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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

Viejas Band of Kumeyaay Indians and Sycuan Band of the Kumeyaay Nation; and County of San Diego, California, Appellants, v. Pacific Regional Director, Bureau of Indian Affairs, Appellee	)))))))))))

NOTICE OF APPEARANCE

The undersigned submits this Notice of Appearance on behalf of the U.S. Bureau of Indian Affairs, Pacific Region. Please direct future correspondence and communications relating to this matter to Karen D. Koch, Assistant Regional Solicitor, at the address above.

Dated this 8th day of October, 2019.

Respectfully submitted,

Karen D. Koch
Assistant Regional Solicitor

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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE ASSISTANT SECRETARY – INDIAN AFFAIRS

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 Affairs Appellee.	APPELLEE ANSWER

I. Background and Request for Administrative Notice of the 2016 Record

Appellants challenge a decision issued April 23, 2019, by the Regional Director, Pacific Region, Bureau of Indian Affairs (BIA), approving an application by the Ewiiaapaayp Band of Kumeyaay Indians (Tribe) requesting that BIA accept a 16.69 acre parcel of property known as the "Walker" property into trust on behalf of the Tribe (Decision). Appellants assert the Decision should be reversed on grounds that the Walker property is not "contiguous" to land currently held in trust for the Tribe consistent with regulatory requirements at 25 C.F.R. Part 151, and because the Decision fails to give due consideration to comments concerning the proposed acquisition. In addition to a request for vacatur and remand of the Decision, Appellants also request the Assistant Secretary-Indian Affairs (AS-IA) include three exhibits in the administrative record: (1) Ewiiaapaayp Band of Kumeyaay Indian Liquor Control Ordinance, 84 Fed. Reg. 15631 (April 16, 2019); (2) Wunderlin Engineering, Inc. Supplemental Comments on Land Description Review Certification, May 21, 2019; and (3) Appellants Viejas Band of Kumeyaay Indians' Opening Brief on the Merits and Reply Brief, Docket Nos. IBIA 11-136 and 137, dated respectively November 4, 2011, and February 22, 2012.

As explained further below, "Appellants Exhibits" are either not relevant with respect to the Decision and were therefore not considered or they were not before the Regional Director when the Decision issued and accordingly are not appropriately included in the administrative record supporting the Decision. However, Appellants Exhibit (1), the Tribe's liquor ordinance, is a matter of public record and Appellee does not object to references to this or other public records. Appellants Exhibit (2), the Engineering Report, post-dates the Decision and could not have been considered by the Regional Director when the Decision issued, but Appellee does not object to consideration of arguments Appellant derives from information in the Report. Appellants Exhibit (3), Opening and Reply Briefs from 2012 concern information that has been updated, but Appellee does not object if the AS-IA takes administrative notice of briefs that were previously filed. However, briefs that are relevant to the current appeal concern the decision to acquire the Walker parcel in trust that issued December 23, 2016 (2016 Decision), and Appellee therefore has included this record with the record for the Decision at issue.

The 2016 Decision was remanded April 20, 2018, pursuant to direction from the Acting AS-IA, and the Decision at issue focuses on issues identified in the remand directive, while building upon the record that supported the 2016 Decision. Both Appellants and Appellee filed briefs with the Interior Board of Indian Appeals (IBIA) before remand of the 2016 Decision. The record filed with the 2016 Decision includes information that is directly relevant to the current appeal. An example of information included in the 2016 Decision record is a letter from the Tribe dated May 30, 2015, which responds to questions concerning the purpose and need for the acquisition, environmental concerns, cumulative effects of the proposed acquisition, and includes the "Pinto Medical Center Updated and Supplemnental Business Plan May 30, 2015", located at Tabs 30 and 31 of the 2016 Decision record. To the extent there may be any question that the 2016 Decision record is included with the record for the Decision herein, Appellee respectfully requests administrative notice of the record that was filed with the IBIA in support of the 2016 Decision. The records filed in support of the Decision at issue and in support of the 2016 Decision together reflect that the Decision to acquire the Walker property in trust is consistent with federal law and regulations governing the BIA and trust acquisition.

