

California Native Plant Society

North Coast Chapter
P.O. Box 1067
Arcata, CA 95518
November 28, 2005

Mr. Clay Gregory
Regional Director, Pacific Region
Bureau of Indian Affairs
2800 Cottage Way
Room W-2820
Sacramento, CA 95825

Subject: DEIS Comments, Elk Valley Rancheria, Martin Ranch Fee-to-Trust
Casino/Resort Project [BY FAX AND BY U.S. MAIL]

Dear Mr. Gregory,

The following comments are submitted on behalf of the California Native Plant Society, and the Environmental Protection Information Center, and the Center for Biological Diversity.

The California Native Plant Society (CNPS) is a nonprofit organization of nearly 10,000 amateurs and professionals dedicated to the preservation of California's diverse native flora. CNPS conducts a variety of conservation efforts focused on long-term protection and preservation of native flora in its natural habitat. The Society has been assessing the status of rare plant species for over 30 years, and is the foremost non-governmental organization working to protect rare, threatened, and endangered plants in California. The North Coast Chapter represents 300 members in Humboldt, Del Norte, and Trinity Counties. Our chapter has worked for many years to protect and restore the habitat of the federally endangered western lily, *Lilium occidentale*, at sites near Crescent City and Table Bluff (adjacent to Humboldt Bay).

The Environmental Protection Information Center is a non-profit corporation registered in California dedicated to the preservation, protection, and restoration of biodiversity, native species, watersheds and natural ecosystems in northern California. EPIC maintains its offices in Humboldt County, California. EPIC has over 3,000 members, many of whom reside in Humboldt and Del Norte Counties, including in and around Crescent City and its coastal area EPIC's members



Dedicated to the preservation of California native Flora

recreate and study in and near the coastal areas of Del Norte County, including the Crescent City Marsh area. EPIC and its members are concerned about the effects of unnatural development on wetland and marsh habitats and native species and plants.

We are concerned that the DEIS is inadequate and will not ensure that the Crescent City Marsh and the western lily will be adequately protected. The Crescent City Marsh is an environmentally sensitive habitat area within the Coastal Zone, and is home to the only recovery-level population of the federally endangered western lily, *Lilium occidentale* (Bencie and Imper 2003). The Marsh is also home to many other species of sensitive plants, and is the only known California occurrence for several species. As such it is of paramount importance to protect the Marsh from indirect impacts of changes to the hydrologic regime, contamination from pesticides and fertilizers used in landscaping, and runoff from impervious surfaces such as parking lots. Please refer to CNPS's letters to the California Coastal Commission (September 14 and October 5, 2005) and the Army Corps of Engineers (July 16, 2004) for further information.

Inadequate Analysis of Reasonable Alternatives

Both federal and state laws and policies require an adequate analysis of a reasonable range of alternatives to the project. As required under CEQ regulations 40 CFR 1502.2(d), NEPA documents must include a section stating how each alternative analyzed in detail would or would not achieve the requirements of sections 101 and 102(1) of NEPA and other environmental laws and policies. NEPA Sec. 101 [42 USC § 4332] states that:

[A]ll agencies of the Federal Government shall -- (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

Although the alternatives section of the DEIS describes a number of alternatives, this section falls short of the standard set by CEQA. Under CEQA, an EIR must analyze a reasonable range of alternatives to the project, or to the location of the project, that would feasibly attain most of the basic objectives while avoiding or substantially lessening the project's significant impacts.

The DEIS fails to meet the CEQA and NEPA standards in large part because the only legal alternative considered is the No-Action Alternative. Alternatives 2, 3, and 4 propose filling coastal wetlands which would not be allowed under the Coastal Zone Management Act for such purposes as a golf course (Alternatives 2 and 3) or a casino/hotel/resort complex (Alternative 4).

CNPS believes that an appropriate alternative to consider would be locating the entire project further south on the Martin Ranch property, to an area that is not hydrologically connected to the Crescent City Marsh.

