

#200807

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County of San Diego
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Attorneys for Appellant County of San Diego

INTERIOR BOARD OF INDIAN APPEALS
UNITED STATES DEPARTMENT OF THE INTERIOR

County of San Diego,
Appellant,
v.
United States Bureau of Indian Affairs,
Respondent,
Ewiiapaayp Band of Kumeyaay Indians,
Real Party in Interest.

IBIA No.

COUNTY OF SAN DIEGO'S NOTICE OF
APPEAL OF APRIL 23, 2019 DECISION OF
THE UNITED STATES BUREAU OF
INDIAN AFFAIRS

Governor's Office of Planning & Research

MAY 28 2019

STATE CLEARINGHOUSE

The County of San Diego (the "County") hereby appeals the April 23, 2019 Decision of the United States Bureau of Indian Affairs to have certain real property accepted by the United States of America in trust for the Ewiiapaayp Band of Kumeyaay Indians, California. A copy of the Decision is attached. The County received the Notice of Appeal on April 29, 2019.

I

REASON FOR THE APPEAL

A. The Bureau of Indian Affairs ("BIA") failed to comply with the National Environmental Policy Act ("NEPA") because the Environmental Assessment fails to examine the environmental impact of the entire project. Therefore, the Finding of No Significant Impact is erroneous.

2005.11.14

B. The BIA failed to comply with NEPA by adopting the FONSI because the project will have a significant impact on the environment.

C. The Supplemental Environmental Assessment and Supplemental Information Report is inadequate and does not comply with NEPA.

D. The BIA applied the wrong standard to Ewiiapaayp's application because the property Ewiiapaayp seeks to take into trust is not on or contiguous to Ewiiapaayp's reservation.

II

RELIEF SOUGHT

Overturn the BIA's Decision allowing Ewiiapaayp to take the land described in the BIA's decision into trust.

III

NAMES AND ADDRESSES OF ALL INTERESTED PARTIES

Interior Board of Indian Appeals U.S. Department of Interior 801 N. Quincy St., Suite 300 Arlington, VA 22203	Assistant Secretary of Indian Affairs U.S. Department of Interior 1849 C Street, N.W., MS 3071-MIB Washington, D.C. 20240
Bureau of Indian Affairs U.S. Department of the Interior Pacific Regional Office 2800 Cottage Way Sacramento, CA 95825	California State Clearinghouse (10 copies) Office Planning and Research P.O. Box 3044 Sacramento, CA 95814
Mr. Jacob Appelsmith Legal Affairs Secretary Office of the Governor State Capitol Building Sacramento, CA 95814	Sara Drake, Deputy Attorney General State of California Department of Justice P.O. Box 944255 Sacramento, CA 94244-2550
Office of the Honorable Dianne Feinstein United States Senator 331 Hart Senate Building Washington, DC 20510	U.S. House of Representatives 50th District 1611 N. Magnolia Avenue, Suite 310 El Caion, CA 92020
San Diego County Assessor 1600 Pacific Highway, Suite 103 San Diego, CA 92101	San Diego Treasurer & Tax Collector 1600 Pacific Highway, Suite 162 San Diego, CA 92101
County of San Diego Office of the Chief Administrative Officer 1600 Pacific Highway, Room 209 San Diego, CA 92101-2480	San Diego County Sheriff's Department 9621 Ridge Haven Court San Diego, CA 92120
County of San Diego Department of Public Works 5510 Overland, Suite 410, MS O-334 San Diego, CA 92123	Sarah E. Aghassi, Deputy CAO County of San Diego, Land Use and Environment Group 1600 Pacific Highway, Room 212 San Diego, CA 92101

1	Chairperson Barona Reservation 1095 Barona Road Lakeside, CA 92040	Chairperson Campo Band of Mission Indians 36190 Church Road, Suite 1 Campo, CA 91906
3	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
5	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
8	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
10	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
12	Chairperson Rincon Band of Mission Indians P.O. Box 68 Valley Center, CA 92082	Chairperson Santa Ysabel Band of Mission Indians P.O. 130 Santa Ysabel, CA 92070
14	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
16	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
18	Mr. Robert Pinto, Sr., Chairman Ewiiapaayp Band of Kumeyaay Indians 4054 Willows Road Alpine, CA 91901	Chairperson Pechanga Band of Mission Indians P.O. Box 1477 Temecula, CA 92593
20	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
22	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 Caion, CA 92022

DATED: May 24, 2019

THOMAS E. MONTGOMERY, County Counsel

By


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.

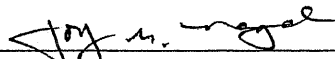
On May 24, 2019, I served the following documents: **COUNTY OF SAN DIEGO'S NOTICE OF APPEAL OF DECEMBER 23, 2016, and NOTICE OF DECISION OF THE UNITED STATES BUREAU OF INDIAN AFFAIRS** in the following manner:

- ☐ 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 May 24, 2019, at San Diego, California.

