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July 14, 2009

**Superintendent**

Yosemite National Park  
ATTN: Environmental Education Campus DEIS  
P.O. BOX 577  
Yosemite, CA 95389

**Re: Draft Environmental Impact Statement, Yosemite Institute Environmental Education Campus, Federal Register Vol. 74, No. 105 at page 26730**

To Whom It May Concern:

I am writing to voice my concern over the proposed alternatives that the National Park Service (NPS) seeks from the public. This comment is in response to the Department of Interior's public notice published in the Federal Register (74 Fed. Reg. 26730) on June 3, 2009 seeking public comments on its Draft Environmental Impact Statement ("DEIS") concerning the Yosemite Institute Environmental Education Campus ("EEC").

I do not support either Alternative 1 ("No Action") or Alternative 3, which would demolish the existing EEC campus at Crane Flat and build a brand new one at the previously undisturbed Henness Ridge area.

I reluctantly support Alternative 2 as the proper course of action that the NPS should take in deciding what to do with the existing campus at Crane Flat. Alternative 2 has a lesser risk of disturbing, unearthing, and destroying American Indian artifacts and items of cultural significance. Alternative 3 involves the breaking of new ground and construction of a new campus at Henness Ridge, an area of land that the DEIS states "has been traditionally used by American Indians during travel to higher elevations in the Sierra."<sup>1</sup> However, Alternatives 2 and 3 conclude there will be no adverse effects to resources managed as American Indian Cultural Properties<sup>2</sup>, and there are no cultural resources covered by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) present.<sup>3</sup> This contradiction makes the DEIS' conclusion erroneous.

The approaches taken under Alternative 2 would attempt to safeguard unearthed American Indian artifacts and items more so than Alternative 3, however either course of action will

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<sup>1</sup> NATIONAL PARK SERVICE, YOSEMITE INSTITUTE ENVIRONMENTAL EDUCATION CAMPUS: DRAFT ENVIRONMENTAL IMPACT STATEMENT 3-113.

<sup>2</sup> *Id.* at DEIS 2-51

<sup>3</sup> *Id.* at DEIS 1-15.

confront the NPS with Indian remains. One organization the NPS recognizes as an “Indian tribe” is incorrect thus tainting the consultation process. The NPS’ consultation procedures must include the lineal American Indian descendants of Yosemite. A suitable remedy would be to re-open the public scoping for this project to allow the voices of these descendants to be heard.

Giving the public access to a facility where anyone can learn about Yosemite and become a better steward of the environment and the National Park system is highly valuable to the NPS and American Indians which is why the “No Action” Alternative is not the best course of action.

## **DISCUSSION**

### **I. AMERICAN INDIAN CONSULTATIONS CONCERNING THIS PROJECT ARE DEFICIENT**

The National Park Service is required under Section 106 of the National Historic Preservation Act of 1966 (NHPA) to “consider the effects of their actions on properties that are eligible for, or included on, the [National Register of Historic Places].”<sup>4</sup> The NRHP includes Yosemite National Park.<sup>5</sup> The NPS meets its statutory responsibility under Section 106 by adhering to 36 CFR §§ 800.1 – 800.16, where “consultation among the agency official and other parties with an interest in the effects of the undertaking . . . commencing at the early stages of project planning.”<sup>6</sup> According to the DEIS, Yosemite National Park’s Section 106 review process is governed by the 1999 Programmatic Agreement Among the National Park Service at Yosemite, the California State Historic Preservation Officer, and the Advisory Council for Historic Preservation regarding the Planning, Design, Construction, Operations and Maintenance of Yosemite National Park (1999 P.A.).<sup>7</sup> The NPS’s Section 106 duties under 36 CFR §§ 800.1 – 800.16 and the 1999 Programmatic Agreement are “developed in consultation with associated American Indian Tribes.”<sup>8</sup>

Here, “other parties with an interest,” such as lineal descendants of the original Yosemite Indian community that existed prior to their discovery in the mid-19<sup>th</sup> century, especially those that are descended from Chief Tenaya, are very concerned over potential intrusive construction projects occurring in Yosemite. They were not aware of any consultation process conducted by the National Park Service. The NPS must carefully scrutinize who should be consulted with and who should not be consulted.

#### **a. Failure to Consult With the Lineal Descendants of the Yosemite Indians Violates Section 106.**

##### **i. Friends of Yosemite Valley v. Kempthorne**

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<sup>4</sup> *Id.* at 1-14.

<sup>5</sup> National Register of Historic Places, <http://www.nps.gov/nr/> (last visited Jul. 6, 2009).

<sup>6</sup> 36 CFR § 801.1(a).

<sup>7</sup> DEIS at 1-14.

<sup>8</sup> *Id.*

In *Friends of Yosemite Valley v. Kempthorne*, 464 F.Supp.2d 993 (E.D. Cal. 2006), the United States District Court for the Eastern District of California granted an injunction against the NPS for failing to prepare a valid comprehensive management plan for several ground breaking construction projects along the Merced River corridor.<sup>9</sup> In particular, the El Portal Wastewater Treatment Facility was due for demolition because it had been abandoned for more than 30 years.<sup>10</sup> This demolition was restricted to previously disturbed ground after which would be re-vegetated; however this ground also housed American Indian remains over 9,500 years old.<sup>11</sup>

Then-Superintendent Tollefson testified that “all appropriate . . . National Historic Preservation Act, and Native American Graves Protection and Repatriation Act compliance [had] been completed.”<sup>12</sup> This compliance also included consultation with the American Indian “tribes associated with Yosemite National Park in regard to the project.”<sup>13</sup> However, Kathy Medina, a lineal descendant of the Yosemite Indians buried at the site overlaid by the treatment facility, communicated with the National Historic Preservation Officer and Native American Liaison Jeanette Simmons, stating: “[w]hile the [NPS] may have conducted consultation meetings with the park-affiliated tribes, the lineal descendants were never given an opportunity to attend a meeting with park officials to discuss this matter.”<sup>14</sup>

Additionally, “the controversy regarding [the treatment facility] project appears to have the greatest potential of resolution through good faith communications between the parties. The court encourages the parties to seek such a resolution.”<sup>15</sup>

As the *Kempthorne* court held, the lack of consultation with lineal descendants of the Yosemite Indian community had a negative impact against Park Service plans. Here, there is no evidence to show that the NPS has identified any lineal descendant of the Yosemite Indian community beyond who the NPS thinks are proper tribal nations such as the American Indian Council of Mariposa County. The 58 public comments gleaned from the public scoping period for the present project do not reflect any real communication between the NPS and American Indians.<sup>16</sup> Only one comment vaguely addresses the EEC Plan and its impact on “local Native American’s ability to harvest medicinal plants.”<sup>17</sup> The identity of the individual who made the comment is unavailable; we do not know if the person was a lineal descendent or not. Even if that person was a lineal descendent, then one person among these various persons does not represent adequate representation of the Yosemite Indian community.

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<sup>9</sup> *Friends of Yosemite Valley v. Kempthorne*, 464 F.Supp.2d 993 (E.D. Cal. 2006).

<sup>10</sup> *Id.* at 1008.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Decl. of Kathy Medina in Sup. Of Pl.’s Rep. Mem. ¶ 8 cited in Pl.’s Rep. Memo. On Req. For Relief at 20.

<sup>15</sup> *Kempthorne I* at 1009.