Drainage sub-basin 4 or 5 might be a more appropriate location since impacts to the Crescent City Marsh would be minimized, according to the DEIS (see Appendix B, Drainage Study). Another appropriate alternative would be to locate the project to another property, one with fewer environmental impacts. The proposed location within the watershed of the only recovery-level western lily population is wholly inappropriate. While CNPS appreciates the many design features of the project that will enhance the region, such as consideration of the viewshed, native plant landscaping, and economic development for the tribe and the community as a whole, the DEIS fails to consider a range of appropriate and least environmentally-damaging alternatives.

Without revision, the alternatives section of the DEIS remains inadequate under CEQA and NEPA.

Impacts to the Federally Endangered Western Lily

CNPS's primary concern is that impacts to the federally endangered western lily are not adequately addressed in the DEIS for this project. CNPS is particularly concerned that no formal consultation pursuant to Section 7 of the Endangered Species Act of 1973, as amended, has been initiated with the U.S. Fish & Wildlife Service regarding impacts to the western lily. Because the Crescent City Marsh is home to the only recovery-level population of this species, any impacts to this population would present a potential jeopardy situation to the western lily. The BIA must provide adequate information to ensure that there will not be adverse impacts to the western lily. The DEIS should be revised to include all relevant information that is necessary to assess potential impacts to the western lily, non-listed sensitive species, wetlands, and unique plant communities therein.

Direct, indirect, and cumulative impacts to the western lily and other public trust resources are not adequately addressed by the DEIS, and cannot be evaluated at this time due to lack of substantial information. According to NEPA, “[a]ll agencies of the Federal Government shall— [i]nitiate and utilize **ecological information** in the planning and development of resource-oriented projects.” (emphasis added). Sec. 102, (H) [42 U.S.C. § 4332]. The lack of such ecological information in the DEIS is a violation of NEPA, and should be included if there is to be a meaningful assessment of impacts of the project.

According to the DEIS, “[t]he drainage basin most impacted by the site development is sub-basin 1” (page 4.3-1). On page 4.5-3, the DEIS states that “[d]rainage basin 1 drains to the Crescent City Marsh through the northern tributary located on site and indirectly through the ditch and seep system located at the southern edge of basin 1.” On the same page, it is stated that since

Alternative A represents a 0.6% increase in the developed area draining to the Crescent City Marsh, the impact is not considered significant, given that the western lily presently exists with stormwater runoff from 500 acres of developed lands. In fact, the western lily has been found to be in severe decline in the past several years, possibly as a result of the developed acreage within the watershed. There is no data presented to determine whether the western lily populations are presently thriving; there is no data on which to base these statements of non-significance. Furthermore, there is no cumulative impacts analysis, other than the unsubstantiated claim of “less than significant” for all biological resources on page 4.12-3.

According to 14 Cal. Code Reg. § 15065 (a), a lead agency shall find that a project may have a significant effect on the environment where the project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species. CNPS believes that this project has the potential to substantially reduce the number of the federally endangered western lily, and by definition such a project must be found to have a significant impact.

The western lily (*Lilium occidentale*) is a federally listed endangered species known from early successional fens and coastal scrub from northwestern California to central Oregon. It was listed as endangered without critical habitat in 1994. **More than half of all known flowering plants occur at the Crescent City Marsh Wildlife Area.** The population is currently estimated at 2,000 plants and represents the only recovery-level population as defined by the federal recovery plan for the species (Bencie and Imper 2003; U.S. Fish and Wildlife Service 1998). The population at the Crescent City Marsh Wildlife Area has been in decline for the past five years, and this decline may be associated with impacts to water levels of past development within the watershed. The western lily populations in the Crescent City Marsh and nearby wetlands exhibited severe declines this year, perhaps in response to late heavy rainfall (Wear unpublished data). This decline may be an indication of further impacts from increases in summer runoff and other hydrologic changes that could occur as a result of the project.

Since the proposed project seeks to develop within the watershed of the only recovery-level western lily population, it is likely that such development would have significant direct, indirect, and cumulative negative impacts to the species, and in fact could lead to its extinction. The creation of impervious surfaces in close proximity to upslope wetlands will alter the hydrology and seasonality of runoff that will flow into wetlands that are within the watershed of the Crescent City Marsh. The DEIS does not provide adequate information to determine how changes in the quantity and/or seasonality of runoff will impact downslope wetlands. It is clear that even small changes in water table levels, precipitation, and hydrology may have significant impacts on the western lily.