By:

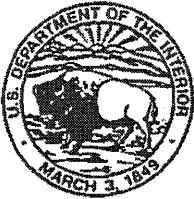


Joy M. Nagal

SERVICE LIST

Interior Board of Indian Appeals U.S. Department of Interior 801 N. Quincy St., Suite 300 Arlington, VA 22203 <i>(Via FedEx Overnight Delivery)</i>	Assistant Secretary of Indian Affairs U.S. Department of Interior 1849 C Street, N.W., MS 3071-MIB Washington, D.C. 20240
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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

APR 23 2019

NOTICE OF DECISION

CERTIFIED MAIL – RETURN RECEIPT REQUESTED – 7019 0140 0000 7335 8125

Mr. Robert Pinto, Sr., Chairman
Ewiiapaayp Band of Kumevaay Indians, California
4054 Willows Road
Alpine, California 91901

Re: County of San Diego, California; Viejas Band of Kumevaay Indians; and Sycuan Band of the Kumevaay Nation. v. Pacific Regional Director, Bureau of Indian Affairs. Docket Nos. IBIA 17-033; IBIA 17-038 and IBIA 17-042

Dear Mr. Pinto:

On April 20, 2018 the Interior Board of Indian Appeals (IBIA or Board), issued an Order Vacating Decision and Remanding County of San Diego, California; Viejas Band of Kumevaay Indians; and Sycuan Band of the Kumevaay Nation. (Appellants) v. Pacific Regional Director, Bureau of Indian Affairs. Docket Nos. IBIA 17-033; IBIA 17-038 and IBIA 17-042 concerning the acquisition of land into trust for the Ewiiapaayp Band of Kumevaay Indians, California (Ewiiapaayp Band). The Board granted the Pacific Regional Director's (Regional Director) request to vacate the Decision of December 23, 2016 and remanded back to the Regional Director for further consideration and issuance of a new decision.

Appellants challenged the December 23, 2016, Decision by the Acting Regional Director, Bureau of Indian Affairs (BIA), Pacific Region's intent to approve the 16.69 acre parcel known as the "Walker Parcel" into trust by the United States for the Tribe. Appellants asserted the Decision should be reversed on grounds that the Walker property should not have been acquired as property that is "contiguous" to an existing reservation pursuant to 25 C.F.R. § 151.10, purportedly because the Tribe's existing trust property was never proclaimed to be reservation land in accordance with 25 U.S.C. § 5110 (previously § 467), and purportedly because the Walker property is not contiguous to the Tribe's existing reservation land. Additionally, Appellants challenged the acquisition on grounds that the environmental impacts analysis allegedly was inadequate.

Upon remand, the Regional Director reconsidered the following issues before reissuing a Decision:

- 1) More fully develop the reasoning and analysis as to how the Walker Parcel is contiguous to the Tribe's reservation in Alpine, California and constitutes an on-reservation acquisition; and
- 2) Further develop and clarify the record as to the proposed use of the Walker Parcel and, if necessary, modify the Supplemental Environmental Assessment (EA) consistent with the proposed use.

This is notice of our decision upon the Ewiiapaayp Band's application to have the below-described real property accepted by the United States of America in trust for the Ewiiapaayp Band of Kumeyaay Indians, California.

The land referred to herein is situated in the State of California, County of San Diego, State of California, and is described as follows:

Parcel 1:

Parcel A as shown on Certificate of Compliance as evidenced by document recorded June 1, 2001 as Instrument No. 2001-0359315 of Official Records, being more particularly described as follows:

Being a portion of the Southeast quarter of Section 25, Township 15 South, Range 2 East, San Bernardino Meridian, in the County of San Diego, State of California, according to the official plat thereof, described as follows:

Beginning at a point on the Southerly line of said Southeast Quarter, distant South $89^{\circ}14'02''$ West; record $S88^{\circ}58'36''$ West per deed recorded January 8, 2001 as Document No. 2001-0010304 of Official Records (deed), 126.03 feet from the Southeast corner of land described in said deed; Thence continuing along said Southerly line South $89^{\circ}14'02''$ West ($S88^{\circ}58'36''$ W per deed) 619.97 feet to a point distant thereon North $89^{\circ}14'02''$ East ($N88^{\circ}58'36''$ E per deed) 413.79 feet from the South quarter of said Section 25; Thence North $45^{\circ}42'22''$ West 580.90 feet to a point on the Westerly line of the Southeast Quarter of said Section 25 distant thereon North $00^{\circ}17'00''$ West ($N01^{\circ}51'00''$ W) 411.20 feet from said South quarter corner; Thence along said Westerly line North $00^{\circ}17'00''$ West 121.39 feet ($N01^{\circ}51'00''$ W, 121.42' per deed); Thence North $56^{\circ}56'50''$ East 264.05 feet ($N57^{\circ}15'00''$ E, 264.00' per deed); Thence North $00^{\circ}17'00''$ West ($N01^{\circ}51'00''$ W per deed) 166.32 feet; Thence North $80^{\circ}31'53''$ East 236.22 feet ($80^{\circ}45'00''$ E, 236.28' per deed); Thence North $64^{\circ}07'47''$ East 131.95 feet ($N64^{\circ}30'00''$ E, 132.00' per deed); Thence North $80^{\circ}11'55''$ East 71.22 feet ($N80^{\circ}30'00''$ E, 71.25 per deed) to the Southwesterly corner of land described in deed to Henry Marshall Dobbs, Et Ux., recorded February 13, 1945 in Book 1813, Page 362 of official records; Thence along the Westerly line of said Dobbs land North $09^{\circ}37'21''$ West 127.64 feet ($N09^{\circ}30'00''$ W, 135.00' per deed) to a point on the Southerly line of land described in deed to the State of California, Recorded May 11, 1966 as File No. 78689 of Official Records, said point