II. The Tribe's Existing Trust Property is Reservation Land

As an initial matter, the Walker property was previously the subject of a September 6, 2013, Board Order wherein the Board observed: "'Indian reservation' is defined to include 'that area of land over which the tribe is recognized by the United States as having governmental jurisdiction.'" *County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*, IBIA 11-136; 11-137, *citing* 25 C.F.R. § 151.2(f). In the 2013 Order, the Board confirmed the Tribe's existing trust lands in Alpine constitute a "reservation" for the purpose of trust acquisition pursuant to 25 C.F.R. § 151, even though the Alpine trust land has not been proclaimed a formal reservation under 25 U.S.C. § 467.

III. The Walker Property is Contiguous to Tribal Reservation Land Held in Trust

The acquisition of land in trust by the BIA for Indian tribes is authorized by section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, and is governed by regulations at 25 CFR Part 151. In acquiring property in trust, the BIA must consider whether to consider the application to take land into trust pursuant to criteria that apply to "on-reservation acquisitions", at § 151.10, or whether criteria for "off-reservation acquisitions", at § 151.11, are applicable. Criteria for "on-reservation" acquisitions pursuant to § 151.10, apply when "the land is located within or contiguous to an Indian reservation". Appellants assert the Walker property is not contiguous to other tribal property held in trust because the Walker property is separated from the Tribe's Alpine trust property by roads with differing ownership interests. As Appellants attest, there are three public roadways separating the Walker property from the existing Alpine trust lands consisting of a State highway and two County roads. Appellants assert that the right-of-way corridors for the roadways are not merely surface easements, but that instead, the State of California and the County of San Diego own the underlying fee property upon which the roadway right-of-ways are located. Appellants assert that the road easements preclude a finding that the Walker parcel is contiguous with existing trust land because of the asserted separation of both the surface and subsurface estates from existing trust property due to the easement ownership interests.

Appellants reference a Report by Wunderlin Engineering dated May 21, 2019, which concerns a Land Description Review (LDR) provided by a BLM Surveyor to the BIA, wherein the

Surveyor opines that the proposed Walker acquisition is contiguous to existing trust land. While the record appropriately reflects that Appellees considered the opinion of the BLM Surveyor regarding contiguity of the Walker property, Appellees respectfully request that administrative notice be taken of Department of the Interior National Policy Memorandum NPM-TRUS-36-A1, effective August 5, 2019, and which extends a similar NPM issued May 31, 2018, concerning review and approval of off-reservation fee-to-trust acquisitions. The NPM provides, at Part A, "Determining When an Application is On- or Off-Reservation" that: "If a question arises whether property that is the subject of a particular fee-to-trust application qualifies as contiguous, an opinion should be requested from the appropriate field or regional Office of the Solicitor (SOL)." Consistent with the NPM, the BIA requested a contiguity opinion from the Office of the Regional Solicitor and relied upon the attorney-client privileged contiguity opinion issued by the Office of the Regional Solicitor in rendering the Decision. Because the opinion is attorney-client privileged, the administrative record does not include the legal opinion concerning contiguity, although it is part of the privileged records supporting the Decision.

The record includes the BLM Surveyor LDR, which is not a privileged document, the attorney-client privileged SOL opinion concerning contiguity is held separately among privileged record documents. Portions of the SOL opinion addressing contiguity were incorporated in the Decision and in the Answer brief submitted in the appeal of the 2016 Decision, and are again incorporated herein in support of the Decision at issue. Consistent with the NPM, the BIA relied upon a legal opinion issued by the SOL, rather than only the Surveyor's opinion concerning contiguity. Appellants have submitted the Wunderline Engineering Report to rebut the Surveyor's LDR opinion, but that opinion is not dispositive of the continuity analysis provided by the Regional Solicitor's Office that was relied upon by the BIA consistent with the NPM, and which is referenced in the Decision and incorporated in the following discussion.

First, the BIA Decision relies upon the definition of "contiguous" in Department gaming regulations because it is not defined in the Part 151 regulations. Appellants argue that the IBIA conclusively defined contiguous in 2014, in the case *Preservation of Los Olivos*, 58 IBIA 278 (2014), to mean a parcel sharing a boundary with an existing Indian reservation whether through surface or subsurface. In *Los Olivos*, Appellants observe, the IBIA determined that a parcel of land

shared a common boundary with an existing reservation because subsurface rights of an intervening roadway had not been acquired with the roadway/right-of-way that divided the existing reservation land from the proposed trust acquisition and the parcels were thus contiguous via their connected subsurfaces. Appellants also note that the IBIA remanded another matter to the BIA, in *County of Santa Barbara v. Pacific Regional Director*, 65 IBIA 204, 17 (2018), for examination of whether the parcels shared a common boundary through surface or subsurface connections. Appellants maintain the IBIA established that the definition of "contiguity" is limited to a connection between parcels through the surface or subsurface.

