UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

COUNTY OF SAN DIEGO, CALIFORNIA; VIEJAS BAND OF KUMEYAAY INDIANS; and SYCUAN BAND OF THE KUMEYAAY NATION Appellants, v. PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIR Appellee.	APPELLANTS VIEJAS BAND OF KUMEYAAY INDIANS & SYCUAN BAND OF KUMEYAAY NATION'S OPENING BRIEF ON THE MERITS AND MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

APPELLANTS OPENING BRIEF ON THE MERITS AND MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

The Viejas Band of Kumeyaay Indians ("Viejas") and Sycuan Band of Kumeyaay Nation ("Sycuan") (together, "Appellants") request vacatur and remand of the April 23, 2019, decision ("2019 NOD") of the Pacific Regional Director ("Director") of the Bureau of Indian Affairs (BIA) to accept land ("Walker Parcel") into trust for the Ewiiaapaayp Band of Kumeyaay Indians ("Ewiiaapaayp", but also referred to as "Cuyapaipe"). Appellants respectfully move the AS-IA to exercise her authority to include the exhibits attached to Appellants' Opening Brief as part of the Administrative Record now before the AS-IA in the current appeal. The documents included in this motion constitute substantial evidence in support of Appellants' arguments that the BIA's decision to take the Walker Parcel into trust should be overturned, and were either erroneously omitted from the record, or should be included in the administrative record of the decision on remand. The AS-IA has the power to order supplementation of the record.[1]

[1] The Board often exercises its authority to order supplementation of the record, and the AS-IA, in this case, can do the same. *United Auburn Indian Community v. Sacramento Area Director*, 24 IBIA 33 (1993) and *Cecilia Plain Feather v. Acting Billings Area Director*, 18 IBIA 26 (1989).

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I. INTRODUCTION

The legal and policy issues associated with the Ewiiaapaayp use of the Southern Indian Health Clinic, Walker and Salerno Parcels have remained unresolved for approximately two decades. During this period, neither BIA nor the Ewiiaapaayp have been forthcoming or in compliance with law regarding the intended use of these parcels and the relationship among them. In addition, the underlying issues of contiguity and the requirements of BIA trust land rules for the development of a business plan and consideration of the impacts to surrounding tribal and local governments have never been resolved. To the contrary, BIA has persisted in ignoring the Principal Deputy's clear direction to more fully develop the analysis of contiguity and to further develop and clarify the record as to the proposed use of the Walker Parcel. As a result, the assumption of jurisdiction by the Assistant Secretary was a necessary step and will advance not only the decision on the Walker and Salerno Parcels but also general trust land acquisition requirements.

Ewiiaapaayp has devised an intricate and persistent plan to develop an off-reservation casino by utilizing multiple parcels of land (including the Walker Parcel).[2] Since the mid-1990s, Ewiiaapaayp's series of requests to the BIA for actions in the Alpine area include:

1) A fee-to-trust request for the 16.69-acre Walker Parcel;
2) A fee-to-trust acquisition and reservation proclamation request for the 18.95-acre Salerno parcel ("Salerno Parcel");
3) A reservation designation request for the 10-acre Southern Indian Health Clinic (SIHC) parcel ("SIHC Parcel");
4) A fee-to-trust acquisition and reservation proclamation request for the approximately 10.45 acres called the Willows Road parcels; and
5) A request for approval of a lease relinquishment for the SIHC Parcel.

[2] The Director's decision followed *County of San Diego v. Pacific Regional Director*, 65 IBIA 188 (2018) ("*Walker II*"), where the Board of Indian Appeals ("Board") vacated the Director's December 23, 2016, decision ("2016 NOD") to take the Walker Parcel in trust, and remanded the matter to the Director upon the Director's own motion for voluntary remand. The description of the factual background in *Walker II* is incorporated by reference.

To date, none of these requests have been granted. Ewiiaapaayp's gaming and non-gaming development plans for the Walker Parcel and the SIHC Parcel are chronicled in *County of San Diego v. Pacific Regional Director*, 58 IBIA 11, 14, 30 (2013) ("*Walker I*").[3] A more detailed factual background follows in the next section.

The Director failed to adequately address previous public comments in the 2011 notice of decision ("2011 NOD") and 2016 NOD to take the Walker Parcel in trust. Once again, the Director's 2019 NOD failed to consider new information and comments submitted by Viejas during the remand. (AR 1; AR 22). Therefore, the 2019 NOD violated both the IRA and NEPA and warrants vacating and remanding the BIA's decision.

Appellants filed an appealed of the 2019 NOD on May 24, 2019.

II. FACTUAL BACKGROUND

Ewiiaapaayp's campaign for gaming trust land, and the decision in this case are part of a long and complex history. The claims presented on appeal are deeply rooted in the factual background. As the history of the Walker Parcel decisions confirm—and as Viejas has steadfastly maintained—the trust land acquisition on appeal is part of a longstanding off-reservation casino scheme initiated by Ewiiaapaayp in the mid-1990s. Even if that were not the case, Ewiiaapaayp has evidenced plans for significant economic development on these lands, but has not disclosed the details, nor afforded the BIA an opportunity to apply the requisite environmental review. In addition, by obfuscating its true intent Ewiiaapaayp precludes public participation and neighboring tribal input.

[3] For the purpose of brevity, Viejas resorts to the Board's factual determination in *Walker I*, which was based on the AR available before the Board in that appeal.