being on the arc of a 3970.45 foot (3970.00' grid per deed to the State of California) radius curve, concave Southerly, a radial to said point bears North 03°32'54" East (N03°34'35" East per deed); Thence Easterly along said Southerly line of land described in deed to the State of California 306.24 feet (306.51' per deed) through a central angle 04°25'09" (04°25'25" per deed); Thence South 75°25'33" East per deed) 111.92 feet; Thence leaving said Southerly line of land described in deed to the State of California South 80°15'30" West 262.32 feet (S80°30'10"E, 262.08' per deed); Thence South 08°15'27" East 225.28 feet (S08° 20'29"E, 225.40 per deed); Thence South 22°09'45"E 287.13 feet (S22°19'35"E, 287.15' per deed); Thence North 89°22 '30" East per deed) 124.47 feet to the intersection with a line parallel with and 126.00 feet westerly, measured at right angles, of the easterly line of said land in said deed to Cuyapaape; Thence along said parallel line South 00°31 '14" West 472.45 feet to the point of beginning.

Parcel 2:

An easement for road, ingress and egress and utility purposes lying within a portion of the southeast quarter of Section 25, Township 15 South, Range 2 East, San Bernardino Meridian, in the County of San Diego, State of California, being 60 feet wide and more particularly described and designated in grant of easement recorded January 8, 2001 as File No. 2001-0010305 of Official Records and as reserved in deed recorded May 15, 2001 as instrument no. 2001-0307433 of official records.

The above-described Parcel is referred to as San Diego County Assessor's Parcel Number 404-080-26, containing approximately 16.69 acres, more or less (Walker Parcel).

Federal Law authorizes the Secretary of the Interior, or his authorized representative, to acquire title on behalf of the United States of America for the benefit of tribes when such acquisition is authorized by an Act of Congress and (1) when such lands are within the consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the land is necessary to facilitate tribal self-determination, economic development, or tribal housing. In this particular instance, the authorizing Act of Congress is the Indian Reorganization Act of 1934 (25 U.S.C. § 5108). The applicable regulations are set forth in the Code of Federal Regulations (CFR), Title 25, INDIANS, Part 151, as amended. This land acquisition falls within the land acquisition policy as set forth by the Secretary of the Interior.

The Ewiiapaayp Band of Kumeyaay Indians is not affected by the United States Supreme Court decision in the case of Carcieri v. Salazar, Circuit No. 07-526. The Tribe is listed in the Haas Report on page 14 in Table C, of the Ten Years of Tribal Government under the I.R.A. by Theodore H. Haas. The Tribe was originally established by Executive Order on December 29, 1891 pursuant to the Act for the Relief of the Mission Indians in the State of California (26 Stat. 712-714, Fifty-First Congress, Session II, Chapter 65) dated January 12, 1891.

On October 20, 2008, by certified mail, return receipt requested, we issued notice of and sought comments regarding the proposed fee-to-trust application from the California State Clearinghouse; Legal Affairs Secretary, Office of the Governor; Sara Drake, Deputy Attorney General, State of California; James Peterson, District Director, Office of Senator Diane Feinstein; Honorable Barbara Boxer; Honorable Duncan Hunter; Honorable Charlene Zettel, California Legislature; County of San Diego, Board of Supervisors; San Diego County Assessor; County of San Diego, Office of Planning and Land Use; San Diego Treasurer and Tax Collector; San Diego County, Department of Public Works; Chantal Saïpe, Tribal Liaison, San Diego County; Chairperson, Barona Band; Chairperson, Campo Band; Chairperson, Inaja-Cosmit Reservation; Chairperson, Jamul Indian Village; Chairperson, La Jolla Band; Chairperson, La Posta Band; Chairperson, Los Coyotes Band of Cahuilla Mission Indians; Chairperson, Manzanita Band; Chairperson, Mesa Grande Band; Chairperson, Pala Band; Chairperson, Pauma Band; Chairperson, Rincon Band; San Pasqual Band; Chairperson, San Ysabel Band; Chairperson, Sycuan Band; Chairperson, Viejas Band; Daniel Harrington, a neighboring property owner.

In response to our 2008 notification, we received the below listed comments, which were considered in the Regional Directors Notice of Decision dated May 31, 2011, that was appealed by the County of San Diego and Viejas Band.