On page 14 of Appellants' brief, they assert that 2018 Caltrans Records they submitted include a "limited ownership analysis of the Intervening [roadway] Parcels" due to Caltrans' lack of human resources, but nevertheless conclude, based on the limited ownership analysis, that the Caltrans Records reflect that Caltrans owns both surface and subsurface interests in the intervening roadways. On pages 15-16 of their brief, Appellants argue that the 2018 Caltrans Records "unequivocally concluded that its 'current and superseded right of way maps' do not show any 'fee acquisition deeds. . . that contained *exceptions* for sub-surface rights adjacent to [the Walker property]" and that the roadways were transferred without reservation of rights. A problem with this conclusion is that the roadways are right-of-ways which, by their nature, are almost always in the nature of surface easements that do not include additional encubmrances or reserved rights because easements, by their nature, are encumbrances or reservations on the servient estate they encumber. As a general rule, right-of-ways do not include further encumbrances or reservations linked to fee acquisition deeds, as the right-of-ways themselves are encumbrances linked to deeds for the underlying servient estate, and those deeds generally reflect that the right-of-way or easement is a superior estate reserved from or encumbering the surface of an underlying subsurface servient estate. Hence, it is unlikely that an easement or right of way would reflect that it is encumbered by a fee acquisition deed in title documents, and if the deeds included with the 2018 Caltrans Records "unequivocally concluded" that the road easements or right-of-ways contain no additional reservation of rights any such conclusion is consistent with the general nature of easements as reservations or encumberances on other property rights.

Second, the Caltrans Records include deeds that reflect transfer of highway right-of-ways

in fee, but a search through State regulations including the California Streets and Highways Code, does not reflect the legal nature of a right-of-way in fee under State law and the deeds for the right-of-way in fee were provided by Caltrans with the caveat that they included a "limited ownership analysis of the Intervening [roadway] Parcels". But if the highway right-of-way on the boundary of the Walker property was a full fee interest, then the boundary of the Walker property would not extend entirely across the right-of-way interest; the boundary of the Walker property would instead not include the right-of-way interest at all and it would be clear from title documents that the Walker property is not contiguous with the adjacent Alpine property. However, an intervening fee interest was not identified in during review of the title documents for the property that was provided by the Office of the Regional Solicitor consistent with 25 CFR Part 151, or by the BLM Surveyor, who concluded the properties are contiguous.

Absent legal documents or State law that unequivocally establishes the right-of-ways that normally would be surface encumbrances on the Walker property include both surface and subsurface land, the application of a standard definition for purposes of determining the contiguity of land encumbered by the right-of-ways is reasonable and rational. Consistent with the nature of a superior surface estate encumbering a servient subsurface estate, a right-of-way interest such as the ones maintained in the Caltrans Records would naturally not reflect that the right-of-way interest is the subject of any other fee acquisition deed because, as noted, the right-of-way itself would be reflected as an encumbering interest in the acquisition deed for the underlying servient estate, and further research and possibly consultation with the State would be required to determine if the right-of-way interest included ownership of the subsurface estate, which Caltrans expressly noted that it lacked the resources to provide. Conclusions concerning whether the right-of-ways are anything other than standard encumbrances on a servient estate would require research and analysis concerning the vesting deeds and State law to determine whether the subsurface interests of the roadways were included with what normally are encumbrances on servient subsurface interests. The requirement for performance of sophisticated property interests analyses when properties are separated by roadways likely contributed to the regulations promulgated pursuant to the Indan Gaming Regulatory Act (IGRA) concerning the definition of "contiguous", although IGRA legislative history concerning this issue is sparse, as discussed below.