A. Ewiiaapaayp's Complicated History on the Walker Parcel Fee-to-Trust Application

Ewiiaapaayp has approximately five members. Ewiiaapaayp has a 5460-acre reservation approximately 12 miles north east of the SIHC Parcel. *Walker I*, 58 IBIA at 14. The State gaming compacts set forth a revenue-sharing mechanism and threshold for California tribes that operate less than 350 gaming devices to receive a sum of $1.1 million per year from other larger gaming tribes.[4] Ewiiaapaayp has been receiving such amount ever since 2001.[5] In addition to the Indian Gaming Revenue Sharing Trust, Ewiiaapaayp receives approximately another $1.1 million in royalty revenue sharing from the Tule Wind project on its 5460-acre reservation.[6]

In 2001, Ewiiaapaayp first applied its fee-to-trust application ("Application") for the Walker Parcel for the purpose of constructing and relocating the Southern Indian Health Clinic (SIHC) to a new healthcare clinic and daycare center. The Director approved the Walker Parcel acquisition on June 27, 2002. However, on July 22, 2002, the AS-IA withdrew the Director's decision in order to conduct his own review. In 2004, Ewiiaapaayp and Viejas began talks to pursue a joint venture whereby each tribe would operate a casino on the Viejas Indian Reservation, and Ewiiaapaayp requested the AS-IA to delay the decision on the Walker Parcel. The joint venture fell through. Subsequently, Ewiiaapaayp reactivated and amended its Walker Parcel fee-to-trust application on May 1, 2008 ("Amended Application") for non-gaming economic development. On May 11, 2011, the Director issued a notice of decision to accept the

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[4] *California Valley Miwok Tribe v. California Gambling Control Com.*, 231 Cal. App. 4th 885, 888, 180 Cal. Rptr. 3d 499, 503 (2014) (gives a general overview of the Indian Gaming Revenue Sharing Trust sharing mechanism and history).

[5] The Indian Gaming Revenue Sharing Trust quarterly reports also indicate numerous years of shortfalls. http://www.cgcc.ca.gov/?pageID=rstfi.

[6] The royalty sharing sum was disclosed as a part of the commenting process for the proposed revision for the Indian Trader Rule. https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/39%20-%20Ewiiaapaayp%20Band%20of%20Kumeyaay%20Indians%201%20of%204.pdf.

Walker Parcel into trust on behalf of Ewiiaapaayp. Viejas filed its notice of appeal on June 30, 2011. *Walker I,* 58 IBIA at 11.

Meanwhile in 2010, during the Amended Application process, SIHC exercised its lease option with Ewiiaapaayp for the SIHC Parcel. When Ewiiaapaayp rejected the SIHC's request a dispute ensued that came before the Board in *Ewiiaapaayp Band of Kumeyaay Indians v. Acting Pacific Regional Director, Bureau of Indian Affairs*, 56 IBIA 163 (2013). As explained in this decision and reiterated by Principal Deputy Assistant Secretary – Indian Affairs, Exercising Authority of Assistant Secretary – Indian Affairs ("Acting Secretary"), Ewiiaapaayp purchased the SIHC Parcel on behalf of SIHC with the funds provided by SIHC for the benefits of SIHC member tribes. 56 IBIA at 163,164; (AR 29, Ex. 1 at 1) (unnumbered). The purpose of Acting Secretary's letter is to voice his concern regarding a possible change in the current use of the SIHC Parcel and that it would "undermine[] the collective, good faith efforts of the other SIHC member tribes and potentially jeopardize[] critical health care services." (AR 22, Ex. 1 at 2) (unnumbered). More importantly, in this very same IBIA decision, the record showed that in 2000, Ewiiaapaayp was negotiating with SIHC "concerning *another parcel* of land [and that] SIHC apparently had agreed that if it accepted $5 million to surrender any rights it had to the [SIHC] parcel, it would negotiate with [Ewiiaapaayp]" further on SIHC's lease situation. *Id.* at 172 (emphasis added).[7]

In February 4, 2013, and during the *Walker I* appeal before the Board, the National Indian Gaming Commission "sent Ewiiaapaayp a declination letter stating that the A & R Pre-Opening Consulting Agreement ("Consulting Agreement") and the A & R Development Agreement with

[7] The great sum of monetary inducement to relocate SIHC would lead one to reasonably believe that Ewiiaapaayp most likely had other significant economic plans for the SIHC Parcel.

WGSD, LLC, were not management contracts. AR 54, Ex. B at 1 ("Declination Letter). The Consulting Agreement is open-ended as to its termination date and set to expire the "day before Class II and/or Class III gaming is first operated at a facility" because many intervening steps would have to occur, including "obtaining a lands option, relocating an existing healthcare facility." (AR 54, Ex. B at 3).

B. The First Walker Parcel Decision and Remand in 2013

In *Walker I*, the Board vacated the Director's decision ("2011 NOD") to take the Walker Parcel into trust and remanded the matter for the Director to: (1) give further consideration to whether the Walker Parcel is contiguous to the Ewiiaapaayp reservation,[8] and therefore properly considered under the criteria for on-reservation acquisitions; and (2) supplement BIA's 2001 EA to consider the potential cumulative environmental impacts of simultaneously operating two healthcare clinic and daycare centers. *Walker I,* 58 IBIA at 11-12, 34. The Board also found that, given this vacatur and remand, it was premature to decide whether the 2011 NOD adequately addressed the 25 CFR § 151.10 criteria—including § 151.10(b) (need), § 151.10 (c) (purpose), and § 151.10(f) (jurisdictional and land-use conflicts)—but directed the Director, if she should again approve the acquisition, to address Appellants' comments in *greater detail* to establish that they have been considered. *Walker I*, 58 IBIA at 30 (emphasis added).