1. Letter dated October 30, 2008, from Gregory Smith, County Assessor, San Diego County, stating that total taxes collected for the subject Parcel for the 2008-2009 tax roll was \$7,624.58.
2. Letter dated November 20, 2008, from the Native American Heritage Commission stating that they have no objections or concerns regarding the pending action.
3. Letter dated November 21, 2008, from Dianne Jacob, Vice Chairwoman, Supervisor Second District, San Diego County Board of Supervisors, stating, "I oppose Ewiiapaayp's continued attempts to acquire additional land into trust in order to construct a new casino on land which is currently occupied by the Southern Indian Health Clinic. This clinic continues to be an important asset in the community and serves Indian as well as non-Indian residents."
4. Letter dated November 24, 2008, from Chandra Wallar, Deputy Chief Administrative Officer, Land Use and Environment Group, County of San Diego, strongly opposing the Application for the reasons of jurisdiction, environmental impact, and zoning.
5. Letter dated November 24, 2008, from Andrea Lynn Hoch, Legal Affairs Secretary, Office of the Governor, comments on the Parcel is not contiguous, SIHC lease for a dollar a year (there would be no financial incentive), and possible gaming.

6. Letter dated December 11, 2008, from Daniel and Gloria Harrington, stating that, "This property being considered is zoned for residential/agricultural use and any other use will devalue our property and destroy the peaceful use of our residence. Access to this property is currently over an easement on our property. Any use other than residential or agriculture should not be allowed on this easement. The purchased easement to this property crosses the water line to our water well/tank, and loss of access to this water pipe for maintenance will cut off water to the three homes on this property. Water use, sewage disposal, traffic, lighting, and all other environmental concerns must be addressed on the specific land use intended of this property."
7. Letter dated December 11, 2008, from Viejas Tribal Government opposing the Ewiiapaayp Band's application because the NEPA, the wrong authority, the need, the jurisdictional, the land use the zoning and gaming.
8. Letter dated January 22, 2009, from the Viejas Tribal Government opposing the Ewiiapaayp Band's Fee-to-Trust application. Supplemental documents released by the BIA to Viejas relevant to the Walker Parcel.
9. Wunderlin Report dated July 14, 2009, prepared for Viejas Tribal Government by Wunderlin Engineering, Inc. that presents and historic boundaries of Assessor's Parcel Number 404-061-01 (SIHC) and 404-080-26 (Walker Parcel), Alpine, California.
10. Viejas Band's rebuttal letter dated December 17, 2009, to the Ewiiapaayp responses to comments on the Ewiiapaayp proposal to have the Walker Parcel taken into trust, submitted for the record to the Central Office on November 24.
11. Letter dated December 21, 2009, from the Ewiiapaayp Band to Larry Echo Hawk, Assistant Secretary-Indian Affairs, requesting him to withdraw the Regional Director's decision and take authority by issuing the decision on the Walker Parcel.

By correspondence dated April 21, 2009 and August 4, 2009, the Ewiiapaayp Band responded to the above comments with regards to:

- San Diego County tax assessments for 2008-2009 \$157.32;
- Proposed use, County's General Plan and Zoning, off reservation, business plan;
- Additional healthcare and childcare facility on project site;
- Contiguous to the Ewiiapaayp Band's reservation;
- Joint venture regarding the Gaming and SIHC lease with Viejas;
- Regulatory Authority of 25 C.F.R. §151.10;
- Additional NEPA is due to an inadequate project description;
- No casino will be build; and
- NEPA compliance with regards to the Environmental Assessment.

On September 6, 2013, the Office of Hearings and Appeals, Interior Board of Indian Appeals, issued an Order Vacating Decision and Remanding the 2011 Decision.

After the IBIA remand, the following letters were received:

1. Letter dated October 1, 2013, the Ewiiapaayp Band submitted a summary of IBIA Decision and requested actions upon remand. The summary addresses the appellants concerns on the Walker Parcel for the contiguity and the Environmental Assessment supplement for additional clinic and daycare center.
2. Letter dated November 20, 2014, from the Ewiiapaayp Band providing additional documentation on the contiguity of the Walker Parcel.
3. Letter dated December 8, 2014, from Bradley Downes (Tribal Attorney) providing the Ewiiapaayp Band's response to the Assignment of Error in the Matter of *County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*. Mr. Downes responds to the September 6, 2013 IBIA remand for further consideration on the contiguity, the Wunderlin Report and the NEPA impact.
4. By letter dated May 26, 2015, the Viejas Band submitted a response to Mr. Downes submission by providing the supplemental Wunderlin 2015 Report.
5. By letter dated June 8, 2015, the Ewiiapaayp Band responded to Viejas Band Erroneous Assertions on contiguity.
6. By letter dated January 7, 2016, the Viejas Band responded to Ewiiapaayp Band's response to contiguity.
7. Viejas Band's letter dated June 27, 2016, supplement the record for the FTT for the Walker Parcel upon a recent decision by the IBIA in an integrally related matter, the Salerno Parcel.

Pursuant to 25 CFR §151.10, the following factors were considered in formulating our recommendation: (1) need of the tribe for additional land; (2) the purpose for which the land will be used; (3) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (4) jurisdictional problems and potential conflict of land use which may arise; (5) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status, (6) and whether or not contaminants or hazardous substances may be present on the property.