In 2008, Department regulations implementing the IGRA defined "contiguous" as "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point". *73 Fed. Reg. 29354, 29376, May 20, 2008 ("Gaming on Trust Lands Acquired After October 17, 1988")* (Gaming Rules). The commentary section of the published Gaming Rules does not elaborate further on the definition discussed at page 29355 of the Federal Register:

> Section 292.2 How are key terms defined in this part?
>
> Contiguous
>
> Several comments related to the definition of contiguous. One comment suggested removing the definition from the section. A few other comments suggested keeping the definition, but removing the second sentence that specifies that contiguous includes parcels divided by non-navigable waters or a public road or right-of-way. A few comments suggested including both navigable and non-navigable waters in the definition. Many comments regarded the concept of "corner contiguity." Some comments suggested including the concept, which would allow parcels that only touch at one point, in the definition. Other comments suggested that the definition exclude parcels that only touch at a point.
>
> Response: The recommendation to remove the definition was not adopted. Likewise, the recommendation to remove the qualifying language pertaining to non-navigable waters, public roads or right-of-ways was not adopted. Additionally, the suggestion to include navigable waters was not adopted. The concept of "corner contiguity" was included in the definition. However, to avoid confusion over this term of art, the definition uses the language "parcels that touch at a point."

Although the commentary section of the Gaming Rules does not elaborate on the meaning of the definition of contiguous, it clarifies the Department intent to define "contiguous" to include parcels of land separated by non-navigable waters or a public road or right-of-way. The Department's 2008 Gaming Rules definition of contiguous also includes land that touches at a point, and this is consistent with the decision in *County of Sauk v. Midwest Regional Director*, 45 IBIA 201 (2007), *aff'd, Sauk County v. U.S. Department of the Interior,* No. 07-cv-543-bbc (W.D. Wisc. May 29, 2008), which Appellants note resulted in the Board conclusion that: "[t]he fact that a highway easement separate the actual land surfaces of the two parcels does not render them any less contiguous". 45 IBIA at 213.

Absent definitive title information concerning whether parcels separated by roads touch at any surface or subsurface point, the definition of contiguous established by the Department in the

Gaming Rules is significant because the IGRA provides that gaming may only be conducted on land located within or contiguous to the boundaries of a reservation of an Indian tribe. 25 U.S.C. § 2719 (a)(1). Hence, the definition of contiguous established by the Department in the Gaming Rules speaks to the contiguity of trust land, which is precisely what is at issue when the Department acquires land in trust pursuant to 25 CFR Part 151. Like the regulations at Part 151, the Gaming Rules concern land that has been or will be acquired for Indian tribes and whether that land is contiguous to existing land held in trust. Because the Gaming Rules define the term contiguous in the context of trust acquisition, the definition may reasonably be applied to trust acquisitions pursuant to Part 151, when that term is not defined and definitive title information concerning surface and subsurface interests is not readily available and it is not readily discernable whether the roadways are simply suface encumbrances, particularly if the interests on both sides of the encumbrances are being acquired on behalf of the same owner.

The definition of contiguous in Department Gaming Rules that includes "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point" must have been intended to encompass these features when they are located on fee property that separates trust lands because if a road, right-of-way, or water body is owned as an easement that encumbers otherwise contiguous property held in fee, the underlying, or servient, property would remain contiguous to adjoining or abutting property and it would not be necessary for the definition of contiguous to include properties that are separated by a road, right-of-way, or water body on the boundary of trust property. The use of the term "notwithstanding", in the Gaming Rules definition of "contiguous", is defined by both Black's Law Dictionary and Webster's, to mean "in spite of". In other words, the Gaming Rules define contiguity to include two land parcels with a common boundary "in spite of" the existence of a public road, right-of-way, or water body along such boundaries. It is a common practice, as evidenced by public land records, for public roads to be located along township section lines and property boundaries to avoid interference by the roadway with landowner property use. Hence, Department Gaming Rules allow tribes to use neighboring properties that are acquired in trust, despite separation of those properties by public roads, right-of-ways, or water bodies, by establishing a definition of contiguous that encompasses land parcels with a common boundary in

spite of public roads located on boundaries.

Here, the Walker property is separated from other land held in trust for the Tribe 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 sixteen lane State highway was located on the 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. Applying the same definition of contiguity the Department adopted in the Gaming Rules to Part 151 acquisitions, the parcels here are contiguous. 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, the BIA reasonably and rationally determined the term "contiguous" under Part 151 may be defined in the same manner as it was defined by the Department in the Gaming Rules to trust acquisitions pursuant to Part 151. Applying the definition of contiguous incorporated in the Gaming Rules to Part 151, lands acquired in trust are contiguous to existing trust lands if they are separated by public roads or right-of-ways located along property boundaries.

