File Org # 200807

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.	)

APPELLANT COUNTY OF SAN DIEGO'S OPENING BRIEF

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Appellant County of San Diego (the "County") submits the following opening brief in support of its appeal.

I. INTRODUCTION

On April 23, 2019, the Pacific Regional Director of the Bureau of Indian Affairs (the "Regional Director") approved for the third time the application of the Ewiiaapaayp Band of Kumeyaay Indians ("Ewiiaapaayp") to take a 16.69-acre parcel of property located in the unincorporated County (the "Walker Property") into trust.[1] The Regional Director's decision should be overturned because she applied the Code of Federal Regulations ("C.F.R.") provision governing land that is "located within or contiguous to an Indian reservation" to the application. 25 C.F.R. § 151.10. The Regional Director should have applied the criteria specified in 25 C.F.R. § 151.11 for "off reservation" lands.

The Regional Director's decision to apply section 151.10 was in error because the Walker Property is not contiguous to Ewiiaapaayp's reservation. Rather, Ewiiaapaayp's reservation is located approximately 40 miles west of the Walker Property. (Ex. 1 to the Supplemental Administrative Record [hereinafter "Suppl. AR"], at p. 2.) Moreover, the Walker Property is located across a major interstate (Interstate 8) and two County roads (Willows Road and Alpine Boulevard) from land that was taken into trust on behalf of Ewiiaapaayp in 1986. The property taken into trust in 1986 is currently the location of

[1] The Regional Director previously approved Ewiiaapaayp's application to take the Walker Property into trust in a decision dated May 31, 2011. (Ex. 1 to Suppl. AR.) The County appealed that decision and the Interior Board of Indian Appeals reversed and remanded. *County of San Diego v. Pacific Regional Director,* 58 IBIA 11 (2013). On remand, the Regional Director again approved Ewiiaapaayp's application to take the Walker property into trust in a decision dated December 23, 2016. (Ex. 22 to Suppl. AR.) The County again appealed. On April 20, 2018, the Interior Board of Indian Appeals issued a decision vacating and remanding the Regional Director's decision. (Ex. 30 to Suppl. AR.)

the Southern Indian Health Council, Inc. ("SIHC") clinic.[2] The property where the SIHC clinic is located is not part of Ewiiaapaayp's reservation because the Secretary of the Interior never took the action required by 25 U.S.C. § 5110 to make the property part of the reservation. Further, even if the property where the SIHC clinic is located were part of Ewiiaapaayp's reservation, it is not contiguous to the Walker Property. The two properties are separated by a major interstate highway and two County roads. The properties cannot be accessed from one another and are 1.3 miles apart. The Interior Board of Indian Appeals has held that the term "contiguous" as used in 25 C.F.R. § 151.10 means "adjoining or abutting." The Walker Property and the SIHC clinic property are not adjoining or abutting. Rather, they are separated by a major interstate highway and two County roads. Since the Regional Director applied the wrong standard in reviewing Ewiiaapaayp's fee-to-trust application, the Regional Director's decision should be overturned. On remand, the Regional Director should be instructed to apply the criterial specified in 25 CFR § 151.11 to Ewiiaapaayp's application.

II. THE REGIONAL DIRECTOR APPLIED THE WRONG STANDARD TO EWIIAAPAAYP'S APPLICATION BECAUSE THE WALKER PROPERTY IS NOT ON OR CONTIGUOUS TO EWIIAAPAAYP'S RESERVATION

In approving Ewiiaapaayp's application, the Regional Director erroneously applied the standard specified in 25 C.F.R. § 151.10, which governs land that is "located within or contiguous to an Indian reservation." (Decision, Ex. 46 to Supp. AR, at p. 5.) The Regional Director should have applied the standard specified in 25 C.F.R. § 151.11, which governs applications "when the land is located outside of and noncontiguous to the tribe's reservation."

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[2] The SIHC is "a nonprofit health care organization, now serving the Indians of the Ewiiaapaayp, Manzanita, La Posta, Viejas, Sycuan, Jamul and Barona Reservations. Services from this facility are currently provided to non-Indians of the community as well." (April 23, 2019 Notice of Decision of the Regional Director ("Decision"), Ex. 46 to Suppl. AR, at p. 7.)