<sup>16</sup> CONTENT ANALYSIS TEAM, U.S. FOREST SERVICE, YOSEMITE NATIONAL PARK: ENVIRONMENTAL EDUCATION CAMPUS PLAN – SCOPING (DEC. 2002), available at <http://www.nps.gov/yose/parkmgmt/upload/yieccscopingrpt.pdf>.

<sup>17</sup> *Id.* at 16.

Kathy Medina, whose declaration was cited by the *Kemphorne* court in granting the injunction against the El Portal Wastewater Treatment Facility, stated that she was not contacted or consulted about this project or any other project since the *Kemphorne* ruling.<sup>18</sup>

As a descendant of Chief Tenaya, I do not recall any attempt by the National Park Service to solicit my consultation in this project or any project dealing with possible unearthened remains, demolition, or invasive construction within Yosemite. I only heard of this project through reading the Federal Register but in relation to doing research for an unrelated law review article. Thus far, the “good faith communications” that the *Kemphorne* court suggested has not taken place. I, and other lineal descendants, respectfully ask the NPS for a reopening of the scoping period to let other descendants voice their opinion on this project.

**ii. 36 CFR §§ 800.1 to 800.16**

36 CFR §§ 800.1 – 800.16 outlines the necessary steps the NPS must take to comply with Section 106 of the National Historic Preservation Act.

Relevant portions of 36 CFR § 800.2:

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.

Relevant portions of 36 CFR § 800.3:

(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

As a lineal descendent, I have not been contacted to consult on neither these proceedings nor any other proceeding concerning possible invasive ground impacts. As stated above, Kathy Medina, another lineal descendant, has not been contacted either concerning this project or any other project.<sup>19</sup>

As a lineal descendant, I have a demonstrated interest in this undertaking and any undertaking by the NPS to conduct projects that have invasive ground impacts because Yosemite was abundant in Indian activity. The pre-contact Yosemite Indian community is my ancestors. More pointedly, they are my family. Because the human remains that have been found in Yosemite are my family I am allowed under Title 36, Section 800.2(c)(5) of the Code of Federal Regulations to participate as a consulting party on this project and any future project by the NPS that involves Indian remains.

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<sup>18</sup> E-mail from Erick Rhoan to Kathy Medina (Jul. 5, 2009, 10:42 a.m. PST) (on file with author).

<sup>19</sup> See note 18, *supra*.

The NPS has failed to identify me and other lineal descendants outside the park affiliated tribes to consult in matters such as these. The NPS has had since October 27<sup>th</sup>, 2002 to identify various lineal descendants, including myself, because it was this date that we appeared to question the archaeologists and excavators doing work on the Lower Yosemite Falls Project. At that time we spoke with several persons conducting the excavation and also Laura Kirn, the park archaeologist.<sup>20</sup> We identified ourselves as lineal descendants at this event and several other meetings with NPS officials.

Because we were not consulted, I respectfully ask for a re-opening of the public scoping period to let other descendants to voice their opinions on this project.

**b. The American Indian Council of Mariposa County is not a federally recognized Indian tribe because it has not completed procedures under 25 CFR §83 and therefore lacks standing to consult with the NPS.**

The National Park Service concedes in a 1997 Traditional Use Agreement (“1997 Agreement”) that the American Indian Council of Mariposa County (AICMC) is not a federally recognized Indian tribe.<sup>21</sup> However, the 1999 P.A. lists them as an Indian tribe.<sup>22</sup> However, despite what the NPS says, the AICMC are not a federally recognized tribe pursuant to Congressional guidelines via the Indian Reorganization Act.<sup>23</sup> The AICMC is only a 501(c)(3) nonprofit organization.<sup>24</sup> This confusion on the part of the NPS underlines a cornerstone rule of law in Federal Indian jurisprudence: “. . . to what extent [Indian communities], and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress . . .”<sup>25</sup> Only Congress has the plenary authority to deal with Indian tribes with special “care and attention.”<sup>26</sup> As such, federal recognition requires Congressional or Executive approval, neither of which AICMC has obtained.<sup>27</sup>

The Office of Federal Acknowledgment (OFA) is the federal agency, under the Department of Interior, responsible for implementing 25 CFR § 83, the Procedures for Establishing that an

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<sup>20</sup> Videos of this protest were made and are available on the internet. YouTube.com, <http://www.youtube.com/watch?v=1svYZgz9Iz4> (last visited Jul. 6, 2009). See also DVD: Lower Yosemite Falls Protest 10/27/02 (Kathy Medina 2009) (on file with author).

<sup>21</sup> NATIONAL PARK SERVICE, AGREEMENT BETWEEN THE NATIONAL PARK SERVICE, YOSEMITE NATIONAL PARK AND THE AMERICAN INDIAN COUNCIL OF MARIPOSA COUNTY, INC. FOR CONDUCTING TRADITIONAL ACTIVITIES 1 (1997) (“. . . the National Park Service, Yosemite National Park recognizes the American Indian Council of Mariposa County, Inc. . . . as meeting a shared group identity standard of cultural affiliation with prehistoric inhabitants of Yosemite *in the seeking of Federal recognition* as a contemporary tribe . . .” (emphasis added) .

<sup>22</sup> 1999 P.A. at 1.

<sup>23</sup> [http://www.doi.gov/bia/docs/ofa/admin-docs/status\\_summary\\_092209.pdf](http://www.doi.gov/bia/docs/ofa/admin-docs/status_summary_092209.pdf) (accessed Jun. 27, 2009).

<sup>24</sup> <http://www.melissadata.com/lookups/np.asp?ein=770161686> (accessed Jul. 1, 2009.) The AICMC’s Tax ID number is 770161686.

<sup>25</sup> *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

<sup>26</sup> *Id.* at 45.

<sup>27</sup> *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of United States Atty. for Western Div. of Michigan*, 369 F.3d 960, 968 (6th Cir. 2004).

American Indian Group Exists as an Indian Tribe.<sup>28</sup> Successfully completing these procedures subjects an Indian tribe to “the same authority of Congress and the United States . . .”<sup>29</sup> The AICMC has chosen to participate in these procedures.<sup>30</sup> The OFA maintains a list of petitioners seeking federal recognition but have not yet received it; among them is the American Indian Council of Mariposa.<sup>31</sup> Additionally, the OFA lists the AICMC’s January 16, 1998 petition as “Ready, Waiting for Active Consideration,” but not federally recognized.<sup>32</sup>

The most recent public notice in the Federal Register of who is a federally recognized Indian nation was listed and published on April 4, 2008.<sup>33</sup> This list is maintained pursuant to the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103-454, 108 Stat. 4791).<sup>34</sup> Neither the American Indian Council of Mariposa County nor the Southern Sierra Miwok (the name AICMC also uses) are listed.

Since AICMC is a non-profit organization and not an Indian tribe, then it has no standing to enter into any consultation with the National Park Service. The NPS’ lack of diligence in researching this issue and/or intentionally or negligently entering into consultation with this organization despite absence of legal justification is in error.

**i. The American Indian Religious Freedom Act does not grant NPS authority to consult with AICMC.**

In Article II of the 1997 Agreement, the NPS lists the American Indian Religious Freedom Act (AIRFA) as an authority for entering into a Traditional Use Agreement with the AICMC.<sup>35</sup> Specifically, the NPS states: “[AIRFA] establishes a national policy encouraging recognition of the rights of American Indians to the use and possession of sacred objects, and access to sites of traditional religious significance.”<sup>36</sup> In these general terms this is true, however its application to AICMC is not correct.