C. The Salerno Parcel Decision and Remand in 2016

On October 16, 2014, the Director issued a notice of decision to acquire the Salerno Parcel in trust for Ewiiaapaayp; despite contrary evidence, that decision was based on Ewiiaapaayp's assertion that there was no intended change in use for the vacant parcel. Viejas, San Diego County, and the State of California ("State") appealed the Director's decision. *County*

[8] The Board has determined that the SIHC Parcel is a "reservation" for purposes of 25 CFR Part 151 acquisition. 58 IBIA at 29. For purposes of judicial review, Viejas preserves its arguments that the SIHC Parcel is not a reservation.

of San Diego v. Pacific Regional Director, 63 IBIA 75 (2016) ("*Salerno I*"). The Board found that the Director failed to adequately consider Appellants' comments on the proposed trust acquisition and found that Ewiiaapaayp's assurance that it has no "immediate" change-of-use plans for the Salerno Parcel was not a proper basis for the BIA to apply a categorical exclusion under NEPA from further environmental review. *Id.* at 75.

D. The Second Walker Parcel Decision and Remand in 2018

On December 23, 2016, the Director issued the second notice of decision, the 2016 NOD, to acquire the Walker Parcel in trust on behalf of Ewiiaapaayp. (AR 22). The 2016 NOD concluded that Walker and SIHC Parcels were contiguous, despite the three public roads, including an interstate highway, separating the parcels. (AR 22 at 4-6). The 2016 NOD included virtually the same verbatim summary of the comments received before the remand and merely lists some (but not all) of the comments received during the remand. (AR 22 at 25-26). The 2016 NOD discussed the six factors for Part 151.10 acquisition. The discussion of six factors was virtually identical to that in the 2011 NOD. *See generally,* AR 1 ("2011 NOD"). Appellants and San Diego County filed their appeals subsequent to the 2016 NOD in 2017.

On April 12, 2018, the Board received a request for remand of the 2016 NOD from the Director pursuant to a memo issued by the Principal Deputy Assistant Secretary – Indian Affairs, Exercising Authority of Assistant Secretary – Indian Affairs. AR 25 ("Tahsuda Memo"). On April 20, 2018, the Board issued its decision to vacate and remand the 2016 NOD back to the Director. *Walker II,* 65 IBIA at 189.

The Tahsuda Memo directed the Pacific Region to reconsider the 2016 NOD as follows:

1) [to] more fully develop the reasoning and analysis as to how the Walker parcel is contiguous to Ewiiaapaayp Band's reservation such that it constitutes an on-

reservation acquisition under 25 CFR § 151.10 or, alternatively, evaluate the Walker parcel as an off-reservation acquisition pursuant to 25 CFR § 151.11; and

2) [to] further develop and clarify the record as to the proposed use of the Walker parcel and, if necessary, modify the Supplemental EA consistent with the proposed use.

(AR 25 at 2). On the question of "contiguity," the Tahsuda Memo encouraged the Director to consider "ownership of the road's surface or subsurface by easement, fee, lease, or grant" to assist in her determination. (AR 25 at 3-4).

E. Ewiiaapaayp's Liquor Control Ordinance in 2019

On April 19, 2019, the BIA published Ewiiaapaayp's Liquor Control Ordinance ("Liquor Ordinance") that shall take effect May 16, 2019. Exhibit 1, 83 Fed. Reg. 15,630 (Apr. 23, 2019).[9] On record, Ewiiaapaayp currently does not have any plans or have any enterprise that would require a liquor ordinance. The Walker Parcel is ostensibly for another healthcare facility. The SIHC Parcel is for a clinic. The only other trust parcel is for Ewiiaapaayp's Tribal headquarters. Finally, the Salerno Parcel remains "undeveloped."

The Liquor Ordinance by its terms states:

(b) The Tribe is the beneficial owner of Tribal Trust Lands, upon which the Tribe plans to construct and operate a *gaming facility* and *related entertainment and lodging facilities*.

(c) The Tribe's *gaming facility* will serve as an integral and indispensable part of the Tribe's economy…

….

[9] Department of the Interior, Bureau of Indian Affairs; Ewiiaapaayp Band of Kumeyaay Indians Liquor Control Ordinance, 83 Fed. Reg. 15,630 (Apr. 23, 2019).

(c) Compact means the Tribal-State *compact* between the State and the Tribe that governs the conduct of *class III gaming* activities on that portion of the Tribal Trust Lands…

Id. at 15,631 (emphasis added). Appellants are cognizant that Ewiiaapaayp's enactment of its Liquor Ordinance seems to contradict, or at the very least, raises serious questions about the veracity of Ewiiaapay's stated purposes for all of its fee-to-trust applications.

F. The Third Walker Parcel Decision and Appeal in 2019

On April 23, 2019, the Director issued the decision currently on appeal, the 2019 NOD, to acquire the Walker Parcel in trust. Viejas, Sycuan, and San Diego County appealed this decision.

III. IMPACT ON APPELLANTS

A. Impact on Viejas

The 1,900-acre Viejas Indian Reservation, home to approximately 394 Tribal members of the Viejas Tribe, is located near the City of Alpine, California. The Viejas Casino & Resort, which is located on the Viejas Indian Reservation, is the principal source of income for Viejas to support Viejas Tribal government and related services. The Walker Parcel is within two miles of the Viejas Indian Reservation, and acquisition of the parcel in trust will have negative economic and cultural impacts on Viejas, including its tribal sovereignty, economic ventures, environmental interests, jurisdictional interests, cultural values, and other interests. Trust acquisition and development of the Walker Parcel, and especially if it is gaming, will generate environmental harms impacting Viejas, through increased traffic, land use conflicts, environmental impacts, and economic impacts.[10]

[10] General information about the Viejas Band of Kumeyaay Indians can be found on Viejas' official website. http://viejasbandofkumeyaay.org/.

B. Impact on Sycuan

The Sycuan Band of the Kumeyaay Nation is a small tribe comprised of 141 adults and 116 children living and working within a small footprint. Its original reservation is approximately one square mile in size, less than 640 acres. Sycuan's Reservation is 10.5 miles from the Walker Parcel, and the area in between is part of the tribe's watershed, historic and cultural lands, and in close proximity to Sycuan's primary economic enterprise—the Sycuan Casino and Resort. The tribe's environmental, economic, planning, and resource management does not end, and has not ended at its reservation line. The acquisition and development of the Walker Parcel for gaming will strain the infrastructure, upset the environmental balance, and undermine the fee-to-trust process if the stated reason for acquisition is an artifice.