A. The Property Where The SIHC Clinic Is Currently Located Is Not Part Of Ewiiaapaayp's Reservation.

In a prior decision approving Ewiiaapaayp's application to take the Walker Property into trust, the Acting Regional Director stated that the "the subject property [the Waker Property] is located in Alpine, California, approximately 40 miles west of the main Ewiiaapaayp Reservation." (Ex. 1 to Suppl. AR, at p. 1.) Ewiiaapaayp was even more candid in its application, acknowledging that the "Walker Site is located approximately 40 miles west of the Band's reservation and approximately 1.3 miles from the Band's trust lands in Alpine, California, that are the current site of the SIHC health clinic." (Ex. 1 to the Original Administrative Record, at p. 2) (emphasis added). Nonetheless, the Regional Director concluded that the land previously taken into trust where the SIHC clinic is currently located is part of Ewiiaapaayp's reservation.[3] The Regional Director was mistaken.

A federal statute -- 25 U.S.C. § 5110 -- provides that "[t]he Secretary of Interior is hereby authorized **to proclaim** new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or **to add such lands to existing reservations**: *Provided*, That **lands added to existing reservations shall be designated** for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservation." (emphasis added.) The property where the SIHC clinic is currently located was acquired pursuant to the Act -- 25 U.S.C. § 5108. Thus, in order for that property to become part of Ewiiaapaayp's reservation, the Secretary of Interior must take the action required by

[3] The County recognizes that the Interior Board of Indian Appeals has rejected the County's argument on two prior occasions. The County is making the argument again to preserve it for court review.

25 U.S.C. § 5110.[4] Ewiiaapaayp recognizes this fact, stating in a letter to the Secretary of Interior that "the Ewiiaapaayp reservation proclamation is an administrative clarification of the status of the Tribe's trust lands in Alpine, California, which proclamation the Tribe originally requested from the BIA in 1986, again in 1994, again in 1995, again in 1998, and again in 2001 . . . ." (Ex. 96 to the Original Administrative Record, at p. 2.) Since the Secretary of Interior has not taken the action required by 25 U.S.C. § 5110 the property where the SIHC clinic is located is not part of Ewiiaapaayp's reservation and the Walker Property is not contiguous to the reservation for this reason alone.

B. The Walker Property Is Not Contiguous To The Property Where The SIHC Clinic Is Located.

Even if the property where the SIHC clinic is located were part of Ewiiaapaayp's reservation, the Walker Property would still not be contiguous to Ewiiaapaay's reservation within the meaning of 25 C.F.R. § 151.10. The Walker Property and the property where the SIHC clinic is located are separated from one another by two County roads and Interstate 8. Thus, these properties are not contiguous.

"The proper construction of the terms 'contiguous' and 'noncontiguous' in the sections 151.10 and 151.11 is a question of law." *Jefferson County, Oregon, Board of*

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[4] It has been suggested that the definition of "Indian Reservation" contained in 25 C.F.R. § 151.2(f) can be used to trump the Congressional mandate that the Secretary of Interior take the action required by 25 U.S.C. § 5110 to separately determine that land taken into trust should be part of the reservation. (Ex. 29 to the Original Administrative Record, at p. 1.) If 25 C.F.R. § 151.2 provides that land taken into trust automatically becomes part of the reservation, it is contrary to 25 U.S.C. § 5110 and must yield. *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."). *See also Pettis ex rel. U.S. v. Morrison-Knudsen Co., Inc.*, 577 F.2d 668, 673 (9th Cir. 1978) ("Statutes should not be construed so as to make mere surplusage of any of the provisions included therein.").