Factor 1 – Need for Additional Land

The Ewiiapaayp Band's Reservation is located in Pine Valley in southeastern San Diego County in the Laguna Mountains. It is approximately 32 miles east of the City of San Diego and 12 miles north of Interstate 8. The reservation was established by Executive

Order dated December 29, 1891 under the authority of the Act of Congress of January 12, 1891 (26 Stat. 712-714 c. 65). Of the tribal trust lands established under the aforementioned authority, approximately 4,100 acres remain in trust.

An additional 1,360 acres were added to the Tribe's reservation land base under the California Indian Land Transfer Act, Public Law 106-568 dated December 27, 2000, located adjacent to the Band's reservation lands in Pine Valley. The additional tribal lands are on ridges in the southwest of the East area of the Ewiiapaayp Indian Reservation at an altitude of between 5,000 and 5,500 feet. These are steep, rocky mountainous areas composed of narrow ridgelines and steep slopes. Its current use is the same use since time immemorial, unsuitable for residential or commercial development.

The Tribe also has land that is held in trust near Alpine, California. An 8.6 acres Parcel was purchased by the Tribe in 1985 and subsequently accepted into trust by the United States for the Ewiiapaayp Band in 1986. The proposed and current use of this property was/is the development/construction of a permanent and adequate health center to meet current and unmet needs for health care services for the Indians within southern San Diego County. The Ewiiapaayp Band is a member tribe of the Southern Indian Health Council (SIHC), a nonprofit tribal health care organization, now serving the Indians of the Ewiiapaayp, Manzanita, La Posta, Viejas, Sycuan, Jamul and Barona Reservations. Services from this facility are currently provided to non-Indians of the community as well.

In 1997, a 1.42 acre Parcel, located adjacent to the 8.6 acre Parcel near Alpine, was accepted into Federal trust for the Ewiiapaayp Band. The proposed use of the 1.42 acres Parcel at the time of acceptance was to expand the existing health care and social services already provided by SIHC, specifically for use as the Pinto Home for Girls, Group Home Site. The current use of the 1.42 acres Parcel is the Ewiiapaayp Band's Tribal Office.

According to the Tribe's application, "present trust land in Alpine, California, has become inadequate for the SIHC's future goals and objectives... since 1986, SIHC has constructed three health clinic buildings with Department of Housing and Urban Development Indian Community Development Block Grant funds obtained by the Ewiiapaayp Band and the La Posta Band of Mission Indians." The SIHC's long-term goals include construction and operation of a permanent health facility, retirement center, and museum/cultural center. The proposed Walker Parcel will provide the Ewiiapaayp Band with sufficient space to pursue its long-term goals to be used for a healthcare facility. Thus, the proposed clinic could still be leased wholly or in part to the SIHC; however the Ewiiapaayp Band could lease it to other similar health service providers as well. This minor change to broaden the potential lessees of clinic space would not affect the overall design or operation of the current clinic. The intended purpose was to provide for the expansion needs of the SIHC, Inc. at a below market rate that yet provides some income for the Ewiiapaayp Band, or, should the SIHC, Inc. not wish to expand to the Walker Parcel, income would be earned from a commercial tenant.

The Tribe states this economic development will allow future generations the continued use of its existing reservation. Such goals are consistent with the legislative history of the Indian Reorganization Act (25 U.S.C. § 5108), i.e., to rehabilitate Tribal economic life, conserve and develop Indian lands and resources, preserving and increasing the amount of Indian lands, and for the economic advancement and self-determination of Indian communities.

We have determined that placing the land into trust and the resulting federal protection of the land that this affords will facilitate the Ewiiapaayp Band's need for the Walker Parcel land to achieve self-sufficiency and economic development.

Factor 2 – Proposed Land Use

The current Proposed Action is identical to the Proposed Action analyzed in the Supplemental EA and 2016 FONSI. A Supplemental Information Report was prepared June 2018 for the Walker Parcel. The proposed land uses does not include a day care center. In fact, day care facilities has never been specifically mentioned in the Ewiiapaayp Band's application as a proposed land use for the Walker Parcel; rather the intended use of the Walker Parcel as described in the original 2001 fee-to-trust application submitted by the Band was for the operation of a health clinic by the Southern Indian Health Council (SIHC). Day care facilities were first introduced as a potential land use on the Walker Parcel in the 2001 Environmental Assessment (EA) prepared to address the environmental consequences of the Band's application.

In, the Ewiiapaayp Band's letter dated July 15, 2018, they stated that "the initial Walker Parcel application the SIHC clinic was operating a day care facility; thus it was assumed that this day care facility would also be a component of the SIHC clinic when it was relocated to the Walker Parcel. Since that time, the day care facilities at the SIHC clinic have closed; thus it is not reasonable to expect that if and when the SIHC clinic is relocated, that day care facilities would be reintroduced. Further, since the 2001 EA, the Band has modified its application to allow for two development scenarios: 1) relocation of the SIHC health Clinic to the Walker Parcel, or 2) operation of a new, independent health clinic facility on the Walker Parcel with continued operation of the SIHC health clinic on the existing site. Under the second scenario, the Tribe has no plans to develop a day care facility, nor has it ever stated otherwise. The mention of the daycare facilities in the 2016 Notice of Decision was an administrative error.

Therefore, we are clarifying the Ewiiapaayp Band has no plans to develop a day care facility on the Walker Parcel.