Sycuan has followed the rules and improved its surrounding roads and services, in coordination with the county, all of which is corroded if a large-scale development is allowed to proceed next door. The loss of habitat, tax on water resources, increased traffic and stress on emergency services is irreversible, and adversely affects Sycuan, its investment in the traditional Kumeyaay territory, and the legitimacy of the fee-to-trust process itself.

IV. STANDARD OF REVIEW

The proper construction of the terms "contiguous" and "noncontiguous" in § 151.10 and § 151.11 is a question of law. *Jefferson County v. Northwest Regional Director*, 47 IBIA 187, 202 (2008). The Board has well established the standard of review for trust acquisition cases, and the AS-IA has followed this standard.[11] In *Shawano County v. Midwest Regional Director*, 40 IBIA 241, 245 (2005), the Board explained that it had full authority to review any legal

[11] *Brian Karmer v. Pac. Reg'l Dir., Bureau of Indian Affairs*, Decision of the Assistant-Secretary Indian Affairs, U.S. Department of the Interior at 11 (January 19, 2017); *Valley Coal. v. Pac. Reg'l Dir., Bureau of Indian Affairs*, Decision of the Assistant-Secretary Indian Affairs, U.S. Department of the Interior at 5 (August 14, 2015).

challenges raised in a trust acquisition case. The Board did not substitute its judgment for that of the Director's in reviewing fee-to-trust decisions, but instead, the Board reviewed whether the Director gave proper consideration to all legal prerequisites to exercise the Secretary's discretionary authority to take land into trust. *Shawano County v. Midwest Regional Director*, 53 IBIA 62, 68 (2011). Appellants bear the burden of proving the Director's improper exercise her discretion. *Id* at 69.

The AS-IA must determine whether the Director's 2019 NOD is arbitrary and capricious. The standard for arbitrariness and capriciousness has been articulated by the Supreme Court in *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983):

> Normally, an agency [decision] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.

Id. Accord, State of Minnesota v. Acting Midwest Regional Director, 47 IBIA 122, 125 (2008), *aff'd, Mahnomen County v. Bureau of Indian Affairs*, 604 F. Supp. 2d 1252 (D. Minn. 2009).

V. ARGUMENT

A. The AS-IA Can Provide Certainty and Clarity to the Definition of "Contiguous"

Since Part 151 does not define "contiguous," tribes, the BIA, other parties of interest, and the Board have seen a steady rotation of appeal cases in an attempt to provide clarity and certainty to the meaning of this word.[12] After the *Walker I,* the Board further clarified that the

[12] *County of Santa Barbara v. Pacific Regional Director*, 65 IBIA 204 (2018); *County of San Diego v. Pacific Regional Director*, 65 IBIA 188 (2018), *Preservation of Los Olivos v. Pacific Regional Director,* 58 IBIA 278 (2014); *County of San Diego v. Pacific Regional Director,* 58 IBIA 11 (2013); *Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187 (2008).

definition of contiguousness means a parcel sharing a boundary with an existing Indian reservation, whether through surface or subsurface and irrespective of the length. *See generally, Preservation of Los Olivos v. Pacific Regional Director,* 58 IBIA 278 (2014). In this case, the Board found that Santa Ynez Band of Chumash Mission Indians' ("Chumash") parcel did touch or share a common boundary with its reservation because the State owned the surface rights (a public highway) but it did not own the subsurface rights of the of Chumash's parcel, and thereby, allowing the Chumash's parcel to touch the Chumash' reservation through subsurface. Therefore, the Director's application of contiguous trust acquisition standards under 25 CFR § 151.10 was appropriate in this case. *Id.* at 26.

Subsequent to *Preservation of Los Olivos*, the Board remanded another matter back to the BIA in order for the Director to examine the *ownership interest* of another parcel in question to find a "common boundary" between the Chumash's parcel and the Chumash's reservation, through surface or subsurface. *County of Santa Barbara v. Pacific Regional Director*, 65 IBIA 204, 17 (2018).

What is absolutely apparent about these recent contiguity cases is that the Board has established a clear standard for finding contiguity if two parcels (1) share a common boundary with *each other*, (2) through surface or subsurface, and (3) irrespective of the length of such common boundary.

In the 2019 NOD, the Director attempted to circumvent IBIA's more recent and on-point cases on contiguity in *Preservation of Los Olivos* and *County of Santa Barabara.* Instead, the Director dedicated a significant amount of time on her "reasonable" and "rational" use of the Gaming Rules for acquisitions under 25 C.F.R. Part 292 to be applied to Part 151 trust acquisitions for the Walker Parcel. (AR 46 at 12-15). Through this appeal, the AS-IA can take this opportunity to affirm the Board's standards for a finding of contiguity through their recent

cases and provide a definitive definition for contiguousness. Additionally, the AS-IA can also declare that Part 292 definition of contiguousness is not an appropriate standard for Part 151 acquisitions.

B. The Walker Parcel and SIHC Parcel Are Not Contiguous.

1. Applicable Precedent

The term "contiguous" is not defined in Part 151. However, to be contiguous under Part 151, the Board found that "at a minimum, the lands must *touch*." *Jefferson County, County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008) (emphasis added). Parcels that share a boundary are contiguous. *Id.* at 205-06. In *County of Sauk v. Midwest Regional Director,* 45 IBIA 201 (2007), the Board stated that "[t]he fact that a highway easement separates the actual land surfaces of the two parcels does not render them any less contiguous for purposes of § 151.10." 45 IBIA at 213. On the other hand, it is not necessarily permissible for BIA to simply assume that the existence of highways separating two parcels is irrelevant and that parcels on each side of the highways necessarily are contiguous—i.e. that they necessarily *do share a common boundary*. Instead, the existence of a highway may require a careful analysis of title records. *Preservation of Los Olivos,* 58 IBIA at 309 (emphasis added). The Board ultimately concluded in this case:

> Thus, notwithstanding the existence of a surface right-of-way or surface fee ownership interest, we conclude that the record supports the Regional Director's determination that the Parcel is contiguous to the Tribe's existing reservation, because they *share a common boundary or, at a minimum, touch one another, through subsurface interests* owned by the Tribe.