Commissioners v. Northwest Regional Director, Bureau of Indian Affairs, 47 IBIA 187, 202 (2008). "The terms 'contiguous' or 'noncontiguous' are not defined in 25 C.F.R. Part 151. The preambles to the draft and final rules reveal that the Department did not anticipate any question about the meaning of the terms, such that it attempted to define or discuss them." *Id.*, at 203 (citations omitted). In *Jefferson County*, the Interior Board of Indian Appeals held that "lands which are 'contiguous' for purposes of 25 C.F.R. § 151.10 are lands that adjoin or abut, and lands which are 'noncontiguous' for purposes of 25 C.F.R. § 151.11 are lands which do not adjoin or abut." *Id.*, at 205. "[T]o be contiguous under § 151.10, 'at a minimum, the lands must touch.'" *County of San Diego*, 58 IBIA at 26 (quoting *Jefferson County*, 47 IBIA at 206).

Absent a definition, words used in a regulation or statute should be given their ordinary meaning. *Monsour Med. Ctr. v. Heckler*, 806 F.2d 1185, 1193 n.20 (3d Cir. 1986) ("words should be given their ordinary meaning, particularly when they are found in a promulgated governmental regulation") (internal brackets, quotation marks, ellipses and citations omitted); *Bay County v. United States*, 796 F.3d 1369, 1375 (Fed. Cir. 2015) ("The court refers to the ordinary meaning of terms only when they are not defined elsewhere in a regulation.") (citations omitted); *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012) ("[O]ur interpretation of regulations begins with their text. The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written.") (internal quotation marks and citations omitted).

"[T]he ordinary meaning of 'continuous' is 'uninterrupted,' 'unbroken,' or 'marked by uninterrupted extension in space, time, or sequence.'" *Williams v. Merit Sys. Prot. Bd.*, 892 F.3d 1156, 1161 (Fed. Cir. 2018).

The undisputed evidence establishes that the properties are not uninterrupted, unbroken and do not adjoin, abut or touch. Thus, they are not contiguous. Indeed, the Regional Director admits that "there are three public roadways separating the Walker Parcel from the existing trust land consisting of a State highway (Interstate 8) and two County roads (Willows Roads and Alpine Boulevard . . . ." (Decision, Ex. 46 to Suppl. AR, at p. 12.) As discussed above, in *Jefferson County*, the Interior Board of Indian Appeals held that the term "contiguous" should be interpreted as being "adjoining or abutting" based upon the Department's previous definition of "contiguous" and the *Black's Law Dictionary* definition of that term. 47 IBIA, at 205. The Board deemed these to be "common sense constructions." *Id.* It is apparent that the plain meaning and common sense interpretation of the word "contiguous" is not met where parcels are separated by a major interstate highway and two County roads. The parcels are separated by an intervening land use, not abutting or adjoining.

Indeed, the Walker Site is located approximately 1.3 miles from the current site of the SIHC health clinic. (Ex. 22 to the Original Administrative Record, at p. 5.) This is true because the Walker Property is not accessible from the property where the SIHC clinic is located. A major interstate highway (Interstate 8) and two County roads (Willows Road and Alpine Boulevard) separate the two properties and make them inaccessible from one another.[5] These roadways are managed and operated by two separate entitles -- the State of California and the County of San Diego. The "as the crow flies" distance between the two properties is also substantial. (Ex. 43 to Suppl. AR, at p. 10.) Indeed, the GIS Cartographer for the United States Government recognized that the Walker Property "is not contiguous" to the property where the SIHC clinic is located

[5] Ewiiaapaayp recognizes that "[t]he construction of Willows Road, Interstate 8 and Alpine Boulevard severed the Walker property from the Alpine North parcels ***into non-contiguous parcels.***" (Ex. 14(e) to the Original Administrative Record, at p. 5.) (emphasis added.)

because they are separated by a freeway. (Ex. 43, attachment 5, to the Suppl. AR.) Because the two properties do not abut or adjoin each other, they are not contiguous.

