It is also the Tribe's position that the entire site is eligible under Criterion A, Criterion B, and Criterion D.

The Tribe has repeatedly expressed to the EPA its position that the entire Buena Vista site is eligible for listing on the National Register, as well as its concerns about the adequacy of the efforts to identify cultural and historical properties affected by the proposed undertaking. These concerns are heightened by the fact that a geological study "within the footprint of the proposed project" (presumably the area of the site where the wastewater treatment plant and casino structure would be built) was still being contemplated as recently as June 2009. *See* Draft HPTP at p.17. As noted on page 9 of its October 2, 2008 letter to the SHPO, the EPA "concluded that the proposed undertaking will not adversely affect historic properties located within the direct APE of the construction zone ... because no such properties have been identified in the direct APE."

Given the Tribe's disagreement with the EPA's (and SHPO's) determination regarding the eligibility of the entire Buena Vista site for listing on the National Register, and the Tribe's concerns regarding the adequacy of the EPA's identification efforts, the Tribe asks that the Advisory Council request the EPA to obtain a determination of eligibility for the Buena Vista site from the Secretary of the Interior pursuant to 36 C.F.R. § 800.4(c)(2) and 36 C.F.R. Part 63. The Tribe also intends to submit an application for the entire Buena Vista site to be listed on the

¹ Unless otherwise noted, all references to the "Draft HPTP" refer to the version of the draft Historic Properties Treatment Plan for the proposed Buena Vista Casino on the Buena Vista Rancheria that was circulated by the EPA on June 4, 2009. A copy of the Draft HPTP is enclosed as Attachment G.

National Register of Historic Places, and it looks forward to working with the Advisory Council to process that application.

Request for Participation in Section 106 Consultation

In addition to asking that the Advisory Council request that the EPA obtain a determination of eligibility from the Secretary of the Interior, the Tribe asks that the Council become involved in the Section 106 consultation process under 36 C.F.R. § 800.6(a)(1)(ii). At least three of the criteria for ACHP involvement set out in Appendix A to 36 C.F.R. Part 800 are met here: the undertaking has substantial impacts on important historic properties, there is the potential for procedural problems (including the dispute about the entire site's eligibility, which the Council's involvement could help resolve), and the project presents issues of concern to an Indian tribe.

The Tribe has expressed to EPA its concern, among others, about whether direct impacts from construction of the casino and related infrastructure (including the wastewater treatment plant) would not occur in the area designated as CA-AMA-411/H. The Draft HPTP states at page 16 "[p]roject construction personnel, vehicles and equipment shall be barred from entering within the known boundaries of CA-Ama-411/H" However, given the small size and narrow shape of the Rancheria, the Tribe is particularly concerned about whether direct impacts from construction can actually be limited to areas outside of CA-AMA-411/H.

The Tribe also has concerns, as do others, about the adequacy of mitigation measures to address adverse effects of the proposed project on the visual, audial and other aspects of the Buena Vista site. At the June 30, 2009 consultation meeting, for example, representatives from the SHPO's office raised concerns about the adequacy of mitigation for the disruption of access between and among the various loci (or areas) of the site. These concerns from the SHPO are similar to some of the concerns expressed by the Tribe in its June 29, 2009 letter to the EPA and elsewhere.

In addition, the Tribe has concerns about the adequacy of efforts to identify and evaluate impacts to properties located outside the Rancheria but affected by the proposed project. The Tribe has expressed to EPA the concern that A construction of the proposed project could result in the widening of roads that would impact cultural sites near or alongside those roads, namely at Jackson Valley Road and Martell Land and at Highway 88 and Buena Vista Road (although the EPA has determined that CA-AMA-650, a cultural resource located near the intersection of Highway 88 and Buena Vista Road where intersection improvements are contemplated as part of the proposed project, is not eligible for listing on the National Register). The Draft HPTP, at page 12, mentions auditory impacts from increased traffic, but it does not address the potential impact that widening roads due to increased traffic going to and from the proposed casino could have on cultural sites located outside the Rancheria's boundaries.

And, importantly, the Tribe has concerns about the impacts of the proposed project – and its construction – on the cemetery located at the Buena Vista site and on Ione Tribal members'

access to the cemetery. Although the proposed project's impacts on the cemetery are not discussed in the description section of the Draft HPTP, cemetery access is addressed in its mitigation section. (On page 13 of its October 2, 2008 letter to the SHPO, the EPA stated that "[b]ecause the [Buena Vista Rancheria of Me-Wuk Indians] will provide access to the cemetery separate from egress and ingress to the proposed gaming and entertainment facility, EPA finds access issues do not constitute an adverse effect on CA-Ama-411/H.")