Id. at 312 (emphasis added). In 2018, following *Preservation of Los Olivos,* the Board remanded the matter back to the Director with the direction that she does a title analysis for surface and subsurface interest in order to determine whether a tribe's parcel is contiguous to its reservation.

County of Santa Barbara, 65 IBIA at 17. The bottom line is: the Director must be able to support her conclusion through an ownership analysis.

The BIA's regulations provide that when evaluating tribal requests to acquire land located within or "contiguous" to an "Indian reservation," i.e., an on-reservation acquisition, BIA must consider the following regulatory criteria in 25 CFR § 151.l0(a)-(c) and (e)-(h). However, additional and more rigorous criteria apply if the land to be acquired is "located outside of and noncontiguous to the tribe's reservation." *See* 25 CFR § 151.11; *County of San Diego v. Pacific Regional Director*, 58 IBIA 11, 13 (2013); *Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 220, 221 (2013). For off-reservation acquisition, the BIA must require a business plan under 25 CFR § 151.11(c).

2. The Director's Application of the Gaming Rules Legal Definition for Contiguity is Arbitrary and Capricious

In the 2019 NOD, the Director stated:

> Because the term contiguous is not defined by Department trust acquisition regulations at Part 151, and because both the Gaming Rules and Part 151 concern the acquisition of trust land, we *reasonably* and *rationally* determine the term "contiguous" under Part 151 may be defined in the same manner as it was defined by the Department in the Gaming Rules.

(AR 46 at 15) (emphasis added).

In *Walker I*, the Board concluded that the Director did not properly determine whether the Walker Parcel is located contiguous to the SIHC Parcel and thus whether the acquisition should be evaluated under the standard applicable to on-reservation acquisitions. *Walker I*, 58 IBIA at 11. Specifically, the Board stated that:

(1) the Director did not explain the rationale for her apparent determination that the lands are contiguous notwithstanding their separation by three roads;

(2) the Director did not appear to have fully considered the record on this issue; and

(3) it did not appear that the administrative record itself was complete.

Walker I, 58 IBIA at 12. In 2014, shortly after *Walker I,* the Board issued a very instructive decision on determining contiguity through an ownership interest analysis in *Preservation of Olivos.* The Board further reaffirmed such ownership interest analysis in *County of Santa Barabara.*

The Director need not nor should have resorted to the Gaming Rules[13] for the definition of contiguousness to support Part 151 acquisition. The Board has been clear in its direction on how to determine contiguousness under Part 151 in *Preservation of Los Olivos* and *County of Santa Barbara* - an ownership interest analysis of a common boundary through surface or subsurface.

On July 30, 2018, Ewiiaapaayp submitted a supplemental letter to support a finding of contiguity to the Director. (AR 35, Attach. 1). On October 16, 2018, Viejas supplemented the record in 2018, AR 39 ("2018 Caltrans Records"), after reviewing Ewiiaapaayp's 2018 letter on contiguity, (AR 35, Attach. 1). Viejas obtained the 2018 Caltrans Records directly from Caltrans because it is the state agency controlling most the Intervening Parcels. Caltrans provided Viejas numerous additional ownership records, Caltrans internal right-of-way maps, and Caltrans' comments. *See generally,* AR 39. Due to lack of human resources, Caltrans did a limited ownership analysis of the Intervening Parcels for the purpose of illustrating the noncontiguous relationship between the Walker Parcel and the SIHC Parcel. Caltrans pointed out that it owns in fee simple absolute (both surface and subsurface interests with no reservation of rights) for some of the Intervening Parcels. For the purpose of disproving contiguity, an illustration of *one*

[13] Department of the Interior, Bureau of Indian Affairs; Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354 (May 20, 2008).

intervening parcel that separates the SICH Parcel and the Walker Parcel is sufficient, let alone multiple parcels. Appellants adamantly contend that it would be impossible for the SICH Parcel and the Walker Parcel to share a common boundary with each other through surface or subsurface with the amble evidence available in the record.

Despite the extensive supplemental title records provided by Viejas in 2018, the Director never did an ownership analysis to determine whether the Walker Parcel and the SIHC Parcel share a common boundary *with each other* in her 2019 NOD. Instead, the Director found the parcels to be contiguous through her "rational" and "reasonable" application from Part 292 gaming acquisition and other sources, which resulted in her finding of contiguity between the Walker Parcel and the SIHC Parcel.

Here, even with ample title records available to the Director,[14] especially with the latest submission of the 2018 Caltrans Record by Viejas, and after the explicit direction by the Board itself in *Walker I* and by the Tahsuda Memo, the Director still refused to do an ownership interest analysis of the Intervening Parcels. The Director simply stated:

> Here, the Walker Parcel is separated from the existing trust land by three public roads and nothing else. The fact that there are three roads located between the properties rather than one should make no more difference to a contiguity analysis than if a multi-lane highway was located on property boundaries instead of a one lane County road. In either of those hypothetical scenarios or the case here, the properties are contiguous as that term is defined in the Gaming Rules.

(AR 46 at 15).