Instead of applying the plain meaning of the word "contiguous" as contained in 25 C.F.R. § 151.10, the Regional Director "borrowed" the definition of contiguous contained in a different regulation, effectively adding words to section 151.10. In the Decision, the Regional Director states "[i]n 2008, regulations implementing the Indian Gaming Regulatory Act (IGRA), the Department 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." (Decision, Ex. 46 to Suppl. AR, at p. 13) (quoting 25 C.F.R. § 292.2.) According to the Regional Director, "[t]the definition of contiguous established by the Department in the Gaming Rules is significant because the IGRA provides that gaming may conducted on land located within or contiguous to the boundaries of a reservation of an Indian tribe." (Decision, Ex. 46 to Suppl. AR, at p. 14.) The Regional Director concluded that "[b]ecause the Gaming Rules define the term contiguous in the context of trust acquisition, the definition may be reasonably, rationally, and appropriately applies to trust acquisition pursuant to Part 151, when that term was not defined at the time the regulations for acquiring land in trust were promulgated." (Decision, Ex. 46 to Suppl. AR, at p. 14.)

The Regional Director's decision is simply wrong. The Regional Director has effectively added words to 25 C.F.R. § 151.10 -- the definition of contiguous in 25 C.F.R. § 292.2 -- that do not appear in 25 C.F.R. §151.10. This is contrary to a cardinal rule of statutory construction, which applies to regulations.

There can be no doubt that the ordinary rules of statutory construction apply when interpreting agency regulations. *Time Warner Entertainment Co., Ltd. P'ship v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1050 (10th Cir. 2004) ("We review the district court's **interpretation of federal regulations** de novo, **applying general rules of statutory construction**, beginning with the plain language of the regulations.")

(emphasis added); *Sekula v. FDIC*, 39 F.3d 448, 454 n.14 (3d Cir. 1994) ("The plain meaning rule is the basic principle of statutory construction. . . . **While the rule is one of statutory construction, it also has been applied to agency regulations.**") (emphasis added)(citations omitted); *Kisor v. Shulkin*, 880 F.3d 1378, 1380 (Fed. Cir. 2018) ("**In interpreting a regulation**—including when deciding whether the regulation is ambiguous—**we apply the ordinary rules of statutory construction.**" (citations and internal quotation marks omitted) (emphasis added.)

A cardinal rule of statutory construction is that words cannot be added to a statute or regulation that do not appear in the regulation. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) ("[W]e are not allowed to add or subtract words from a statute; we cannot rewrite it.") (citations omitted); *Arkansas Valley Indus., Inc. v. Freeman*, 415 F.2d 713, 718 (8th Cir. 1969) ("The courts are not at liberty to **add** to or deviate from words in a statute and thus thrust the court's will, or that of an administrative agency, upon the Congress where the same is not necessary to avoid an absurdity or frustrate the meaning or purpose of the statute.") (citations omitted) (emphasis added); *Fides v. Commissioner*, 137 F.2d 731, 734 (4th Cir. 1943) ("courts should be extremely cautious not to add words to a statute that are not found in the statute").

Moreover, the fact that the Department of the Interior failed to make 25 C.F.R. section 292.2's definition applicable to 25 C.F.R. section 151.10, despite having knowledge of the definition, confirms that the Department did not want that definition to apply to section 151.10. *Jefferson County*, 47 IBIA at 207 (declining to interpret section 151.10 as applying to parcels that are "adjacent" because "[t]he Department was free to employ the word 'adjacent' in 25 C.F.R. §§151.10 but it did not do so."). Likewise, had the Department wanted section 292.2's definition to apply in the fee-to-trust context, it would have said so explicitly.

Next, the Regional Director states in the Decision that "[i]n *Jefferson County*, the Board also noted the definition of contiguous was previously addressed by the Board and the Wisconsin District Court 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). In the *Sauk* case, parcels were found to be contiguous despite surface easements for public roads that separated the land surfaces of the properties." (Decision, Ex. 46 to Supp. AR, at pp. 13-14.)