When AIRFA was passed in 1978 as a Joint Resolution, the Congress declared that the President “shall direct the various Federal . . . agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures . . .”<sup>37</sup> In 1996, President Clinton issued Executive Order 13007 defining an “Indian tribe” to be “an Indian . . . tribe, band,

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<sup>28</sup> [http://www.doi.gov/bia/asia\\_ofa.html](http://www.doi.gov/bia/asia_ofa.html) (last accessed Jul. 1, 2009).

<sup>29</sup> 25 CFR § 83.2 *available at* [http://www.doi.gov/bia/docs/ofa/25CFR/25CFR83\\_2008.pdf](http://www.doi.gov/bia/docs/ofa/25CFR/25CFR83_2008.pdf) (last accessed Jul. 1, 2009)

<sup>30</sup> See notes 31 and 32, *infra*.

<sup>31</sup> OFFICE OF FEDERAL ACKNOWLEDGEMENT, STATUS SUMMARY OF ACKNOWLEDGEMENT CASES 3 *available at* [http://www.doi.gov/bia/docs/ofa/admin\\_docs/Petitioners\\_by\\_State\\_092208.pdf](http://www.doi.gov/bia/docs/ofa/admin_docs/Petitioners_by_State_092208.pdf) (last accessed Jul. 1, 2009)

<sup>32</sup> OFFICE OF FEDERAL ACKNOWLEDGEMENT, [http://www.doi.gov/bia/docs/ofa/admin\\_docs/Status\\_Summary\\_092208.pdf](http://www.doi.gov/bia/docs/ofa/admin_docs/Status_Summary_092208.pdf) (last accessed Jul. 1, 2009) at page 3.

<sup>33</sup> 73 Fed. Reg. 18553 (2008) *available at* <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=56399017847+1+2+0&WAIAction=retrieve>.

<sup>34</sup> Section 102(2) of this Act defines “Indian tribe” as “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the *Secretary of the Interior acknowledges to exist as an Indian tribe*” (emphasis added).

<sup>35</sup> 1997 Agreement at 2.

<sup>36</sup> *Id.*

<sup>37</sup> Pub. L. 95-341, § 2.

nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe . . .<sup>38</sup>

Here, as stated above, AICMC has not been acknowledged as an Indian tribe by the Secretary of the Interior through 25 CFR § 83. Nor has it been listed as such in the Federal Register pursuant to the Tribal List Act of 1994. Furthermore, the OFA has listed AICMC as “ready” to be considered for acknowledgment with no prediction as to whether they will even succeed or not. For certain, the OFA has not listed AICMC as a federally recognized tribe.

As an authority to enter into a Traditional Use Agreement with AICMC or consult with them for this and other projects, the AIRFA does not approve.

**ii. The National Historic Preservation Act does not grant NPS authority to consult with AICMC.**

In Article II of the 1997 Agreement, the NPS lists the NHPA as an authority for dealing with the AICMC.<sup>39</sup> According to the 1997 Agreement, the NHPA “provides that the NPS shall carry out a program for the identification, evaluation, and treatment of historic properties, including traditional cultural properties and cultural landscapes . . .”<sup>40</sup> This laudable goal cannot be achieved if consulting with a non-federally recognized tribe like the American Indian Council of Mariposa County.

As stated previously, the NPS meets its statutory responsibility under Section 106 by adhering to 36 CFR §§ 800.1 – 800.16. Relevant portions concerning Indian tribes under 36 CFR § 800.2(c) state:

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(2) Indian tribes and Native Hawaiian organizations . . .

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act *requires the agency official to consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking.* This requirement applies regardless of the location of the historic property. Such Indian tribe . . . shall be a consulting party. . .

(C) *Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes.* The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the

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<sup>38</sup> Executive Order 13007, § 1(b)(ii). (May 24<sup>th</sup>, 1996)

<sup>39</sup> 1997 Agreement at 2.

<sup>40</sup> *Id.*

concerns and needs of the Indian tribe or Native Hawaiian organization.<sup>41</sup> (Emphasis added.)

A “government-to-government” relationship between Indian tribes and the Federal Government exist when that Indian tribe has successfully completed federal acknowledgment procedures under 25 CFR §38 et. seq.<sup>42</sup> As shown above, AICMC is not federally recognized through this process and thus, has no “government-to-government” relationship with the National Park Service.

In *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992), the plaintiffs, who were federally unrecognized tribes, sought injunctive relief from the Army Corps of Engineers for its authorizing the local village to raise the spillway of a hydroelectric facility which would have had significant environmental impacts. The plaintiffs sought relief, *inter alia*, under the NHPA, section 106. The court held:

It is undisputed that no plaintiff is formally recognized by the Secretary of the Interior as an Indian Tribe. A list of recognized tribes was published in the . . . Federal Register . . . and plaintiffs were not included. Nor have they been added to the list since that time. Whether plaintiffs are an “Indian tribe” for other purposes (such as the receipt of benefits from other federal or state agencies) does not bear on their rights under the NHPA. As such, the plaintiffs . . . were not entitled to participate as consulting parties . . . nor were they entitled to receive documents produced under a Section 106 review.<sup>43</sup>

Similar to the plaintiffs in *Abenaki*, the AICMC is neither federally recognized nor listed as such in the Federal Register and has not been added since the last published list in 2008. As such, the AICMC is not entitled to consult with the NPS over this project or any project, past, present or future; and are not “entitled to receive documents produced under a Section 106 review.”<sup>44</sup>

As an authority to enter into a Traditional Use Agreement with AICMC or consult with them for this and other projects, the NHPA does not approve.

**iii. The 1980 General Management Plan for Yosemite does not grant NPS authority to consult with AICMC.**

In Article II of the 1997 Agreement, the NPS lists 36 CFR §1.2(d) as an authority for dealing with the AICMC.<sup>45</sup> Specifically, the agreement states section 1.2(d) “does not prohibit administrative activities conducted by the NPS, or its agents, in accordance with approved general management and resources management plans . . .”<sup>46</sup> Article I lists these plans as the “General Management Plan” and Resource Management Plan for Yosemite National Park.<sup>47</sup>

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<sup>41</sup> 36 CFR § 800.2(c)(2)(ii)(c)

<sup>42</sup> 25 CFR § 83.2; 73 Fed. Reg. 18553.

<sup>43</sup> *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 250 (D. Vt. 1992).

<sup>44</sup> *Id.*

<sup>45</sup> 1997 Agreement at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1.

### *1980 General Management Plan*

According to the General Management Plan (GMP), Yosemite National Park's purpose is to preserve its unique natural resources including "historic resources . . . and evidences of the Indians that lived on the land."<sup>48</sup> Under the heading of "Man and Yosemite – different times, cultures, values, and impacts," the GMP calls for "interpretive services that relate the natural and cultural significance of Yosemite to visitors" by telling the "story of the cultures of Native Americans in Yosemite before and after European contact; their lives and settlements, their material and social culture, their values, their fate, and their future . . ."<sup>49</sup> However, while the GMP and NPS recognize that "Indian people have inhabited the park for at least 2,000 years," only the "Miwok" Indians are mentioned by name.<sup>50</sup> The AICMC are mentioned as the conduit through which the NPS upholds their obligations to promote the cultural significance of Yosemite, on behalf of the "Yosemite Indian people."<sup>51</sup>

The AICMC does not represent the spectrum of Yosemite Indian existence from prehistoric, pre-European Contact. A thorough development of this conclusion is beyond the scope of this note, however, the NPS has had ample opportunity to hear from several lineal descendants that claim Paiute influence and habitation of Yosemite.