Factor 3 – Impact on State and Local Government's Tax Base

According the County Assessor, total taxes collected for the subject Parcel for the 2018-2019-tax roll is \$9,687.80.

The projected lost revenues to the county and other local governments agencies is less than \$9,687.80 per year and is therefore not considered significant. The Band stated in its application it would enter into discussions with the county and local government agencies as the project progresses and would attempt to resolve any reasonable financial issues, by, among other things, making payments in lieu of the taxes to offset the County's losses. If the land is leased to a non-Indian entity, the San Diego County could generate some income for possessory interest. Furthermore, the benefit of the increased access to health care for the general public more than offsets the projected financial loss to the County of San Diego.

It does not appear that removal from the tax rolls will cause a major impact on the County's financial situation.

Factor 4 – Jurisdictional Problems/Potential Conflicts

Tribal jurisdiction in California is subject to Public Law 83-280, as such, there will be no change to criminal jurisdiction. Civil jurisdiction will fall under the authority of the Ewiiapaayp Band and other existing authorities.

The subject property is currently undeveloped. According to the County, the proposed land is designated as A-70 (Limited Agriculture Use Regulations). The Walker property is subject to the Forest Conservation Initiative ("FCI") whereby the County of San Diego imposed limitation on growth in certain areas of the county. The purpose of this designation is to provide lands for limited residential, civic and agricultural use. Also, the healthcare facility is classified as a commercial use that is not allowed use and therefore is not consistent with current zoning.

The County of San Diego is currently undergoing a comprehensive updated General Plan. "The San Diego County General Plan Amendment for the Alpine Planning Area (1) zoning" of nearby parcels for rural commercial use designation for the Walker Parcel (2) provides for "spot zoning" of nearby parcels for rural commercial uses that (3) permits environmental impacts such as traffic and noise.

A letter from Daniel and Gloria Harrington, stating that this property being considered is zoned for residential/agricultural use and any other use will devalue our property and destroy the peaceful use of our residence. Access to this property is currently over an easement on our property. Any use other than residential or agriculture should not be allowed on this easement. The purchased easement to this property crosses the water line to our water well/tank, and loss of access to this water pipe for maintenance will cut off water to the three homes on this property. Water use, sewage disposal, traffic, lighting, and all other environmental concerns must be addressed on the specific land use intended of this property."

Once in trust, the land will still be subject to legally authorized encumbrances located on the property that are recorded with the County and those encumbrances may still legally be enforced. Moreover, the Ewiiapaayp Band response is that they will not use the

Harrington/Walker access road during construction on the Walker property. If the Harrington/Walker road is damaged through the fault of the Tribe or its contractors, the Tribe will repair the road and restore it to its pre-damaged condition. The Ewiiapaayp Band has also committed to pay for and build a fence on the Ewiiapaayp Band's easement property between the Harrington/Walker easement roads. The additional request for a gate in the fence-line is acceptable to the Ewiiapaayp Band.

In the past, commenters have raised the possibility that tribal government gaming under the Indian Gaming Regulatory Act might occur on the Walker Parcel. Nothing in the record suggests that the Walker Parcel will be used for gaming purposes. "[M]ere speculation that gaming may occur at some future time does not require BIA to consider gaming as a possible use of land being considered for trust acquisition." *Thurston County (Scott I)*, 56 IBIA at 75 n.15.

In the Section 3.0 of the 2014 EA Supplement provides a discussion of past, present, and reasonably foreseeable future development projects in the vicinity of the Walker Parcel, and includes the grocery store approximately 1.3 miles west of the Walker Parcel and the Alpine Sheriff's Station approximately 1.5 miles west of the Walker Parcel. These two projects were considered in the updated description of the affected environment in Section 3.0, and updated cumulative effects analysis provided in Section 4.0 of the 2014 Supplement. No new effects were identified as a result of the updated analysis.

Factor 5 – Whether the BIA is equipped to Discharge the Additional Responsibilities

The Bureau of Indian Affairs has a trust responsibility for all lands held in trust by the United States for Tribes. Therefore, administratively there will be little change to existing BIA functions. Any additional responsibilities resulting from this transaction will be minimal. Anticipated workload to BIA (Real Estate and Environmental staff) would result should there be a lease to an outside entity.

Factor 6 – Whether or not Contaminants or Hazardous Substances are Present

In accordance with Interior Department Policy (602 DM 2), the Bureau of Indian Affairs is charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability for, hazardous substances or other environmental remediation or injury. We have determined that no hazardous substances, or other environmental hazards, are present on the subject Parcel. The record includes a negative Phase I "Contaminant Survey Checklist" dated January 16, 2013, reflecting "no hazardous materials or contaminants".

National Environmental Policy Act Compliance

Pursuant to the September 6, 2013, remand, the IBIA directed the BIA to supplement its 2001 Environmental Assessment to consider: 1) potential impacts of simultaneous operation of both a new healthcare facility on the Walker Parcel and the existing SIHC

Clinic, and 2) potential impacts associated with past, present, and reasonably foreseeable future actions.