The Regional Director is simply wrong. In *County of Sauk*, the Board did not actually decide whether properties separated by roads are contiguous. In that case, "[t]he County also assert[ed] that Parcel 7 'is not, in reality, directly contiguous to any trust or reservation land [because] it is located across a major United States Highway,' . . . which suggests that the factors of 25 C.F.R. § 151.11, rather than section 151.10, should be considered. The County raises this argument for the first time on appeal in its reply brief, **and therefore we need not address it.**" *County of Sauk*, 45 IBIA at 208, n.11 (citing *Aloha Lumber Corp. v. Alaska Regional Director*, 41 IBIA 147, 161 (2005) ("The Board generally will not consider arguments raised by an appellant for the first time in a reply brief.")). *Accord County of San Diego*, 58 IBIA 11 at 26 ("The Board has been asked once before, in *County of Sauk*, to decide whether separation by a road renders otherwise contiguous parcels noncontiguous. In that case, the county raised the issue for the first time on appeal and the Board determined that it need not address the issue.").

In dicta, the Board in *County of Sauk* cited *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc) for the proposition that "separation of a tribe's land by road does not render the parcels noncontiguous for purposes of the application of 25 C.F.R. § 151.10." *County of Sauk*, 45 IBIA at 208, n.11. The First Circuit stated in *Carcieri*, however, that "[t]he State challenges the finding by the BIA and the district court that the Parcel is **adjacent** to the settlement lands, yet recognizes that this determination is insignificant to the application of either section in this case, as the sections differ only

slightly. The Parcel is **adjacent** to the Settlement Lands, but separated from them by a town road." 497 F.3d at 44 n.21 (emphasis added.)

As the Interior Board of Indian Appeals has recognized, however, the differences between section 151.10 and section 151.11[6] are not "slight" and the Department obviously believes that the additional requirements of section 151.11 should apply where off reservation lands are at issue. Otherwise, there would not be two separate standards applicable to fee-to-trust applications. *Jefferson County*, 47 IBIA at 207 ("We will not construe section 151.11(b) to be meaningless in some undefined set of cases where parcels are noncontiguous but close."). Indeed, in *Jefferson County*, the Board recognized that the First Circuit's decision in *Carcieri* is not instructive on this issue of whether parcels are contiguous when separated by roadways. According to the Board, in *Carcieri*, "[w]ithout addressing the meaning of the term 'contiguous' or the ownership of the road's surface or subsurface by easement, fee, lease, or grant, the Court of Appeals affirmed the BIA's decision, asserting that the State had 'recognized' that any determination regarding the facts would be 'insignificant to the application of either section 151.10 or 151.11 in this case, as the sections differ only slightly whether the Parcel taken into trust is adjacent to the Settlement Lands, but separated from them by a town road.' Thus, while the First Circuit affirmed BIA's implementation of 25 C.F.R. Part 151, **it did not engage in the analysis we must undertake here**." 47 IBIA, at 204 (internal brackets, ellipses and footnote omitted.)

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[6] Section 151.11 requires a tribe in addition to meeting the requirements of section 151.10 "provide a plan which specifies the anticipated economic benefits associated with the proposed use" "where land is being acquired for business purposes." Section 151.11(c). Here, Ewiiaapaayp plans to use the Walker parcel for business purposes. Section 151.11 also requires the BIA to give greater weight to the concerns of the County regarding the negative effects of the fee-to-trust application and project. It also requires the BIA to give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition.

Further, as discussed in detail below, the Board has recognized that the meaning of the term "adjacent" is not the same as "contiguous." Therefore, the First Circuit's discussion of the parcels being "adjacent" has no bearing on the question on whether the parcels at issue in this case are contiguous.

Moreover, the parcels at issue in this case are not separated by a single town road that can be used to access both parcels. Here, the parcels are separated by a limited access interstate highway and two additional roads. To access the parcels, a person must drive a distance of approximately 1.3 miles. In any event, the *Carcieri* decision was reversed by the United States Supreme Court. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