IV. The BIA Decision and Administrative Records Demonstrate Comments Were Appropriately Considered

Appellants argue that neither the Decision nor the administrative record demonstrate that BIA has considered all comments submitted. As noted above, the Decision focuses on issues identified in the remand directive for the 2016 Decision that was issued by the Acting AS-IA, and which resulted in remand April 20, 2018. The record filed with the 2016 Decision includes information that is directly relevant to the current appeal and which was not included with the record for the current appeal that focuses on the remand directive. As noted previously, information included in the 2016 Decision record includes a letter from the Tribe dated May 30, 2015, which responds to questions concerning the purpose and need for the acquisition, environmental concerns, cumulative effects of the proposed acquisition, and includes the "Pinto Medical Center Updated and Supplemnental Business Plan May 30, 2015". 2016 Decision Record at Tabs 30 and 31. Despite Appellants' complaint that a business plan concerning the proposed health center was required to be submitted, Appellants responded to the 2016 Decision

and should have been aware that the BIA considered the 2015 Business Plan. Likewise, in issuing the Decision, the BIA considered the purpose and need for the acquisition that is more fully explained by the 2015 Letter.

Appellants complaint concerning the proposed contruction of the health center on the Walker property is focused on prior attempts by the Tribe to obtain or identify land that could be the location for a tribal casino, which Appellants indicate would cause them economic and environmental harm. Appellants point to approval of a liquor orginance for the Tribe as an indication that tribal motives involve construction of projects other than a health center. In sum, Appeallants appear to argue that the Tribe should not be afforded opportunities currently enjoyed by Appellants and submit, the BIA failed to consider the Tribe's "true purpose" for the trust application. However, the IBIA has consistently held that BIA may not consider speculative uses for land that is proposed to be acquired in trust and instead must consider the use proposed by a tribe seeking trust acquisition. *Board of County Commissioners of Spokane County, WA and Spokane Tribe of Indians v. Acting NW Regional Director, BIA*, 66 IBIA 276 (2019).

As noted, the administrative records reflect that BIA clarified purpose and need with the Tribe, and the proposed use was supported by a Business Plan that was the subject of an analysis pursuant to the National Environmental Policy Act (NEPA) that considers comments concerning the acquisition and which resulted in a finding of no significant impact. Appellants nevertheless argue the Decision fails to give adequate consideration to comments, and argue the BIA failed to adequately address purpose and need and the Tribe's "true purpose" for the trust application, and maintain the BIA failed to adequately consider "jurisdictional and land-use conflicts" that appear to concern existing infrastructure and agreements and operations currently in place or conducted by Appellants. Appellants additionally argue the BIA failed to adequately consider cumulative impacts due to foreseeable uses of the Salerno Parcel, which the NEPA Supplemental Environmental Assessment reflects was proposed to be acquired in trust with no proposed change in land use by the Tribe. In responding to comments, the BIA noted there are no proposed changes in land use associated with the pending fee-to-trust application for the Salerno Parcel, and, as such, consideration of future potential changes would be speculative. *See Board of County Commissioners v. Acting NW Regional Director,* supra.

V. Conclusion

The Decision to acquire the Walker property in trust is appropriately supported by the records filed in support of the Decision at issue and in support of the 2016 Decision, which together reflect that the Decision to acquire the Walker property in trust is consistent with federal law and regulations governing the BIA and trust acquisition.

Dated this 8th day of October, 2019.

Respectfully submitted,

Karen D. Koch
Assistant Regional Solicitor

CERTFICATE OF SERVICE

RE: Viejas Band of Kumeyaay Indians & Sycuan Band of Kumeyaay Indians'; and County of San Diego, California v. Pacific Regional Director, Bureau of Indian Affairs; Notice of Appearance.

I, the undersigned, declare that:

I am a citizen, of the United States, over the age of eighteen, and not a part of this litigation. On October 9, 2019, I served the

NOTICE OF APPEARANCE

by placing a true copy enclosed in a sealed envelope via FedEX at Sacramento, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on the 9th day of October, 2019 at Sacramento, California.

Suzanne Y. Ifft
Administrative Assistant