Several resources point to Paiute influence and habitation within Yosemite. For example, Lafayette Houghton Bunnell, *Discovery of the Yosemite* (1880)<sup>52</sup>:

- "My tribe is small—not large, as the white chief has said. *The [Paiute]s and Mono's are all gone*. Many of the people with my tribe are from western tribes that have come to me and do not wish to return. If they go to the plains and are seen, they will be killed by the friends of those with whom they had quarreled."
- "For a correct pronunciation, Major Savage was our best authority. He could speak the dialects of most of the mountain tribes in this part of California, but he confessed that he could not readily understand [Chief Tenaya], or the Indian guide, *as they appeared to speak a [Paiute] jargon*."
- "The entrance to the Valley had ever been carefully guarded by the old chief, and the people of his band. As a part of its . . . history, it was stated: "That when [Tenaya] *left the tribe of his mother and went to live in Ah-wah-ne*, he was accompanied by a very old Ah-wah-ne-chee, who had been the great 'medicine man' of his tribe." It was through the influence of this old friend of his father that [Tenaya] was induced to leave the Mono tribe, and with a few of the descendants from the Ah-wah-nee-chees, *who had been living with the Monos and [Paiute]s*, to establish himself *in the valley of his ancestors as their chief*. He was joined by the descendants from the Ah-wah-ne-chees, and by others who had fled from their own tribes to avoid summary Indian justice."
- "It was from them that the Major first learned that the Yosemitees were a composite band, collected from the disaffected of other bands in that part of California, and what is now Nevada; and as the Major said, the dialect in common use among them was nearly as

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<sup>48</sup> NATIONAL PARK SERVICE, GENERAL MANAGEMENT PLAN: VISITOR USE / PARK OPERATIONS / DEVELOPMENT 5 (1980).

<sup>49</sup> *Id.* at 20-21.

<sup>50</sup> *Id.* at 23.

<sup>51</sup> *Id.*

<sup>52</sup> Lafayette Houghton Bunnell, *Discovery of the Yosemite* passim (1880).

much of a mixture as the components of the band itself, *for he recognized [Paiute], Kah-we-ah and Oregon Indian words among them.*”

- “The [Paiute] and Mono Colony originally established by [Tenaya], was the result of a desire to improve their physical condition. They were attached to this valley as a home. The instinctive attraction that an Indian has for his place of nativity is incomprehensible; it is more than a religious sentiment; it is a passion.”
- “[Major Savage] was accompanied by several young warriors, selected because they were all familiar with the Sierra Nevada trails and *the territory of the [Paiutes]*, where it was thought probable the expedition would penetrate.”
- [Tenaya] was recognized, by the Mono tribe, as one of their number, as he was born and lived among them until his ambition *made him a leader and founder of the [Paiute] colony in Ah-wah-ne*. His history and warlike exploits formed a part of the traditionary lore of the Monos. They were proud of his successes and boasted of his descent from their tribe, although [Tenaya] himself claimed that his father was the chief of an independent people, whose ancestors were of a different race.

Ed Castillo, Petition to Congress on Behalf of the Yosemite Indians, 5 J. Cal. Anthro. 271 (Winter 1978), which cites a failed petition written on behalf of the remaining Indians in Yosemite to Congress for monetary compensation after their forced removal:

“We, the undersigned chiefs and head men of the *existing remnants of the tribes of the [Yosemite], the Mono and the [Paiute] Indians, who hold claims upon that gorge in the Sierra Nevada Mountains known as the Yosemite Valley, and the lands around and about it, by virtue of descent from the forenamed tribes, who were inhabitants of that valley and said territory at the time when it was taken from our fathers by the whites . . .*”<sup>53</sup>

Kathleen Louann Hull, *Culture Contact in Context: A Multiscalar View of Catastrophic Depopulation and Culture Change in Yosemite Valley, California* (Spring 2002) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with UMI Dissertation Services), theorized that tyranny displayed in the Spanish Missions of Alta California contributed runaway neophytes to Tenaya’s band of mixed people which included the Paiute Indians.<sup>54</sup>

JAMES A. BENNYHOFF, UNIVERSITY OF CALIFORNIA ARCHAEOLOGICAL SURVEY NO. 34, AN APPRAISAL OF THE ARCHAEOLOGICAL RESOURCES OF YOSEMITE NATIONAL PARK 2 (1956), which places “various Miwok groups” around Yosemite’s northern and western borders, the Paiute to the east, and the Mono to the south. Inside Yosemite, however, “the only tribelet firmly established in the ethnographic literature is the [Ah-wah-ne-chee], the inhabitants of Yosemite Valley and the Merced River . . . This group is usually referred to as the Yosemite Indians in the historical accounts.”

MICHAEL J. MORATTO, NATIONAL PARK SERVICE, AN ARCHEOLOGICAL RESEARCH DESIGN FOR YOSEMITE NATIONAL PARK, CALIFORNIA 31 (November 1981), which states that the “Yosemite area was held mainly by the Central and Southern Sierra Miwok” whereas Mono and Paiute Indians were co-occupants or visitors.

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<sup>53</sup> Castillo at 273.

<sup>54</sup> Hull at 32 – 36.

Bunnell's account of the Mariposa Battalion's discovery of the Yosemite Valley in 1851 makes it clear that Chief Tenaya, his lineal descendants, and those that made up his colony in Yosemite were from a mixed selection of at least Paiute and Mono Indians. Nowhere are these tribes mentioned in the GMP. Though several Indian tribes are listed in the DEIS, only the American Indian Council of Mariposa County is specifically listed in the GMP as the means through which the NPS attempts to preserve Indian culture. This flies in the face of one of the earliest primary sources that historians, anthropologists, and archeologists have in deciphering American Indian history in Yosemite – especially when AICMC lists its “tribal” name as the Southern Sierra *Miwok*.

Likewise, Castillo, Hull, Bennyhoff and Moratto, give the Paiute Indians, as well as many others, residency in the Yosemite. Lineal descendants of Chief Tenaya and the Paiute Indians, like myself, are not represented by the American Indian Council of Mariposa and have sought recognition by the NPS, not so much seeking recognition that we exist as a separate community outside of the AICMC, but that we want our place at the table, so to speak, concerning possible invasive ground procedures such as the one contemplated for Henness Ridge. To place AICMC on an equal playing field with “Indian tribes” in the consultation process is erroneous, especially when lineal descendants whose legitimacy is no less than the AICMC are left out. The NPS' failure to recognize Paiute, and thusly, Tenaya's and his descendant's influence in Yosemite, in the GMP is flawed and cannot be recognized as an authority to enter into a Traditional Use Agreement with the AICMC. As a non-federally recognized tribe, the AICMC's consultation in this, or any project, with the NPS is in error.

**iv. The AICMC is not an “Indian Tribe” under the Indian Self-Determination and Educational Assistance Act or the Indian Reorganization Act.**

In the 1997 Agreement, 1999 P.A., the DEIS and other documents refer to the AICMC as an “Indian tribe.” In addition to not being a federally recognized Indian tribe as shown above, AICMC is a 501(c)(3) non-profit organization. The *Abenaki* court noted the possibility that an organization may be an “‘Indian tribe’ for other purposes (such as the receipt of benefits from other federal or state agencies).” However, the AICMC do not qualify under two major Indian laws, the Indian Self-Determination and Educational Assistance Act (ISDEAA) or the Indian Reorganization Act (IRA).