Based on the July 2015 Supplemental EA, it has been determined that the proposed action will not have significant impact on the quality of the human environment, and therefore, an Environmental Impact Statement is not required. In accordance with Section 102 (2)(c) of the National Environmental Policy Act of 1969, as amended, an Environmental Impact Statement will not be required. A Finding of No Significant Impact (FONSI), dated January 4, 2016, was distributed on January 20, 2016.

Based upon a 2018 Supplemental Information Report, the 2001 EA and the July 2015 Supplemental EA, the current conditions of the Walker Parcel remain similar to the conditions at the time of the preparation of the Supplemental EA, and no changes are planned to the Proposed Action as it was described in the Supplemental EA. As analyzed within **Section 2.0 of the Supplemental Report**, the conclusions and mitigation measures for the Walker Parcel set forth in the Supplemental EA and 2001 EA remain adequate to mitigate environmental impacts from the Proposed Action. There are no significant new circumstances or information relevant to environmental concerns that would have bearing on the Proposed Action and its impacts; therefore, no additional mitigation is warranted. The Supplemental EA and 2001 EA appear adequate to meet the BIA's NEPA compliance requirements for evaluating the Proposed Action, and further environmental analysis is not needed.

In response to the IBIA Order dated April 20, 2018 (Docket No. IBIA 17-033, 17-038 and 17-042) Vacating and Remanding the Decision, the following letters were received:

- Letter dated July 15, 2018, from the Ewiiapaayp Band responding to the Principal Deputy Assistant Secretary Indian Affairs Memorandum dated February 14, 2018 to reconsider the continuity of the Walker Parcel and the Proposed Land Use. The Band's letter addressed/clarified the proposed land use to the Walker Parcel, which does not include a day care center. Also, the Band states, the mentioning of the daycares facilities in the 2016 Notice of Decision was an administrative error, that was carried over from the previous 2011 Decision.
- Letter dated July 30, 2018, from the Ewiiapaayp Band addressing and clarifying the contiguity of the Walker Parcel to the Ewiiapaayp Tribe's reservation and that the Walker Parcel satisfies all applicable definitions of contiguity.
- Letter dated October 16, 2018, from the Viejas Band responding to the recent IBIA remand of the Walker Parcel and the Principal Deputy Assistant Secretary of Indian Affairs' Memo dated February 14, 2018 directed the Regional Director to request a vacate/remand of the 2016 Notice of Decision of the Walker Parcel. In the letter it was stated that Viejas strongly disagree with the finding of contiguity. Additionally, they have provided documents from Caltrans to assist the Region in making the determination of contiguity, or lack thereof.

- Letter dated November 19, 2018, from Viejas Band supplementing their comments to the October 16, 2018 letter regarding Caltrans' Ownership Rights Analysis to the Walker Parcel.

Letter dated December 12, 2018, from San Diego County submitting comments regarding the Caltrans' ownership rights analysis.

In response to the IBIA's Remand Order, the BIA is providing our clarification of findings regarding the contiguity and the consistency of the proposed use.

Contiguity Analysis

The authority to bring land into trust for Indian tribes is authorized by Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108 (previously 465), and is governed by regulations at 25 C.F.R. § 151. In acquiring property in trust, the BIA must consider whether the application to take land into trust is processed pursuant to the criteria that applies to "on-reservation acquisitions" at § 151.10, or "off-reservation acquisitions" at § 151.11. Criteria for "on-reservation" acquisitions pursuant to § 151.10 apply when "the land is located within or contiguous to an Indian reservation".

In Order dated September 6, 2013 (*County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*) the IBIA noted: "Indian reservation" is defined to include "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." In the 2013 Order, the IBIA established the Tribe's existing trust lands in Alpine, consisting of approximately 10 acres, more or less, and recorded under Tract 573 T1123 and 573 T5210 (trust land) constitutes 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. § 5125 (previously 467).

Appellants assert the Walker Parcel is not contiguous to tribal trust property. The Walker Parcel is separated from existing trust land by roads with differing ownership interests. Access to the trust lands from the Walker Parcel can only be obtained by driving over the intervening roads. The Appellants note 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 Road and Alpine Boulevard), which are contiguous to each other.

In the briefs dated May 31, 2017 by Appellants in *County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*, IBIA 11-136; 11-137, the Appellants observe the right-of-way corridors for the roadways are not merely surface easements, also, the State of California and the County of San Diego own the underlying fee property upon which the roadways are located. As clarified below, trust properties may be contiguous in accordance with Department regulations regardless of whether ownership interests in roads separating the properties are held as public easements or in public fee.

The Board had previously noted that the definition of "contiguous" is not defined by the 25 C.F.R. § 151 regulations, see *Jefferson County v. Northwest Regional Director*, 47 IBIA 187 (September 2, 2008), and at one time, the definition was not found anywhere in Department regulations despite incorporation of the term "contiguous" in 25 C.F.R. § 151. In 2008, Department regulations implementing the Indian Gaming Regulatory Act (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's intent to define "contiguous" to include parcels of land separated by non-navigable waters or a public road or right-of-way.