The 2018 Caltrans Record, Caltrans unequivocally concluded that its "current and superseded right of way maps" do not show any "fee acquisition deeds …that contained

[14] Viejas submitted the first Wunderline Engineering report on the historic boundaries of the SIHC and Walker Parcels in 2009 ("2009 Wunderline Report") that was part of *Walker I* appeal record even though it was noted by the Board that said submission by the BIA was missing numerous attachments. Subsequent to *Walker I*, Viejas resubmitted the 2009 Wunderline Report to the BIA to complete the record. Additionally, Viejas submitted a supplemental report by Wunderline Engineering focusing on the intervening parcels between the Walker and SIHC Parcels on three different occasions on a (May 26, 2015; January 7, 2016; and May 11, 2016).

exceptions for sub-surface rights adjacent to APN 404-080-26[, the Walker Parcel]."[15] (AR 39, Ex. 1) (emphasis added). The 2018 Caltrans Record shows that the parcels labeled as Nos. 5, 8, 10, & 9 of Map 1 in Exhibit 2 and reference Nos. 8 & 5 of Map 2 in Exhibit 3 were transferred to the State without any reservation of rights (in fee simple absolute) as indicated by the 2018 Caltrans Records in Exhibits 2 & 3. In short, the Walker Parcel and the SIHC Parcel are separated in the following order from south to north: (1) San Diego County's right-of-way[16] (Nos. 3 & 4 of Map 1; Nos. 2 & 3 of Map 2), (2) Caltrans' fee parcels (Nos. 8, 10 & 9 of Map 1; Nos 8 & 5 of Map 2), (3) Caltrans' right-of-way (No. 11 of Map 1), (4) San Diego County's right-of-way (No. 7 of Map 1), (5) Caltrans's fee parcels (No. 5 of Map 1), and finally (6) San Diego County's right-of-way (Nos. 1 & 2 of Map1; No. 1 of Map 2). *See generally,* AR 39, Ex. 2 & Ex. 3. Therefore, it is impossible for the Walker and SIHC Parcels to share a common boundary on the surface or subsurface.

In conclusion, the BIA's decision is arbitrary and capricious because it (1) fails to evaluate the intervening property rights between the SICH and the Walker Parcels and (2) does not address contrary evidence in the Administrative Record. The Director's finding of contiguity was an error and must be reversed by the AS-IA.

3. The Director's Reliance on the Bureau of Land Management Indian Land Surveyor is Arbitrary and Capricious

The Director further stated:

> The BILS contiguous determination was based on possible *future* public right-of-way vacations by the State and the County of San Diego. The common rule of vacation of a right-of-way, is that when current ownership of each parcel adjoining the public right-of-way is held by two different persons/entities, the right-of-way is split at the centerline and

[16] After the issuance of the 2019 NOA, Viejas had a follow-up conversation with Caltrans. Caltrans representative further explained that all of the relinquishments to the County of San Diego were in fee simple and not just in right-of-way surface rights because the State relinquishes its ownership interests in their entirety. If the State owns the parcels in fee simple, it relinquishes in fee simple.

> each property owner would be granted their perspective part and would cause the new boundary line to be common and touching. If the property on both sides of the right-of-way to be vacated *is owned by the same person/entity, the entire right-of-way would be granted to the person/entity* and the new boundary line would be common and touching.

(AR 46 at 15) (emphasis added). Under the standard of *Motor Vehicles Mfrs. Ass'n of U.S.*, the Director's reliance on BILS's memo, (AR 43), is arbitrary and capricious.

Viejas' expert land surveyor, Wunderline Engineering, refuted BILS' assertion on "future vacations" of public rights-of-way by the State and the County of San Diego for Alpine Blvd., Willows Road, and Interstate 8. *See generally,* Exhibit 2 ("2019 Wunderline Comments"). The 2019 Wunderline Comments stated:

> I respectfully disagree with the above statement by Mr Kehler and Mr. Kimbrough for two reasons:
>
> 1. Currently, the 16.68-acre parcel and the Cuyapaipe Reservation Tract T1123 are separated by Willows Road a San Diego County Public Right-Of -Way, Interstate Highway 8 a State of California Public Right-Of -Way and Alpine Blvd a San Diego County Public Right-Of-Way.
> These three roadways will never be vacated/closed/relinquished and there are no plans to relocate the.
> I do not believe it is proper to use an *impossible scenario* as the basis for their opinion.

2019 Wunderline Comments at 1 (emphasis added). Even if this impossible scenario is to occur, "[o]wnership lines in a street are determined by the original ownership lines as they existed *before* the easement or dedication of the road." 2019 Wunderline Comments at 2 (emphasis added). In this case, the original ownership lines would be that of the original landowners prior to their transfers to the State (i.e., Linus Green, Henry Dobbs and Mark Schwartz, Ruth Mae Jones, Alvin G. Voelker, and Mildred M. Voelker). *See generally,* AR 39. Again, even under this impossible scenario of vacation/abandonment/relinquishment by the State and the County of San Diego, it would still be impossible for the Walker and SIHC Parcels to share a common boundary line.

The Director's arguments regarding the potential vacation of the intervening roads impliedly concede that there is no common boundary at present. In addition, vacation of any one of the intervening roads in the future is purely speculative, and vacation of all three simply piles speculation on top of speculation. If such speculation is allowed, the same could be said for speculation that an intervening fee simple parcel(s) could potentially be acquired by the tribal applicant in the future to establish a common boundary—which would completely negate the requirement of a common boundary.

Again, the Director did not critically examined or scrutinized BILS' unsupported assertions and conclusion. As illustrated in this subsection, BILS' analysis is faulty. The Director's erroneous and undiscerning reliance on BILS' claim of an impossible scenario of vacation/relinquishment/abandonment of Alpine Blvd., Willows Road, and Interstate Highway 8 is arbitrary and capricious.