*Indian Self-Determination and Educational Assistance Act*

However, under Indian Self-Determination and Education Assistance Act (Pub. L. 100-472, 25 U.S.C. § 450b(e)) states:

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . *which is recognized* as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; (Emphasis added)

As stated previously, an Indian tribe “recognized as eligible for special programs and services provided by the United States” can only be granted by Congress via successful completion of 25 CFR §38 et. seq.<sup>55</sup>

The court in *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471 (9th Cir. 1987), interpreted the ISDEAA to exclude non-profit corporations from the definition of “Indian tribes”:

In May of 1976, the Assistant Solicitor for Indian Affairs interpreted the [ISDEAA] for the BIA. *Because regional profit corporations are expressly mentioned in the definition, he stated that customary rules of construction support their recognition as tribes under the Self-Determination Act.* To avoid rendering their mention superfluous, he interpreted the eligibility language to modify only the words “any Indian tribe, band, nation, or other organized group or community ...” Memorandum of Charles Soller, May 21, 1976. This interpretation was adopted by IHS. Letter of Duke McCloud, May 25, 1977.

The record indicates that the administrative interpretations have remained consistent with this construction. See “Implementing Public Law 93-638,” Native News and B.I.A. Bulletin, Vol. 13, No. 4, pp. 2-3 (July-October 1976) (BIA Bulletin) (“*only the following entities are recognized as tribes: -Native Villages-Regional (profit) corporations-Village (profit) corporations-Legally recognized tribes*”); Village Self-Determination Workbook, Nos. 1, 6, 12 (Nov. 1977) (Self-Determination Workbook); Alaska Native Village Self-Determination Briefing Book, pp. 6-7 (Nov. 1977) (Briefing Book); 46 Fed.Reg. 27179 (May 18, 1981) (*recognizing regional profit corporations but not non-profit corporations as a village governing body for purposes of contracting*) (emphasis added).<sup>56</sup>

The court went on to hold that “[r]egional profit corporations were properly recognized as Indian tribes for purposes of the Self-Determination Act . . . Furthermore, the plain language of the House Report indicates that regional corporations formed under the Settlement Act are to be considered tribes.”<sup>57</sup> Excluding non-profit organizations from the definition of “Indian tribe” comports with “the administrative interpretation of the statute,” and that it is “reasonable, and consistent with the statutory language and legislative history.”<sup>58</sup>

Here, as shown above, the American Indian Council of Mariposa County is a registered 501(c)(3) non-profit organization. Therefore, they are excluded from the “Indian tribe” definition under the Indian Self-Determination and Educational Assistance Act.

#### *Indian Reorganization Act*

The text of the IRA defines “Indian tribes”: The term “Indian” as used in this Act shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*” (emphasis added).<sup>59</sup>

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<sup>55</sup> 25 CFR § 83.2; 73 Fed. Reg. 18553.

<sup>56</sup> *Cook Inlet Native Association v. Bowen*, 810 F.2d 1471, 1474 (9th Cir. 1987).

<sup>57</sup> *Id.* at 1475.

<sup>58</sup> *Id.* at 1476.

<sup>59</sup> 25 U.S.C. § 479.

Until the AICMC successfully navigates the procedures of 25 CFR §38 et. seq., the non-profit organization cannot be held to be an “Indian tribe.”

In *United States v. State of Washington*, the Snohomish tribe intervened into an existing lawsuit to assert fishing rights, claiming to have been reorganized under the IRA after leaving the reservation specifically mentioned in a treaty conferring fishing rights. Factual findings of the Snohomish tribe include:

(35). The Intervenor Snohomish Tribe exercises no attributes of sovereignty over its members or any territory. It is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory. None of its organizational structure, governing documents, membership requirements or membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs. Said Intervenor is *organized as a corporate entity under . . . state law with a constitution and articles of incorporation and bylaws filed with the State . . . as a nonprofit corporation and purports to operate as an identifiable and distinct entity on behalf of its members*. It has, pursuant to such constitution and bylaws, a tribal council and a tribal chairman. It claims 720 members.

(37). The Intervenor Snohomish Tribe *has had dealings with agencies of the United States*, the State of Washington and local governments and with private organizations and Indian tribes, but said dealings were not different in substance from those engaged in by any social or business entity.

Here, as in *Washington*, the AICMC is “organized as a corporate entity under . . . state law,” whose bylaws are filed with the State of California. They are a 501(c)(3) non-profit organization and “pursuant to such . . . bylaws,” it has an office of “tribal chairman,” along with a “council.” The AICMC, like the Snohomish Tribe in *Washington*, does exercise sovereignty due to its non-recognized status. Like *Washington*, the AICMC has had dealings with the National Park Service which is a governmental agency under the Department of Interior.

The rule of law the *Washington* court held to in interpreting the IRA was:

In determining whether a group of persons have maintained Indian tribal relations and a tribal structure sufficient to constitute them an Indian tribe having a continuing special political relationship with the United States . . . *and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and Indians* are all relevant factors to be considered (emphasis added).<sup>60</sup>

Here, Congress has yet to grant the AICMC federally recognized status that would give them “express acknowledgement” because they have yet to complete the recognition procedures under 25 CFR §38 et. seq.

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<sup>60</sup> *Washington* at 1110.

**v. The 1999 Programmatic Agreement does not grant NPS authority to consult with AICMC.**

The 1999 P.A. states that:

WHEREAS, YOSE has consulted with Indian Tribes (*American Indian Council of Mariposa County, Inc.*, the Tuolumne Me-Wuk Tribal Council, the Mono Lake Indian Community, the Bridgeport Paiute Tribe, the Chukchansi Nation, the Northfork Mono Rancheria and the Northfork Mono Indian Museum) and has provided these parties the opportunity to participate in the development of, and to concur in the terms of, this Agreement . . . (Emphasis Added).<sup>61</sup>

The 1999 P.A. is part of the NPS' Section 106 compliance.<sup>62</sup> The NPS' consultation with Indian tribes is also governed by 36 CFR §§ 800 et. seq.<sup>63</sup> As shown above, the AICMC is not a federally recognized Indian tribe under 36 CFR §§ 800 et. seq. or NHPA, section 106.

Using the 1999 P.A. as a basis of authority to consult with the AICMC is not approved.

**vi. The AICMC cannot be recognized as an Indian tribe under federal common law.**

In *Montoya v. United States*, 180 U.S. 261 (1901), the United States Supreme Court held that:

By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community *under one leadership or government*, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design (emphasis added).<sup>64</sup>

In *Montoya*, a breakaway remnant of Chiricahua Apache Indians resisted attempts from the United States to corral them on a reservation.<sup>65</sup> They were led by Victoria who ultimately commanded about 200 Indians which were an amalgamation of different tribes of Apache.<sup>66</sup> "Victoria's band" committed hostile acts against the United States and civilians in New Mexico; this included the plaintiffs who brought claims against the Apache and the United States in federal claims court seeking recompense for stolen and damaged property.<sup>67</sup> The plaintiffs'

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<sup>61</sup> NATIONAL PARK SERVICE, 1999 PROGRAMMATIC AGREEMENT AMONG THE NATIONAL PARK SERVICE AT YOSEMITE, THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING PLANNING, DESIGN, CONSTRUCTION, OPERATIONS AND MAINTENANCE, YOSEMITE NATIONAL PARK, CALIFORNIA 1 (1999) available at [http://www.nps.gov/archive/yose/planning/yvp/seis/vol\\_II/appendix\\_d.html](http://www.nps.gov/archive/yose/planning/yvp/seis/vol_II/appendix_d.html).