In addition to the First Circuit's decision in *Carcieri*, the Board in *County of Sauk* cited *Maahs v. Acting Portland Area Director*, 22 IBIA 294, 296 (1992). In *Maahs*, the area director denied an individual's application to take land into trust. In her notice of appeal to the Board, the applicant stated that "[I] feel we are as close to the Tulalip reservation as we could be, a thirty foot road is the only thing that separates us from the reservation." *Id.*, at 295. According to the Board, "the Area Director reached the legal conclusion that the proposed acquisition was in conflict with the regulations because the property is not adjacent to the reservation. . . . If appellant's statement concerning the location of her lot is correct, the Area Director's conclusion that the lot is not adjacent to the reservation may be erroneous." *Id.*, at 295-296. As explained by the Board in the earlier appeal of this matter, however, "the phrase 'contiguous or adjacent to the existing reservation' is nowhere found in Part 151. As we explained above, the two terms appear in different provisions of the regulations **and we have never held that they are synonymous, nor is it apparent that they are**. Only the word 'contiguous' is relevant to the on- versus off-reservation distinction." *County of San Diego*, 58 IBIA at 28 (emphasis added). Thus, consideration of whether the property in *Maahs* was adjacent to the reservation has no bearing on the question of whether the Walker parcel is

"contiguous" to the property where the health clinic is currently located. Further, unlike *Maahs*, more than a thirty foot access road separates the parcels at issue in this case.[7]

Next, the decision states that "the Pacific Region received a memorandum dated December 19, 2018 from the Bureau of Land Management Indian Land Surveyor (BILS) stating the Walker Parcel is considered contiguous to the Alpine trust land. The BILS contiguous determination was based on the possible future public right-of-way vacation by the State of California 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 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." (Decision, Ex. 46 to Suppl. AR, at p. 15.)

The memorandum written by land surveyor Jon L. Kegler is entitled to no weight. Whether the parcels are contiguous within the meaning of 25 C.F.R. section 151.10 is a legal question for the Assistant Secretary, not a factual question for a land surveyor. *Jefferson County,* 47 IBIA at 202 ("The proper construction of the terms 'contiguous' and 'noncontiguous' in the sections 151.10 and 151.11 is a question of law."). Indeed, the

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[7] In *County of Souk*, the county also argued "that it is an abuse of discretion to accept into trust a parcel of land that exacerbates, rather than ameliorates, the 'scattered' land base of the Nation." 45 IBIA at 213. Relying on the First Circuit's decision in *Carcieri* and the Interior Board of Indian Appeals decision in *Maahs*, the Board stated that "[b]ased on the parcel maps in the record, Parcel 7 appears, in fact, to be contiguous to a larger parcel on which sits the Nation's 'Ho-Chuck Casino.' The fact that a highway easement separates the actual land surfaces of the two parcels does not render them any less contiguous for purposes of section 151.10, nor does it add another 'scattered' parcel to the tribe's land holdings." 45 IBIA at 213. As discussed above, this dicta should not be followed because *Carcieri* is distinguishable and has been overruled by the United States Supreme Court. *Maahs* is also distinguishable for the reasons discussed above.

facts are undisputed. The parcels are separated by two County roads and Interstate 8. The legal question is whether given these undisputed facts the parcels are contiguous within the meaning of section 151.10.

In reaching his conclusion, the land surveyor states that "the definition of contiguous or contiguous property is very vague, and interpreted many ways." (Ex. 43 to Suppl. AR, at p. 3) The land surveyor also cites two definitions of contiguous contained in ordinances enacted by two California cities. (Ex. 43 to Suppl. AR, at p. 3.) The Interior Board of Indian Appeals specifically held, however, that the term contiguous as used in section 151.10 cannot be determined based on how the term is defined in state or local law. *County of San Diego*, 58 IBIA at 27 ("First, contrary to what Ewiiaapaayp argues on appeal, the meaning of "contiguous" in § 151.10 does not depend on the law of the state in which the land to be acquired is located. We find not the slightest hint in the regulations of any intention to make state law applicable, nor do we understand BIA's and its counsel's references to the California Subdivision Map Act to imply so much. It is a question of Federal law.").