4. The Director has not Addressed BIA's Own Cartographer's Finding of Non-Contiguousness between the Walker and SIHC Parcels

In 2008, the BIA's GIS Cartographer, Jamie Schubert, ("2008 Schubert Memo") concluded that the Walker Parcel is not contiguous to the SIHC Parcel. (AR 43, Attach. 5 at 1) (unnumbered). In all three decisions (2011 NOD, 2016 NOD, and 2019 NOD), the Director never once commented on the determination of non-contiguity in the 2008 Schubert Memo. This is especially troubling since the Schubert Memo is now a part of the 2018 BILS's record in issuing its determination to support a finding of contiguity. The non-comment on the 2008 Schubert Memo by the Director on such a central issue in the Walker Parcel trust acquisition in all three notices of decision gives Appellants the impression that the Director ignored or purposefully shrouded the determination of non-contiguousness in the 2008 Schubert Memo, or at the very least, the Director did not give full consideration of all the comments, especially one

within the BIA's internal divisions. But instead, 10 years after the 2008 Schubert Memo, the Director resorted to the Bureau of Land Management, an external bureau, to support her finding of contiguity, contradicting a BIA's internal division. The Director's unsupported reliance is arbitrary and capricious.

5. The Director Wrongly Assumed that if One Public Road Does Not Destroy Contiguity, then Three Roads Cannot do so Either.

The Director stated:

> Here, the Walker Parcel is separated from the existing trust land by three public roads and nothing else. The fact that there are three roads located between the properties rather than one should make no more difference to a contiguity analysis than if a multi-lane highway was located on property boundaries instead of a one lane County road.

2019 NOD at 15. The Director supplied no analysis of how the "one public road" standard would allow a contiguity finding when she did not do an ownership analysis for any of the Intervening Parcels. Both Viejas and the County of San Diego requested the Director to approach Caltrans directly for a more thorough analysis of Caltrans' ownership interest in the Intervening Parcels. (AR 41 at 2 (unnumbered); AR 42 at 2). Had the Director approached Caltrans and requested a thorough analysis of the Intervening Parcels, the Director may have been informed that there are multiple surface and subsurface ownerships by various entities. However, the Director's inaction and lack of analysis, and failure to fully explain her reasoning is arbitrary and capricious.

6. Even if the Part 292 definition is applicable, the Director's interpretation is wrong as a matter of law.

The Director's interpretation of the definition of "contiguous" in the 25 C.F.R. Part 292 regulations is incorrect as a matter of law. First, the "notwithstanding" clause of the definition—"notwithstanding the existence of non-navigable waters or a public road or right-of-way"—

establishes that the requirement of a common boundary takes precedence over the existence of a intervening public road. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 939 (2017) (explaining the meaning of a "notwithstanding" clause). The Director, however, would interpret the clause to mean a common boundary is *not* required if there is an intervening road.

Second, the exclusion of navigable waters in the clause makes clear that a common boundary is required. Under the common law, riparian owners have title to the beds of adjacent non-navigable waters. For example, under California common law, abutting owners to non-navigable waters are deemed to be owners to the middle of such waters, *Bishel v. Faria*, 347 P.2d 289, 292 (Cal. 1959); Cal. Civ.Code § 830; Cal.Civ.Proc.Code § 2077. Contiguity is defeated by navigable waters separating two parcels because of state ownership of the beds underlying navigable waters. Thus, the inclusion of non-navigable waters in the definition only makes sense if intervening roads are considered in the same light: contiguity is not defeated by an intervening road if there is nonetheless a common boundary in the subsurface. Otherwise, navigable waters would be included in the definition as the equivalent of intervening public roads with no subsurface common boundary.

7. Contiguity Determines Whether the Director Must Require and Consider a Business Plan that Discloses Ewiiaapaayp's True Intended Use of the Walker Parcel

The significance of the contiguity question is that it determines the criteria under which Ewiiaapaayp's application is evaluated. If the Walker Parcel is not contiguous to the SIHC Parcel, the off-reservation criteria unarguably apply, and Ewiiaapaayp would be required to submit a business plan under § 151.11(c). This would force the Director to scrutinize the evidence of Ewiiaapaayp's true intentions and make a determination of the anticipated economic benefits; in turn, that determination would be subject to administrative appeal and judicial

review. Ewiiaapaayp has been fighting to avoid such disclosure *for over 15 years.* And for just as long, the BIA has refused to demand the necessary disclosure. The obvious question is why—why is it so important to avoid revealing Ewiiaapaayp's true business plans if the purpose is not a development of a casino?

C. BIA's Decision Fails to Give Due Consideration to Comments.

As set forth in *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4 (2013), the Board "must be able to discern from the Director's decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties." 57 IBIA at 12-13. Neither the 2019 NOD nor the record demonstrates that BIA has considered all comments submitted. This failure to adequately address comments plainly does not comply with the Board's direction in *Walker I*, which reaffirms the *Village of Hobart*.

In *Walker I*, the Board found that, given its vacatur and remand of the May 31, 2011 decision, it was premature to decide whether that decision adequately addressed the criteria under 25 C.F.R. § 151.10, including § 151.10(b) (need), § 151.10(c) (purpose), and § 151.10(f) (jurisdictional and land use conflicts), and Appellants' comments. 58 IBIA at 30. The Board, however, directed that "if the Regional Director again determines to approve the acquisition, she should address Appellants' comments in *greater detail* to establish that they have been considered." *Id.* (emphasis added). Even though this is the BIA's third notice of decision on this parcel the criteria for Part 151 acquisitions still apply, and the Director must be able to present in greater detail the factors required under Part 151 acquisition, none of which has happened here.