<sup>62</sup> DEIS at 1-14.

<sup>63</sup> *Id.*

<sup>64</sup> *Montoya* at 266.

<sup>65</sup> *Id.* at 269.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 270.

theory of recovery was based on a 1891 federal statute granting the federal court of claims jurisdiction to adjudicate “payment of claims arising from Indian depredations.”<sup>68</sup>

Here, the concern over depredations arising from hostile Indian tribes against life and property of the United States is not of significant concern as it may have been in the late 19<sup>th</sup> century when the depredations occurred. Furthermore, the United States is a much different place than it was in 1891; the motivations of Congress in passing an act like the one in *Montoya* differ from Congress’ motivations in dealing with Indians today. The context of *Montoya* should have been limited in facts and application under the 1891 Act, however *Montoya*’s holding has been used to demonstrate a common law form of tribal recognition independent of Congressional regulation.

Be that as it may, a *Montoya* analysis requires a united community under one leadership or government. Here, with no federally recognized government to speak of (as shown above), the AICMC is not in a position to claim common law recognition. AICMC is more properly a “band” – a group of Indians and non-Indians whose membership is not only lineal descendants but other tribes as well, engaged in various pursuits, among them being federal recognition.<sup>69</sup>

The *Montoya* factors are not, by themselves, dispositive of federal recognition but are factors to be viewed in totality of others.

In *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992), the court thought there were two paths to federal recognition: Congress or satisfying *Montoya*’s analysis.<sup>70</sup> The court restrained itself, viewing *Montoya* as one analysis amongst others such as satisfying 25 CFR § 83 et. seq.; organization under the Indian Reorganization Act; and that the un-recognized tribe show that they are the “modern-day successors to a historical sovereign entity that exercised at least the minimal functions of a governing body.”<sup>71</sup>

Here, AICMC is not an Indian tribe under IRA nor has it successfully completed the procedures under 25 CFR § 83 et. seq. (as shown above). The AICMC’s claim as a “modern-day successor” to Tenaya’s legacy is questionable. Though there are some lineal descendants present within the AICMC this does not save them. I, like many others, are not members of AICMC, but are lineal descendants of Chief Tenaya. Furthermore, AICMC’s membership has mixed lineage; some may claim to be American Indian but they are not lineally descended from Tenaya or even from Yosemite Indians. If the lineal descendants of Tenaya not represented by the AICMC and myself were to form a 501(c)(3) or similar non-profit organization under state law, then, conceivably, we should have just as much authority to consult with the National Park Service as the AICMC does. Perhaps we could ask for our own cultural center as well.

As reviewed above, archeological studies conducted in Yosemite yield a plethora of American Indian groups active within the Valley. What is agreed upon is that Yosemite was a distinct crossroads of Indian cultures that developed during the final ages before its discovery and

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<sup>68</sup> *Id.* at 263; see also Act of Mar. 3, 1891, ch. 538, 26 Stat. 851.

<sup>69</sup> Some members of the AICMC non-profit organization are from other tribes. Some members may not be Indian at all.

<sup>70</sup> *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992)

<sup>71</sup> *Id.*

capture by the United States. This Yosemite Indian community, made up of numerous tribes, was labeled “Ah-Wah-Nee-Chee” since identifying the roots and origins of every Indian that domiciled in “Ah-Wah-Nee” would have proved impossible. These Ah-Wah-Nee-Chee people were lead by Tenaya who himself was the last chief of the Yosemite Indians. It is his descendants who are the ultimate consulting authority for any project requiring Indian consultation in Yosemite National Park, regardless of how many tribal lines are straddled and crossed. These people are the “modern-day successors” of Tenaya’s sovereign legacy.

A group calling itself “Southern Sierra Miwok” has a claim to Yosemite’s culture no greater than, theoretically, “Erick Rhoan’s Band of Paiutes.” Until a federally recognized Indian tribe consisting of only lineal descendants is present within Yosemite, consultation with the AICMC must cease.

On a final note, nearly 12 years after *Puckett* was decided, the Ninth Circuit held in *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), when considering, *inter alia*, *Montoya*, an Indian tribe “does not exist as a legal entity unless the federal government decides that it exists.”<sup>72</sup>

Here, that decision has yet to be made.

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For the foregoing reasons, the AICMC is not a federally recognized Indian tribe under any legal theory. Therefore, the National Park Service cannot justify any consultation agreement with them. Consultation with them must cease and all of the lineal descendants, not just those the NPS thinks are represented by AICMC and any other park-affiliated tribe, must be consulted. Failure to provide “good faith communications” with the lineal descendants of Tenaya, who are entitled under Title 36, Section 800.2(c)(5) of the Code of Federal Regulations, in consultation with this project and all projects that concern American Indian consultation *may* be a violation of federal law.<sup>73</sup>

Furthermore, a defective consultation process ensures error in the handling of sensitive Indian remains found in Yosemite. A group claiming to be an Indian tribe for purposes of consultation with the NPS may be surprised to find out, through the research conducted during the federal recognition process, for example, that they are not lineal descendants of Tenaya and the Yosemite Indian community. If so, then they are not the appropriate group to handle Yosemite Indian remains. To clear up any confusion, a federally recognized Indian nation whose membership is solely derived from Tenaya and claims Yosemite as it ancestral home is the proper Indian tribe to advise the NPS on unearthed Indian remains.

In the interim, all lineal descendants of Tenaya should be consulted with as they present themselves and, in turn, the National Park Service should recognize, as they have with Yosemite’s prehistoric Indian activities, that Yosemite housed several amalgamations of tribes

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<sup>72</sup> *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004).

<sup>73</sup> The word “may” is used deliberately because exploring the depths of any possible cause of action for improper NPS action in entering into agreement with a non-federally recognized tribe under the conclusion (erroneous or deliberate) that they are, in fact, a federally recognized tribe is exponentially far beyond the scope of this comment.

under the penumbra of the Ah-Wah-Nee-Chee people. As such, the National Park Service is imputed with the responsibility of identifying lineal descendants as proper consulting parties. To date, several have presented themselves to the Park Service at various times. I, and my family, are lineal descendants and demand, on behalf of our relations both living and those buried under Yosemite's soil, our rightful place in the consultation process.