The project as submitted includes approximately 9.3 acres of impervious surface and parking lots, which have the potential to cause erosion, sedimentation, pollutant loading, and alteration of the hydrological regime of the Crescent City Marsh. It is unclear at this time whether the Bureau of Indian Affairs (BIA), as the Lead Agency, intends to initiate a Section 7 informal consultation with the U.S. Fish & Wildlife Service. According to the Endangered Species Act of 1973, Section 7(a)(2):

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available (16 U.S.C. § 1536 (a)(2)).

An informal consultation with the U.S. Fish & Wildlife Service is inadequate for this project. A formal consultation must be initiated to ensure that the western lily is protected in a manner that will ensure the species' recovery and survival, and in a manner that is consistent with federal laws and regulations. According to the Endangered Species Act,

All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act (16 U.S.C. § 1536 (a)(1)).

According to 16 U.S.C. § 1532 (3),

The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, **law enforcement**, habitat acquisition and maintenance, propagation, live trapping, and transplantation [emphasis added].

The recovery of the western lily depends on the conservation and protection of the Crescent City Marsh Wildlife Area. If the western lily population in this location is not protected from impacts that result in a decline of the population,

the recovery goal of downlisting to threatened will certainly not be met, and the species as a whole is likely to be jeopardized.

Public review and comment is premature since a formal consultation has yet to be initiated. The public should be given the opportunity to review the Biological Opinion issued as a result of the formal consultation. CNPS respectfully requested that the DEIS be revised and released from public review and comment after the formal consultation process is complete and the Biological Opinion made public.

Non-Listed Species and Sensitive Plant Communities

Direct, indirect, and cumulative impacts to rare, threatened, and endangered plant species are not adequately addressed by the DEIS.

Direct impacts to botanical resources cannot be evaluated at this time due to lack of substantial information. Botanical surveys must be conducted according to state and federal standards (CDFG 2000; U.S. FWS 1996) and the results submitted for review before impacts to sensitive species can be evaluated. The DEIS fails to include basic requirements of appropriate botanical surveys, including a scoping list of sensitive plants known to occur in the vicinity, complete list of species present, qualifications of surveyors, survey routes, and number of field-person hours. Without such information, CNPS cannot assess whether botanical surveys were conducted in accordance with standards set forth by the Department of Fish & Game (CDFG 2000) and the U.S. Fish & Wildlife Service (U.S. FWS 1996).

The Crescent City Marsh and environs are home to more than 230 plant species, at least a dozen of which are considered rare, threatened, or endangered by state and federal laws (CNPS 2001; CDFG 2002). Rare, threatened, or endangered plants of the wetland (fen) habitats include the following species, all of which qualify for consideration under 14 Cal. Code Reg. § 15380:

Western lily (*Lilium occidentale*)
Arctic starflower (*Trientalis arctica*)
Great burnet (*Sanguisorba officinalis*)
Green sedge (*Carex viridula* var. *viridula*)
Lyngbye's sedge (*Carex lyngbyei*)
Marsh pea (*Lathyrus palustris*)
Marsh violet (*Viola palustris*)
Vanilla grass (*Hierochloe odorata*)

Several rare plant communities occur in the Marsh, at least one of which is found nowhere else in California. Known as buckbean marsh, this plant community is

dominated by the buckbean (*Menyanthes trifoliata*), more common in the Sierra Nevada and Cascade Mountains of Oregon.

Impacts to Wetlands

A detailed hydrologic study should be conducted using the best available scientific information to determine the relationship between wetlands of the Crescent City Marsh Wildlife Area, other adjacent and downstream wetlands, and those of the Martin Ranch which are immediately adjacent to the area proposed for development. The best scientific information should be used to determine the existing subsurface connections and relationships between the various wetlands in the watershed, and how changes would potentially affect water levels at the Crescent City Marsh. Information on how the Martin Ranch wetlands are currently contributing to the recharge and/or storage of subsurface water flowing to the Crescent City Marsh is crucial information necessary to evaluate potential direct and cumulative impacts to the western lily and other sensitive species and habitats. The DEIS should include this information and appropriate hydrologic studies should be conducted prior to evaluating this proposal.