In *Jefferson County*, *supra*, the Board held that lands which are contiguous under 25 C.F.R. §151 are lands which adjoin or abut, as those terms are commonly defined. Although, the Board expressly did not address whether contiguous lands include those that touch at a corner. The Department's 2008 Gaming Rules definition of contiguous includes land that touches at a point. In *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. Although, in *Jefferson County*, the Board referenced the *Sauk* case as an example of a prior instance where the term "contiguity" had been defined, the Board did not consider the definition of "contiguous" incorporated in the Gaming Rules, which suggests the *Jefferson County* decision was published before the Board could consider the definition of "contiguous" adopted by the Department in the Gaming Rules.

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). Therefore, the definition of contiguous established by the Department in the Gaming Rules speaks to the contiguity of trust land, which is exactly what is at issue when the Department acquires land in trust pursuant to 25 C.F.R. §151. As the regulations in 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 be reasonably, rationally, and appropriately applied to trust acquisitions pursuant to Part 151, when that term was not defined at the time the regulations for acquiring land in trust were promulgated.

The extension of the term contiguous to include "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 body of water 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 body of water on the boundary of trust property – to that end, it is instructive to note the Gaming Rules do not define contiguous properties to include land that is separated by an "easement". Moreover, the inclusion of "water bodies" as an acceptable ownership interest separating contiguous trust properties indicates the Department did not intend for the term "contiguous" to be limited to properties separated only by surface easements, in as much as water bodies generally include both surface and subsurface ownership interests and because water bodies generally are not defined as surface easements.

The term "notwithstanding" 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 body of water 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 address use of neighboring properties that are acquired in trust, despite separation of those properties by public roads, right-of-ways, or bodies of

water, 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 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. 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, 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. Applying the definition of contiguous incorporated in the Gaming Rules to Part 151, lands acquired in trust are contiguous to existing trust lands if the lands are separated by public roads or right-of-ways located along property boundaries.

Additionally, 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 possible future public right-of-way vacations 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.

As noted above, the Walker Parcel is separated by three public road ways consisting of State Highway (Interstate 8) and two County roads (Willows Road and Alpine Boulevard), which are contiguous to each other. It is our determination the Walker Parcel is contiguous to existing trust land, known as the Alpine property, which the Secretary has recognized the Ewiiapaayp Band as having governmental jurisdiction over.

National Environmental Policy Act (NEPA)-Environmental Assessment

A Supplemental Environmental Assessment (SEA) and Finding of No Significant Impact (FONSI) were completed in 2015 and 2016, respectively on remand from IBLA to consider 1) the potential impacts of simultaneous operation of both a new healthcare facility on the Walker Parcel and the existing Southern Indian Health Council Clinic and 2) potential impacts associated with past, present, and reasonably foreseeable future actions. The 2016 FONSI concluded that no operational scenario of the Proposed Action would have a significant impact on the human environment.

Based on the Pacific Region's 2018 request, the IBLA remanded the fee-to-trust decision back to the Regional Director for further consideration and issuance of a new decision. Additional information was obtained from the Tribe to confirm that a day care facility is not planned for development on the Walker property as part of the Proposed Action, which is consistent with the analysis in the 2015 SEA. In addition, a Supplemental Information Report (SIR) was completed in June 2018, concluding that there is no significant new information or circumstances relevant to environmental concerns that would have bearing on the Proposed Action and its impacts. The Pacific Region independently reviewed the 2018 SIR and concluded that no additional National Environmental Policy Act supplementation is necessary.

Conclusion

Based on the foregoing, the Pacific Region, at this time, issues this notice of our intent to accept the subject real property into trust. The subject acquisition will vest title in the United States of America in trust for the Ewiiapaayp Band of Kumeyaay Indians, California in accordance with the Act of Congress is the Indian Reorganization Act (IRA) of June 18, 1934 (48 Stat. 984; 25 U.S.C. 5108).

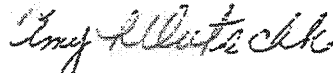
Should any of the below-listed known interested parties feel adversely affected by this decision, an appeal may be filed within (30) days of receipt of this notice with the Interior Board of Indian Appeals, U.S. Department of the Interior, 801 N. Quincy St., Suite 300, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340 (copy enclosed).

Any notice of appeal to the Board must be signed by the appellant or the appellant's legal counsel, and the notice of the appeal must be mailed within thirty (30) days of the date of receipt of this notice. The notice of appeal should clearly identify the decision being appealed.

If possible, a copy of this decision should be attached. Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior 1849 C Street, N.W., MS-3071-MIB, Washington, D.C. 20240; (2) each interested party known to the appellant; and (3) this office. Any notice of appeal sent to the Board of Indian Appeals must certify that copies have been sent to interested parties. If a notice of appeal is filed, the Board of Indian Appeals will notify appellant of further appeal procedures. If no appeal is timely filed, further notice of a final agency action will be issued by the undersigned pursuant to 25 CFR 151.12(b). No extension of time may be granted for filing a notice of appeal.

If any party receiving this notice is aware of additional governmental entities that may be affected by the subject acquisition, please forward a copy of this notice to said party or timely provide our office with the name and address of said party.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tony R. Blumenthal".

Regional Director

Enclosure:

43 CFR 4.310, et seq.

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