## **II. THE NPS' CONCLUSION THAT NO AMERICAN INDIAN REMAINS WILL BE FOUND DURING CONSTRUCTION UNDER ALTERNATIVE 3 IS ERRONEOUS BECAUSE THE ENTIRETY OF YOSEMITE CONTAINS HUMAN REMAINS.**

### **a. NPS' Statements that no TCPs will be found or traditional cultural practices will not be impacted is contrary to NPS' archeological findings.**

In preparing for the *Kemphorne* litigation, the Plaintiffs took the declaration of Patrick Rhoan, a lineal descendant of Tenaya, who said, "Every bit of [Yosemite] Valley was a high human use area for Indian people, and there are burials all over. Every time you dig you are going to dig something up."<sup>74</sup>

According to the DEIS, no cultural resources, religious practice sites, or sacred areas are present within the Crane Flat or Henness Ridge Alternatives that are covered under the Native American Graves Protection and Repatriation Act of 1990, American Indian Religious Freedom Act of 1979, or Executive Order No. 13007.<sup>75</sup> As the DEIS concedes, Yosemite National park is abundant in archeological sites, offering links to our Indian heritage.<sup>76</sup>

A Traditional Cultural Property (TCP) are tangible resources that American Indians view with cultural and religious significance that are eligible for NRHP listing and include structures, objects, districts, and geological features and archeology.<sup>77</sup> These TCPs are of "central importance in defining the property's significance."<sup>78</sup> Crane Flat, the current EEC campus site, is one such area; however Henness Ridge is not.<sup>79</sup>

The DEIS mentions that cumulative impacts to American Indian cultural practices under Alternative 3 "reflect the analysis of past, present, and reasonably foreseeable future actions" within Yosemite National Park.<sup>80</sup> These future actions that may affect cultural practices shall be done by the NPS in consultation with the appropriate American Indians with "traditional cultural ties to the areas."<sup>81</sup> Future impacts regarding TCPs are dealt with according to the 1999 P.A.<sup>82</sup>

*"Reasonably Foreseeable"*

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<sup>74</sup> Decl. of Patrick Rhoan in Sup. Of Pl.'s Mot. For Sum. Judg. ¶ 25.

<sup>75</sup> DEIS at 1-15.

<sup>76</sup> *Id.* at 1-18, 19.

<sup>77</sup> *Id.* at 3-109.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 3-110.

<sup>80</sup> *Id.* at 3-167.

<sup>81</sup> *Id.* at 3-168.

<sup>82</sup> *Id.* at 3-167.

The NPS has concluded that no Indian remains, artifacts or other items will be unearthed – yet. Yosemite is more than just a land of unsurpassed beauty and/or a vacation destination. Yosemite is also a great cemetery and mausoleum; beneath its soil lay the remains of thousands of unidentified American Indians and the tokens of their society. Given the variety and quantity of NPS sponsored archeological studies, the NPS should be well aware of Yosemite’s capacity to hold human remains and artifacts. Failure to realize this is an shocking example of near-sightedness.<sup>83</sup> Simply making a general allegation that no Indian remains will be found at Henness Ridge area is an exercise of ignorance. For the NPS to say Henness Ridge contains no identifiable human remains is erroneous on its face. The implication is that the NPS picks and chooses where Indian remains will be (or will not be) found despite over 50+ years of archeological data imputing the NPS to know that Yosemite National Park is littered with Indian remains. Such an allegation should not empower the NPS to expect that its Draft Environmental Impact Statement on this project or any project will survive close scrutiny, analysis, and rational thought. Assuming, *arguendo*, the NPS guesses right on Henness Ridge leads to blunder still – future impacts shall be done according to a consultation procedure that is deficient and perhaps legally unjustifiable.

The NPS concedes that American Indian TCPs have been lost or damaged in the Crane Flat area through previous development, visitor use, natural events, and widespread disruption of cultural traditions.<sup>84</sup> This is particularly tragic given Crane Flat’s history, much like Yosemite’s history, existed as a crossroads and meeting area among the several Indian tribes.<sup>85</sup> However, the NPS asserts that unlike Crane Flat, Henness Ridge itself is not a TCP despite the NPS’ description of the area of *having been used for traditional gathering, trading, and ceremony by American Indians*.<sup>86</sup> It is no stretch of logic or imagination to conclude that American Indians not only conducted trade, commerce, and subsistence activities but also life and death activities – i.e., dying and being buried.

The NPS concedes that little research has been conducted to “inventory and document traditional resources important” to the Yosemite Indian community.<sup>87</sup> It does recognize that Yosemite National Park borders several traditional Miwok and Paiute traditional territories.<sup>88</sup> I wonder then why the NPS would declare that no TCPs or evidence of traditional culture practices will not be found pursuant to NAGPRA, AIRFA, or Executive Order 13007 given its use by American Indians when it has stated facts to the contrary.

The NPS theorizes that construction related impacts on TCPs will be regulated via consultation with park-affiliated tribes that will reduce the potential impact to zero.<sup>89</sup> However, as stated above, the consultation process is deficient, therefore the potential impact is not minimal. Because the NPS concedes that the Henness Ridge area is one of “cultural significance” (but not a TCP), then its conclusion that no human remains or artifacts will not be found is clearly erroneous.

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<sup>83</sup> Particularly given testimony by a lineal descendant stating that the entirety of Yosemite houses Indian remains.

<sup>84</sup> *Id.* at 3-165.

<sup>85</sup> *Id.* at 3-110.

<sup>86</sup> *Id.* at 3-113, 14.

<sup>87</sup> *Id.* at 3-113.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 3-112.

In sum, Alternative 3 is not the proper alternative to take for developing the EEC. Henness Ridge must remain untouched.

**b. “Reasonably Foreseeable Future Actions” requiring consultation with appropriate tribes concerning TCPs and traditional cultural practices will be wrong because the consultation process is deficient.**

As stated above, the consultation process is deficient, *inter alia*, because all available lineal descendants are not involved nor have been sought out to be involved in the consultation process. At first glance, the label, “lineal descendant,” provides an appropriate answer to the question on who is an appropriate American Indian with traditional cultural ties to Yosemite. However, as shown above, not all the lineal descendants who have an opinion on this matter and other matters concerning possible unearched Indian remains have been contacted. Whether dealing with past, present, or reasonably foreseeable future actions, the lineal descendants have not been sufficiently consulted with.

The 1999 P.A., as shown above, is deficient in its alleged authority to consult with appropriate Indian tribes.

Proper remedies include a re-opening of the public scoping period with a good faith effort on the part of the NPS to find all reasonably available lineal descendants to consult on this matter and field their opinion.

**III. ALTERNATIVE 2 SAFEGUARDS POTENTIAL BURIED INDIAN REMAINS AND PROMOTES NPS GOALS OF EDUCATING THE PUBLIC TO BECOME BETTER STEWARDS OF YOSEMITE AND THE ENVIRONMENT.**

According to the Executive Summary, the current EEC at Crane Flat is over 30 years in operation and was assembled from older park structures not intentionally designed for educational purposes.<sup>90</sup> The buildings themselves are over 60 years old and desperately need to be repaired and upgraded.<sup>91</sup> Furthermore, overnight space at the campus is limited with the overflow students having to take temporary residence in expensive hotels within Yosemite.<sup>92</sup> This will not suffice.

The purpose of the EEC is to mold its students into good stewards of Yosemite’s unique environment and cultural treasures.<sup>93</sup> The goal of the EEC is fundamental to “serve the unmet current and future capacity of park partners who focus on environmental education and interpretation,” and build community amongst those future partners that allows for a greater sense of ownership and personal responsibility towards Yosemite.<sup>94</sup>

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<sup>90</sup> *Id.* at iii.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> NATIONAL PARK SERVICE, YI ENVIRONMENTAL EDUCATION CAMPUS 1 (2009), <http://www.nps.gov/yose/parkmgmt/upload/eecampus309.pdf>

<sup>94</sup> DEIS at 1-7.