The DEIS fails to address wetlands that meet the single criterion definition (hydrology, hydric soils, or hydrophytic vegetation) of wetlands as defined by the U.S. Fish & Wildlife Service, the California Coastal Commission, and the California Department of Fish & Game. The environmental consequences should be revised to assess impacts to all wetlands, rather than limiting the discussion to wetlands as defined by the U.S. Army Corps of Engineers.

Lack of Information on Hydrological Impacts

The BIA has not provided any hydrological analysis of effects on groundwater recharge and hydrologic connections between the project site and the Crescent City Marsh. This lack of information was cited by the California Coastal Commission staff as a deficiency in the BIA's application for a federal consistency determination, and remains an outstanding deficiency in the DEIS. CNPS believes that a review of hydrologic assessments should be conducted by U.S. Fish & Wildlife Service hydrologists to ensure that jeopardy to the western lily will not occur as a result of indirect and cumulative impacts related to changes in the Crescent City Marsh's hydrology. According to the U.S. Fish & Wildlife Service's letter to the BIA dated January 14, 2003,

A qualified hydrologist should conduct studies to determine the hydrologic connections and relationships between the development area and the Crescent City Marsh. Hydrologic and water quality models should be developed that can predict and evaluate changes in surface and ground water flows and characteristics to Crescent City Marsh as a result of

project development and operation. Direct, indirect, and cumulative effects of the proposed action on wetlands in the development area, as well as adjacent properties that are affected, should be considered and described.

Although the wetland fill for a golf course has apparently been omitted from the project, the hydrologic studies requested by U.S. Fish & Wildlife Service remain crucial to minimizing impacts to the Crescent City Marsh and the western lily. The DEIS section on groundwater focuses on impacts related to groundwater withdrawal, rather than changes in the inputs (in both quantity and timing) to groundwater that are likely to occur as a result of this project. As a result, there are no mitigations proposed to protect groundwater, which is a serious deficiency in the DEIS and should be reexamined.

According to the Draft Management Plan for the Crescent City Marsh Wildlife Area (CCMWA),

The CCMWA lies within a relatively small watershed of approximately 2,000 acres. Most of the watershed has a low gradient with slow moving water. The CCMWA receives water from three small creeks (Figure 5). Two of these drainages feed the marshes of Area 4, where the majority of the unique botanical resources of the CCMWA occur. These creeks pass through several culverts under Humboldt Road and Highway 101.

Standing water occurs frequently throughout much of the CCMWA during wet winter periods. Open water occurs year round in two permanent ponds in Areas 2 and 4. Water table measurements have been taken annually in the North and South Marsh since 1997 (Imper & Sawyer 2002). Measurements taken in mid to late-July between 1997 and 2001 show the water table in these marshes ranges from 2 to 36 inches below the surface with an average of 12.85 and 11.1 inches in the North and South Marsh, respectively. The depth of the water table is correlated with vegetation height and species composition; lower water table measurements correspond to taller and woodier vegetation. Because many of the rare plants, including the western lily, occupy only a very narrow elevation band within the marsh, even small changes in water levels caused by increased runoff or sedimentation from land use upstream could impact these species (Wear 2005).

Changes in the quantity and seasonality of runoff could severely impact the western lily and other rare plants and plant communities at the Marsh. Therefore, the hydrological analysis should focus particularly on how the project could potentially affect the water table in the Crescent City Marsh throughout the year. Information on existing water table levels, seasonal changes in water table levels, site specific information on soils and geology that affect subsurface and surface water interconnectivity, and known life history traits of the western lily must be included in the DEIS. Without this information, the analysis cannot ensure that direct, indirect, and cumulative

impacts do not significantly negatively impact the western lily, its habitat, non-listed sensitive species, and the Crescent City Marsh.