The Tribe is particularly concerned about issues regarding impacts to the cemetery and cemetery access since representatives for the Tribe understood the EPA's counsel to say at the March 12, 2009 consultation meeting at the that the EPA was not going to be involved with the project for more than a few months after the issuance of any water discharge permit, and that the agency did not want to be involved with cemetery access issues or ensuring that cemetery access was not impeded. At the June 30, 2009 consultation meeting, counsel for the EPA indicated that she did not think (and representatives from the United States Army Corps of Engineers agreed) that any provisions regarding cemetery access should be in the Historic Properties Treatment Plan or Memorandum of Agreement. The Tribe has not seen a draft HPTP or draft MOA produced subsequent to these meeting and thus does not know if and how these issues have been or are being addressed.

The Draft HPTP provides on page 14 that "[t]he [Buena Vista] Tribe shall make a good faith effort to provide reasonable access to the cemetery located on the Buena Vista Rancheria for descendants and family of interred ancestors"; that "[t]he [Buena Vista] Tribe shall identify and maintain a driveway that will provide access from Coal Mine Road leading to the Cemetery entrance"; that "[a]ccess to the cemetery will be made available to descendants and family of interred ancestors by contacting the [Buena Vista] Tribe during regular business hours[]"; and that "[e]xcept during the Spring Grave Cleaning, the [Buena Vista] Tribe is solely responsible for the maintenance and upkeep of the entire cemetery." The Draft HPTP also discusses "enhancement" of the cemetery at page 15.

And the Draft HPTP claims on page 19 that "[a]lthough no known historic properties would be directly impacted by construction or operation of the project it is possible that previously unknown archaeological deposits, including human remains and funerary objects, could be discovered during ground-disturbing activities." It also states twice, on page 20 and on page 22, that "[d]espite the intensive archaeological resource field investigations that have already been performed prior to project construction, it is nonetheless possible that previously unidentified cultural resources could be discovered during the project construction process."

As noted, the Tribe understands the EPA's position, as articulated through its counsel at the March 12, 2009 meeting, to be that the agency will not be involved in overseeing the implementation of the proposed HPTP or the proposed MOA after the NPDES permit is issued. The Tribe's concerns about the impacts to the cemetery and unanticipated discoveries are thus heightened, especially since the Draft HPTP provides at pages 21 and 23, respectively, that the EPA is to be responsible for notifying the SHPO and other interested persons about discoveries of potentially significant finds during construction or of human remains.

Both the Tribe's October 29, 2009 letter to the EPA and the SHPO's April 10, 2009 letter to the EPA encouraged the agency to formally invite the Advisory Council on Historic Preservation to participate in the Section 106 consultation. (The April 2009 SHPO letter also encouraged the EPA to notify the Advisory Council of the proposed finding of adverse effect and provide the Council with the necessary documentation.) The Proposed Fact Sheet, at page 16, notes that the EPA contacted the Advisory Council. However, to the Tribe's knowledge, the EPA has not communicated to the Council a finding of adverse effect (or no adverse effect) with the documentation required under 36 C.F.R. § 800.11(e).²

The Tribe requests that the Council become involved in the Section 106 consultation process under 36 C.F.R. § 800.6(a)(1)(ii). (The Tribe previously requested at the ACHP initiate Section 106 consultation regarding the proposed Buena Vista Casino in October 2005, before the EPA noticed the proposed NPDES permit and initiated the current Section 106 consultation.) As is clear from the above, at least three of the criteria for ACHP involvement set out in Appendix A to 36 C.F.R. Part 800 are present: the undertaking has substantial impacts on important historic properties, and particularly on a property that is of noteworthy importance as one of the oldest continually inhabited sites in California; there is the potential for procedural problems which the Council's involvement could help resolve, including the dispute about the entire site's eligibility that has already arisen; and the project presents issues of concern to the Ione Band of Miwok Indians.

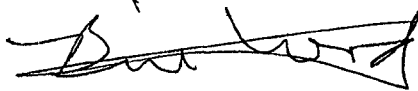
The Tribe also requests that the Advisory Council strongly encourage the EPA and Army Corps to delay the issuance of any permit or any permit decision for the proposed project until a determination of eligibility has been obtained and until the Advisory Council has had the opportunity to prepare its formal comments to the heads of the EPA and Army Corps (and to consult with the agencies, other consulting parties, and the public) so that these comments can be considered by the agencies in reaching a final decision, and until a determination of eligibility for the entire Buena Vista site has been obtained from the Secretary of the Interior pursuant to 36 C.F.R. Part 63.

² When an agency official finds that a project will have an adverse effect, 36 C.F.R. §§ 800.6(a)(1) requires that the official notify the Council of the finding by providing the documentation specified in 36 C.F.R. §§ 800.11(e), which must include (1) a description of the undertaking and its area of potential effects; (2) a description of the steps taken to identify historic properties; (3) a description of the affected historic properties, including information on the characteristics that qualify them for the National Register; (4) a description of the undertaking's effects on historic properties; (5) an explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and (6) copies or summaries of any views provided by the consulting parties and the public.