Moreover, the land surveyor's opinion actually supports the County's position that the two parcels are not contiguous. According to the land surveyor, his opinion that the two parcels are contiguous is "based on **possible future public right-of-way vacations** by the State of California or the County of San Diego." (Ex. 43 to Suppl. AR, at p. 3) (emphasis added.) According to the land surveyor, **if** the County and the State of California vacated their rights-of-way and "both sides of the right-of-way to be vacated is owned by the same person/entity **then** the entire right-of-way would granted to the person/entity **and the new boundary line would be common and touching**." (*Ibid.*) By implication, absent vacation of the public rights-of-way there in no new boundary line and that boundary line is not "common and touching." Since the County and the State of California have not vacated their rights-of-way (and will almost certainly never do so), the land surveyor admits that the two parcels do not touch and therefore are not

contiguous. *County of San Diego*, 58 IBIA at 26 ("[T]o be contiguous under § 151.10, 'at a minimum, the lands must touch.'") (quoting *Jefferson County*, 47 IBIA at 206).

Accordingly, the Walker Property and the property where the SIHC clinic is currently located are not contiguous within the meaning of section 151.10 and the Regional Director's decision must be overturned.

III. CONCLUSION

For all of the foregoing reasons, the Decision of the Regional Director taking the Walker parcel into trust should be overturned. The Regional Director should be ordered to re-evaluate Ewiiaapaayp's application applying the standard applicable to applications to take "off reservation" lands into trust (25 C.F.R. § 151.11).

DATED: September 6, 2019

THOMAS E. MONTGOMERY, County Counsel

By Thomas D. Bunton

THOMAS D. BUNTON, Assistant County Counsel
Attorneys for Appellant County of San Diego

Declaration of Service

I, the undersigned, declare:

That I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the service occurred; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California 92101.

On September 6, 2019, I served the following documents: **APPELLANT COUNTY OF SAN DIEGO'S OPENING BRIEF** in the following manner:

☐ By personally delivering copies to the person served.

☒ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

☐ By faxing a copy to the person served. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

☐ By electronic filing, I served each of the above referenced documents by E-filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, as to the following parties:

(see attached SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 6, 2019, at San Diego, California.

April Sapida

SERVICE LIST

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Chairperson Jamul Indian Village P.O. Box 612 Jamul, CA 91935	Chairperson La Jolla Band of Luiseno Indians 22000 Highway 76 Pauma Valley, CA 92061

Chairperson La Posta Band of Mission Indians 8 Crestwood Road, Box 1 Boulevard, CA 91905	Chairperson Los Coyotes Band of Chauilla & Cupeno Indians P.O. Box 189 Warner Springs, CA 92086
Chairperson Manzanita Band of Mission Indians P.O. Box 1302 Boulevard, CA 91905	Chairperson Mesa Grande Band of Mission Indians P.O. Box 270 Santa Ysabel, CA 92070
Chairperson Pala Band of Mission Indians 35008 Pala Temecula Rd. PMB 50 Pala, CA 92059	Chairperson Pauma Band of Mission Indians P.O. Box 369 Pauma Valley, CA 92061
Chairperson Rincon Band of Mission Indians 1 West Tribal Road Valley Center, CA 92082	Chairperson Santa Ysabel Band of Mission Indians P.O. 130 Santa Ysabel, CA 92070
Chairperson Sycuan Band of Mission Indians 5459 Sycuan Road El Cajon, CA 92021	Chairperson Viejas (Baron Long) Band of Mission Indians P.O. Box 908 Alpine, CA 91903
Chairperson Inaja-Cosmit Band of Mission Indians 2005 S. Escondido Blvd. Escondido, CA 92025	Chairperson San Pasqual Band of Mission Indians P.O. Box 365 Valley Center, CA 92082
Mr. Robert Pinto, Sr., Chairman Ewiiaapaayp Band of Kumeyaay Indians 4054 Willows Road Alpine, CA 91901	Chairperson Pechanga Band of Mission Indians P.O. Box 1477 Temecula, CA 92593
Superintendent, Southern California Agency, BIA 1451 Research Park Drive, Suite 100 Riverside, CA 92507-2154	Senior Advisor for Tribal Negotiations Office of the Governor State Capitol Building, Suite 1173 Sacramento, CA 95814
Xavier Becerra, Attorney General State of California, Department of Justice 1300 I Street Sacramento, CA 94244	Pat Ulm, President Dehesa Valley Community Council, Inc. P.O. Box 1631 El Cajon, CA 92022