In *Walker I*, Appellants raised numerous arguments regarding the Director's failure to correctly apply the § 151.10 criteria. *See* Exhibit 3, Viejas' *Walker I* Opening Brief at 53-62.[17]

[17] Appellants' arguments and comments in *Walker I* were preserved by the Board's remand directing the Regional Director to "address Appellant's comments in greater detail to establish that they have been considered." 58 IBIA 30. In the alternative, Viejas respectfully requests that the ASIA exercise her authority to include the arguments and

Because the Board deferred a decision on whether the Director adequately addressed each of the § 151.10 criteria and Appellants' comments, these arguments are here incorporated by reference in their entirety. *Id.*

The Director once again fails to adequately consider the § 151.10 criteria and respond to Appellants' comments. Appellants do not believe that the BIA adequately analyzed (1) Ewiiaapaayp's need for new trust land (2) its true purpose and use for such land, and (3) the jurisdictional and land-use conflicts in her 2019 NOD. The BIA did not adequately describe Ewiiaapaayp's need for additional land with over $2.2 million in annual revenue it is currently bringing in for five members, or how the development of another health clinic at the Walker Parcel would help meet that need. Viejas has submitted numerous comments to show that Alpine does not need another healthcare facility.[18] Viejas still firmly believes that there is not a demand for additional healthcare facilities in the Alpine area even though Ewiiaapaayp asserted that the "demand for the Walker property is strong" but that it could not disclose that information because of non-disclosure agreements. (AR 115, Attach. 1 at 2). The BIA failed to consider evidence showing that there is no need for another healthcare facility in close proximity to the SIHC clinic and the baffling need for a Liquor Ordinance[19] for multiple healthcare facilities or any of Ewiiaapaayp's current uses or stated future uses for its lands. In *Walker I*, the Board found that the "establishment of a casino is speculative and unconnected to the action concerning the Walker Parcel for purposes of the EA." 58 IBIA at 1. However, the direct evidence of a new Liquor Ordinance combined with a Consulting Agreement indicated in the Declination Letter,

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comments cited by Appellants in *Walker I*, including Viejas' November 4, 2011 Opening Brief and Motion to Supplement the Record, and February 22, 2012 Reply Brief (attached collectively as Exhibit 3), as part of the administrative record in the current appeal. *See* n.1, *supra.*

[18] Viejas submitted the first healthcare need study by ECONorthwest in 2009. In 2015, Viejas submitted a supplement to the 2009 study. (AR 111).The Director's decision fails to address this new information.

[19] The publication date for the Liquor Ordinance is on April 19, 2019, four days before the issuance of the 2019 NOD.

clearly indicates that Ewiaapaayp, by its own statement, "plans to construct and operate a gaming facility and related entertainment and lodging facilities" (83 Fed. Reg. at 15,631) and is taking concrete steps to further these plans. Gaming is therefore no longer merely speculative. Finally, the BIA failed to address jurisdictional concerns adequately, including impacts to Viejas sovereignty, jurisdiction, economic viability, and Ewiiaappaayp's ability to work with the Town of Alpine.

The BIA did not critically analyze submitted comments from all parties, including those submitted by Ewiiaapaayp itself. The BIA certainly did not weigh the evidence on both sides to reach any kind of conclusion. In short, there was no analysis at all. Because neither the 2019 NOD nor the record demonstrates that BIA considered all comments submitted, BIA's decision must be vacated and remanded.

In addition, if the BIA confirms a different use for any of Ewiiaapaayp's parcels, especially with the glaring presence of the Liquor Ordinance, the BIA *must require an updated EA* to include such new uses and their cumulative effects. In *Walker I*, the Board directed BIA to consider on remand the potential impacts of the simultaneous operation of two healthcare clinics, *and any other past, present, or reasonably foreseeable future development activities that should be included in the cumulative impacts analysis for the proposed action*. 58 IBIA at 11-12, 34. Subsequently, in *Salerno I*, the Board remanded the Salerno Parcel decision to BIA and directed BIA to consider whether the potential uses of that property identified in the record were reasonably foreseeable. 63 IBIA at 83-84, 91. Nonetheless, the 2019 NOD fails to consider any such uses and their cumulative impacts. The Director's decision must therefore be remanded for BIA to consider the potential foreseeable uses of the Salerno Parcel, and to evaluate any such uses in a cumulative impacts analysis.

VI. CONCLUSION

As discussed in this brief, throughout the long period of time Ewiiaapaayp has been seeking to undertake an aggressive economic development plan in Alpine—whether through gaming or some other plan—it has stubbornly refused to provide information about its plans. Ewiiaapaayp's plans for trust land in the Alpine area remain a mystery—*nearly 20 years* after they were first proposed—because of BIA's failure to: (1) apply the off-reservation requirements to include a business plan by hiding behind the contiguity finding; (2) consider the reasonably foreseeable uses and cumulative impact of the Salerno and Walker Parcels together; (3) consider contrary evidence to Ewiiappaayp's proposal; and (4) explain the basis for its decisions and respond to significant comments in the record. It is time for BIA to apply the trust land acquisition requirements and NEPA in the manner intended so a full, fair and transparent analysis of Ewiiaapaayp's plans can be achieved. Those requirements would require a transparent and detailed business plan for the Walker and Salerno Parcels and would confirm whether the purpose of the proposed Walker Parcel acquisition is to allow Ewiiaapaayp to exploit the SIHC Parcel's pre-1988 status under IGRA to avoid the required two-part determination for off-reservation gaming. Even if Ewiiaapaayp has given up on its gaming plans for Alpine, the off-reservation review required for non-contiguous lands such as these will provide important information about potential impacts and apply a heightened standard for trust acquisition.

For the reasons stated above, Appellants respectfully request that the AS-IA vacate and remand the proposed acquisition of the Walker Parcel for reconsideration.

Date: 9/9/2019

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Appellants Viejas Band of Kumeyaay Indians & Sycuan Band of Kumeyaay Indians' Opening Brief on the Merits and Motion to Supplement the Administrative Record and exhibits were served on each of the following party on 9/9/2019.

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