Inadequate Mitigation Measures

The mitigation measures proposed are inadequate to protect the western lilies and the Crescent Marsh, given the inadequacy of the hydrologic data, as well as the inadequate analysis of direct, indirect, and cumulative impacts presented in the DEIS. The mitigations for biological resources on pages 5.6 and 5.7 do not even mention the western lily, which is clearly the biological resource that is most likely to suffer significant negative impacts as a result of the project.

Because the DEIS fails to properly disclose and evaluate the impacts associated with the casino on wetland and natives species habitat, as required by CEQA, claims of mitigation are unsupported and invalid. Indeed, it does not appear that the DEIS has met the California CEQA requirements to ensure that potentially significant impacts are fully disclosed and evaluated, and that significant adverse environmental effects are mitigated to a level of insignificance. The DEIS must be redone and recirculated for comment in order to remedy these defects. Given the evidence, should the BIA intend to go forward, it is required to adopt and properly support a statement of overriding considerations.

Need for Long-term Monitoring

A hydrological-based monitoring program, based on the results of the hydrological analysis and any mitigation measures proposed, should be implemented to confirm absence of hydrological impacts on Crescent City Marsh as a result of this project. The monitoring program should be designed by a professional hydrologist, in consultation with a biologist familiar with the ecological requirements of the sensitive resources located within the marsh.

The U.S. Fish & Wildlife Service has funded annual population monitoring for several years, which recently has included limited hydrological monitoring. This hydrologic data should be included in the DEIS since it would be helpful in assessing potential impacts to the Crescent City Marsh and the western lily.

Conclusion

We appreciate the opportunity for input on this process, and look forward to sharing our botanical expertise to help preserve and protect these ecologically spectacular resources for future generations.

Sincerely,



Jennifer Kalt, Conservation Chair
North Coast Chapter, California Native Plant Society
jkalt@asis.com

Larry Evans, Executive Director
Environmental Protection Information Center
P. O. Box 397
Garberville, CA 95542

Peter Galvin, Conservation Director
Center for Biological Diversity
1095 Market St., Suite 511
San Francisco, CA 94103

ec: Mark Delaplaine, California Coastal Commission
Alexis Strauss, U.S. Environmental Protection Agency, Region 9
Mike Accituno, Wetlands Branch, Northern California, U.S. Fish and Wildlife Service
Michael Long, U.S. Fish and Wildlife Service, Field Supervisor, Arcata Office
Bob Williams, California Department of Fish and Game
Craig Martz, California Department of Fish and Game
Karen Kovacs, California Department of Fish and Game
Bonnie Neely, California Coastal Commission, North Coast Representative
Sharon Duggan, Environmental Protection Information Center

References:

Bencie, R. and D. K. Imper. 2003. 2002 Status Report, Western Lily Vegetation Strategy, Crescent City Marsh Wildlife Area, Del Norte County, and Table Bluff Ecological Reserve, Humboldt County, California. Unpublished report submitted to the California Department of Fish and Game, Eureka, 24 pp. and App.

California Department of Fish and Game, Guidelines for Assessing the Effects of Proposed Projects on Rare, Threatened, and Endangered Plants and Natural Communities. May, 2000.

California Department of Fish and Game, Natural Diversity Database. Nov. 2002. Special Vascular Plants, Bryophytes, and Lichens. Biannual publication, Mimeo. 150 pp.

CNPS. 2001. *Inventory of Rare and Endangered Plants of California* (sixth edition). Rare Plant Scientific Advisory Committee, David P. Tibor, Convening Editor. California Native Plant Society. Sacramento, CA.

U.S Fish & Wildlife Service. 1998. Final Recovery Plan for the Endangered Western Lily (*Lilium occidentale*). Portland, OR. 82 pp.

United States Fish and Wildlife Service. 1996. Guidelines for Conducting and Reporting Botanical Inventories for Federally Listed, Proposed and Candidate Plants. Sacramento, CA.

Wear, K. Draft Crescent City Marsh Wildlife Area Management Plan. California Department of Fish & Game and the Humboldt State University Foundation. May 2005 version.

Wear, K. unpublished data, from 2005 field season.