One of the ways the NPS proposes to implement this goal is to increase overall student capacity and reduce reliance on expensive commercial lodging which, in turn, makes the program more affordable and more accessible to children.<sup>95</sup>

- a. **Alternative 2 does not require groundbreaking on an undeveloped portion of Yosemite National Park; therefore, its impact on buried Indian remains will be substantially less than Alternative 3.**

Unlike Alternative 3, Alternative 2 does not require a completely new construction in an undeveloped area of Yosemite National Park. Furthermore, the construction of the new facilities under Alternative 2 would be limited to its existing location with caution to build away from a sensitive meadow area.<sup>96</sup>

However, while the undeveloped Henness Ridge area will remain untouched by this Alternative, reconstruction under Alternative 2 is claimed to have no significant or adverse impact to American Indian TCPs and practices.<sup>97</sup> As stated above, this conclusion is erroneous for several reasons, the least of which is the defective consultation process.<sup>98</sup>

The DEIS also states that operation-related impacts on TCPs will continue as it does today (i.e. with no adverse impact). Though I am skeptical over this conclusion I still support Alternative 2 as the lesser of two evils.

As for the impact on traditional cultural practices, the DEIS states there will be no significant impact during construction or operation.<sup>99</sup> For reasons stated above, this conclusion is erroneous due to its reliance on consultation and agreements with park-affiliated tribes.<sup>100</sup>

However, if I had to choose between keeping the EEC development where it is and an alternative that calls for the evisceration of an undeveloped area of Yosemite that is significantly untouched by construction machinery, then I quickly choose the former.

- b. **Alternative 2 promotes the educational goal of the EEC better than Alternative 3 because it does not require the development of untouched wilderness.**

In addition to keeping Henness Ridge untouched, Alternative 2 still fulfills the purpose of the proposed action by increasing student capacity. The increase is not as substantial as the NPS

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at iv.

<sup>97</sup> *Id.* at vii.

<sup>98</sup> The consultation process is cited as the main factor in the NPS' conclusion that construction-related impacts on TCPs will reduce adverse impacts to zero. *Id.* at 3-111. I renew my objection to this conclusion for the above stated reasons that adverse impacts is not zero, but well above it.

<sup>99</sup> *Id.* at 3-114.

<sup>100</sup> *Id.*

would want under Alternative 3 (the preferred alternative).<sup>101</sup> However, given the NPS' overall goals of allowing natural processes within the park to prevail and protecting "priceless natural beauty" along with its partnered goal to produce future stewards of Yosemite's environment, Alternative 2 strikes the correct balance.

It must also be noted that the NPS does not expressly state that Alternative 3 would eliminate overflow student lodging at expensive commercial hotels within and around Yosemite Valley. It is logical to conclude that no one alternative will completely alleviate problems of overflow. Since this problem cannot be solved with the available alternatives, the correct alternative to choose is the one that avoids needless development of significantly untouched wilderness. The correct alternative is Alternative 2.

Notwithstanding this conclusion, Alternative 2 will serve future students of the EEC as well as Alternative 3 because the facilities will get a much needed face-lift.<sup>102</sup> Aside from ADA accessibility, the EEC will contain sustainable, energy-efficient facilities with considerations given to water conservation, and appropriate health and safety standards.<sup>103</sup>

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For the foregoing reasons, Alternative 2 is the preferred alternative over Alternative 3.

## CONCLUSION

In summation, I support, albeit reluctantly, Alternative 2 as the preferred method of implementing a new Environmental Educational Campus. I, and my family, are predominately concerned with the undiscovered Indian remains that lie beneath Crane Flat and Henness Ridge. While the National Park Service share some of these concerns, it is also mindful of providing an enriching visitor experience.

For an American Indian who traces his or her ancestry to Yosemite, the need to provide a better park visitor experience lacks significant priority. The protection of the land from further unnecessary construction is paramount in the Yosemite Indian community. However, the goals of the EEC campus are laudable and serve the needs of NPS and lineal descendants alike by allowing them to make Yosemite's cultural and environmental resources their personal responsibility. Any education about Yosemite, its original inhabitants, and the unique environmental challenges the NPS faces in trying to preserve the Valley is extremely compelling to the National Park Service and the Yosemite Indian community. If this leads to a better visitor experience on behalf of the students who have and will attend the EEC, then the NPS and Yosemite Indian community share in supporting the redevelopment of the campus.

This community recognizes that the guardian relationship between the NPS and Yosemite is indefinite. The National Park Service should also recognize that the nationalistic relationship

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<sup>101</sup> Alternative 2 would increase overnight space from 76 student beds and 8 staff beds to 154 student beds and 14 staff beds. Alternative 3 would increase student and staff bed space to 224 and 20, respectively. *Id.* at iv.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

between Yosemite and the lineal descendants of Tenaya is just as perpetual. The correct balance is struck when both sides work together. Just as the NPS is required to properly consult with all valid Indian tribes, so too should all lineal descendants from Yosemite become involved with park planning goals and procedures. Until a proper federally recognized Indian nation is in place within Yosemite that is comprised of the correct lineal descendants, the NPS must know who the proper Indian tribes are before they begin consultation with them. For lack of this properly recognized Yosemite Indian nation, the NPS must consult with the lineal descendants of the Yosemite Indians. I offer myself as such a descendant and pledge to act with all possible haste (as my schedule allows) in addressing projects such as these.

\* \* \*

On October 27<sup>th</sup>, 2002, many lineal descendents of Chief Tenaya and the Yosemite Indian community that once lived in Yosemite prior to its discovery by the Mariposa Battalion went to the excavation of the Lower Yosemite Falls under the Lower Yosemite Falls Project.<sup>104</sup> The ground that was being excavated was once the village of Chief Tenaya. I was among the crowd that had gathered to ask questions of the park archeologist and other personnel. During that project a “Native American” monitor was on-site where he took questions from several lineal descendents. He stated that he was there on behalf of the “Mariposa Indian Council.”<sup>105</sup> He also stated that if any American Indian remains were recovered the project would “shut down automatically.”<sup>106</sup> The proceedings then turned into an impromptu Q&A with Jim Nelson and Laura Kirn over the nature of the dig, what procedures were being followed, and who were the consulting Indian tribes over the Project.<sup>107</sup> The proceedings came to a close when Kirn and others allowed us to enter the archeological site to pray and make an offering on behalf of the remains that had been unearthed at that time. For lack of a proper consultation process, this demonstration was as close a substitute as the lineal descendants got. The biggest issue for me was Kirn’s statement that the “park affiliated” tribes were included on the Lower Yosemite Falls Project but only a monitor from a non-federally recognized tribe who had no authority to enter into consultation with the NPS was on-hand.

It is my hope that proper consultation will be put in place for this and future projects. If the NPS is willing, I respectfully request a re-opening of the public scoping period to allow lineal descendants such myself to voice their opinion through a proper consultation process, as well as reveal revised alternatives that shed more light on the impact to American Indian remains.

Thank you very much for your time.

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<sup>104</sup> YouTube.com, <http://www.youtube.com/watch?v=1svYZgz9Iz4> (last visited Jul. 6, 2009). *See also* DVD: Lower Yosemite Falls Protest 10/27/02 (Kathy Medina 2009) (on file with author).

<sup>105</sup> YouTube.com, [http://www.youtube.com/watch?v=VJqbvLZxL\\_I](http://www.youtube.com/watch?v=VJqbvLZxL_I) (last visited Jul. 6, 2009).

<sup>106</sup> *Id.*

<sup>107</sup> YouTube.com, <http://www.youtube.com/watch?v=rRDBonlkgRk> (last visited Jul. 6, 2009). Laura Kirn said the NPS was in consultation with “park associated tribes.”

Sincerely,

/s/ Erick J. Rhoan

Erick J. Rhoan