The Tribe thanks you for your consideration, and for your prompt attention to this matter. If you have questions regarding the Tribe's requests, or if you would like any further information from the Tribe concerning any of the above, please do not hesitate to contact me at (213) 896-2511 or at william.wood@hklaw.com.

Respectfully,

HOLLAND & KNIGHT, LLP

A handwritten signature in black ink, appearing to read "William Wood", written over a horizontal line.

William Wood

cc (w/ attachments):

Valerie Houser, Coordinator, Native American Program, Advisory Council on Historic Preservation

Charlene Dwinn Vaughn, Assistant Director, Federal Permitting, Licensing, and Assistance Section, Advisory Council on Historic Preservation

cc (w/o attachments):

Hon. Matthew Franklin, Chairman, Ione Band of Miwok Indians

Ione Band of Miwok Indians Cultural Heritage Committee

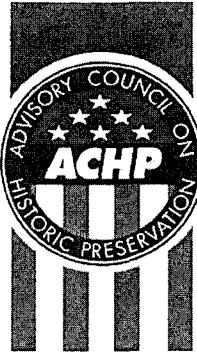
John Tinger, United States Environmental Protection Agency, Region IX, NPDES Permits Branch

Milford Wayne Donaldson, State Historic Preservation Officer, California Office of Historic Preservation, Department of Parks and Recreation

EXHIBIT 6

Ione Band of Miwok Indians v. United States Environmental Protection Agency
NPDES Permit No. CA 0049675 – Buena Vista Casino Wastewater Treatment Plant

Exhibit 6 to Declaration of William Wood in Support of Petition for Review



Preserving America's Heritage

April 20, 2010

William Wood
Holland & Knight, LLP
633 West Fifth Street
Los Angeles, CA 90071

Ref: *NPDES Permit for the Proposed Buena Vista Casino
Buena Vista, Amador County, California*

Dear Mr. Wood:

On January 8, 2010, the Advisory Council on Historic Preservation (ACHP) received your request on behalf of the Ione Band of Miwok Indians that the ACHP become involved in Section 106 consultation to resolve the potential adverse effects of the referenced undertaking on a property or properties listed or eligible for listing in the National Register of Historic Places.

We were notified by the Environmental Protection Agency (EPA) of the Undertaking on July 31, 2009 and provided with adequate documentation per 36 CFR §800.11 to make a determination as to whether Appendix A, *Criteria for Council Involvement in Reviewing Individual Section 106 Cases*, of our regulations, "Protection of Historic Properties" (36 CFR Part 800), would apply to this undertaking. We notified the EPA, by letter of August 13, 2009, that our participation in the case is not needed.

We have evaluated the material you provided, in which the Ione Band of Miwok Indians ("Tribe") assert that the Buena Vista Rancheria is included within a larger, single site that is eligible for listing on the National Register of Historic Places as a Traditional Tribal Cultural Property which would include the Buena Vista Peaks and a spring adjacent to the northeast end of the Rancheria which is affiliated with the Village of Upūsūni. Further, the Tribe requests that ACHP ask the EPA to request a determination of eligibility for the entire Buena Vista site, and to delay any permit or any permit decision for the project until such determination has been obtained.

Likewise we understand that the Tribe has concerns about the adequacy of identification and evaluation, of proposed mitigation measures related to direct impacts on cultural sites outside the Rancheria's boundaries and to the cemetery. Based upon our review, we have concluded that no new information has been introduced in this consultation to cause the ACHP to revisit its decision not to participate in this case. The Section 106 consultation has been inclusive and considered the full range of effects. As we understand, the mitigation set forth in the draft MOA will address effects on known and potentially unknown sites of religious and cultural significance to tribes. We do not see where our involvement at this juncture will alter this mitigation strategy.

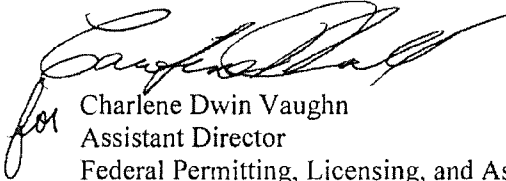
ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

Accordingly, we urge you to continue to consult with the EPA and other consulting parties to negotiate acceptable measures that address the Tribe's concerns.

If you have any questions, please contact Louise Dunford Brodnitz, Historic Preservation Specialist, at 202-606-8527 or via e-mail at lbrodnitz@achp.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlene Dwin Vaughn". The signature is fluid and cursive, with a large initial "C" and "V".

Charlene Dwin Vaughn
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs