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**UNITED STATES DEPARTMENT OF THE INTERIOR**

**OFFICE OF THE SECRETARY**

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| VIEJAS BAND OF KUMEYAAY INDIANS and SYCUAN BAND OF THE KUMEYAAY NATION; and COUNTY OF SAN DIEGO, CALIFORNIA;<br><br>Appellants,<br><br>v.<br><br>PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,<br><br>Appellee. | ) |



# APPELLANT COUNTY OF SAN DIEGO'S REPLY BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**Cases**



**Statutes**



**Regulations**

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

## I. INTRODUCTION

Ewiiaapaayp asks the Assistant Secretary to do what the Bureau of Indian Affairs ("BIA") could have done through normal rulemaking, but chose not to do -- adopt a regulation defining the term "contiguous" as used in 25 C.F.R. § 151.10 in the same way that term is defined in 25 U.S.C. § 2719(a)(1). Ewiiaapaayp's request should be denied. The BIA's decision not to modify Section 151.10 appears to be deliberate, not accidental as Ewiiaapaayp implicitly contends. For this reason alone, the Assistant Secretary should decline to "borrow" the definition of contiguous from 25 U.S.C. § 2719(a)(1)/25 C.F.R. § 292.2. Moreover, borrowing this definition would circumvent the requirement that parties be given notice and an opportunity to comment before a regulation is modified. The Assistant Secretary should uphold the notice and comment requirements, which help ensure better decision making.

Absent a definition, words used in a regulation or statute should be given their ordinary meaning. "[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.)

Ewiiaapaayp contends that Section 2719 of the Indian Gaming Regulatory Act is the genesis of the contiguous/noncontiguous standards used in deciding whether to take land into trust contained in Sections 151.10 and 151.11. Thus, Ewiiaapaayp argues that the term contiguous used in Section 151.10 should be defined the same way it is defined in the Indian Gaming Regulatory Act. Ewiiaapaayp is mistaken. The statement cited by Ewiiaapaayp does not show that the contiguous/noncontiguous standards were adopted as result of the Indian Gaming Regulatory Act. Nor do the fee-to-trust applications addressed in Section 151.10 cover the same subject as the Indian Gaming Regulatory Act. Thus, there is no justification for borrowing the definition of contiguous from 25 U.S.C. § 2719(a)(1)/25 C.F.R. § 292.2 for use in Section 151.10.

Ewiiaapaayp's contention that the Assistant Secretary should adopt the definition of "contiguous parcels" contained in the Fee-to-Trust Handbook is also without merit. The Handbook explicitly states that it defines terms used in the Handbook, not terms used in statutes or regulations. Thus, it is entitled to no weight.

## II. IT IS INAPROPRIATE TO BORROW THE DEFINITION OF "CONTIGUOUS" FROM THE INDIAN GAMING REGULATORY ACT

Ewiiaapaayp urges the Assistant Secretary to borrow the definition of "contiguous" from 25 U.S.C. § 2719(a)(1)[1], which is part of the Indian Gaming

[1] The term is not defined in the Indian Gaming Regulatory Act, but in a regulation that was adopted 20 years after the Act was passed. 25 C.F.R. § 292.2

Regulatory Act. Ewiiaapaayp contends that the "genesis" of the standards that apply to contiguous/noncontiguous fee-to-trust applications in Section 151.10/151.11 is Section 2719 of the Indian Gaming Regulatory Act. Therefore, it contends that the term contiguous as used in Section 151 should be defined the same way it is defined in the Indian Gaming Regulatory Act. Ewiiaapaayp is mistaken. The Indian Gaming Regulatory Act is not the genesis of Section 151. The lone statement Ewiiaapaayp cites in support of its argument does not show the contiguous/noncontiguous standards were adopted as a result of the Indian Gaming Regulatory Act.

**A. <u>The Indian Gaming Regulatory Act is Not The Genesis of Section 151.</u>**

In 1934, Congress enacted the Indian Reorganization Act, which authorizes the Secretary to take land into trust on behalf of an Indian tribe. 25 U.S.C. § 5108. The Indian Reorganization Act provides no standard for the Secretary to use in determining whether to take land into trust.

Ewiiaapaayp notes that in 1988, Congress enacted the Indian Gaming Regulatory Act – a federal statute – **which generally prohibits tribes from using property acquired in trust after October 17, 1988 for gaming**, with the following applicable exceptions. 25 U.S.C. §2719(a). One of those exceptions is where "(1) such lands are located within or **contiguous** to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a)(1). A second relevant exception applies if "(2) the Indian tribe has no reservation on October 17, 1988, and (A) such land are located in Oklahoma and (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or (ii) are **contiguous** to other land held in trust

or restricted status by the United States for the Indian tribe in Oklahoma; or (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation with the State or States within which such Indian tribe is presently located." (25 U.S.C. § 2719(a)(2).)(emphasis added.) The word "contiguous" is not defined in the Indian Gaming Regulatory Act.

Ewiiaapaayp also notes that in 1995, the BIA promulgated the current version of the **regulation** (Section 151.10), which interprets the Indian Reorganization Act of 1934. This regulation specifies the criteria the Secretary will use in deciding whether to take land into trust. For the first time, the regulation used the term "contiguous." Section 151.10 provides that "[t]he Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status **when the land is located within or contiguous** to an Indian reservation." (emphasis added.) The regulation does not define the term contiguous.

Ewiiaapaayp asserts that "[s]ince the genesis of the 'contiguity' provision is 25 C.F.R. § 151.10 is section 2719 of the IGRA, logic and consistency dictate that 'contiguous' should be defined in the same way for section 151.10 as it is in 25 C.F.R. Part 292." In order to support that argument, Ewiiaapaayp notes that when the BIA proposed the current Section 151.10, it stated as follows:

> In recent years, the Bureau has witnessed a number of **requests by tribes for the acquisition of land, in trust, located outside and noncontiguous to the reservation,** for purposes of economic development projects **and, in particular, gaming establishments**. These enterprises, which are often located in urbanized areas, are sought by tribes as a stated means of achieving economic and financial self-sufficiency. Such acquisitions have in many cases become highly visible and controversial due to their possible

> impact on local governments. The loss of regulatory control and removal of the property from the tax rolls are the objections most often voiced by local governments to the acquisition of **noncontiguous, off-reservation land** in trust status. 56 Fed. Reg. 32278 (1991) (emphasis added.)

The problem with Ewiiaapaayp's argument is that the Indian Gaming Regulatory Act generally does not allow gaming on land taken into trust that is "outside and noncontiguous to the reservation." Thus, the BIA's statement that it "has witnessed a number of **requests by tribes for the acquisition of land, in trust, located outside and noncontiguous to the reservation,** for purposes of economic development projects **and, in particular, gaming establishments**" does not show that that the Indian Gaming Regulatory Act is the genesis of Section 151.10 because the Indian Gaming Regulatory Act generally does not allow gaming on land "outside and noncontiguous to the reservation." Moreover, Section 151.11 allows the Secretary to take noncontiguous land into trust, under criteria that is more strenuous than on-reservation acquisitions. There is no indication that the BIA decided to adopt different criteria that apply to contiguous versus noncontiguous land acquisitions because the Indian Gaming Regulatory Act provides that gaming is not allowed on trust land unless that land is continuous to the reservation. Indeed, requests "by tribes for the acquisition of land, in trust, located outside and noncontiguous to the reservation for . . . gaming establishments" would be futile because such land generally cannot be used for gaming under the Indian Gaming Regulatory Act.

Moreover, at the time Section 151.10 was promulgated, the Indian Gaming Regulatory Act did not define contiguous. The definition was not provided until 13 years

after Section 151.10 was amended to provide for the contiguous/noncontiguous criteria. Thus, the definition of contiguous as used in the Indian Gaming Regulatory Act could not have been the genesis of Section 151.10. Indeed, had the BIA wanted to ensure that the word "contiguous" as used in the Indian Gaming Regulatory Act had the same meaning as in Section 151, the BIA would have no doubt amended Section 151 to define contiguous the same way it defined that term for purposes of the Indian Gaming Regulatory Act. Its decision not to do so could not have been accidental, as Ewiiaapaayp implicitly argues.

**B. Section 151.10 and the Indian Gaming Regulatory Act Do Not Cover The Same Subject.**

Ewiiaapaayp cites *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 220 F.Supp.3d 1190, 1261 (D.N.M. 2016) for the proposition that "regulations on the same matter or subject are to be construed together if possible." But, Section 151.10 and the Indian Gaming Regulatory Act do not address the same matter or subject. Sections 151.10/151.11 establishes two separate criteria that apply to fee-to-trust applications depending on whether the land is contiguous or noncontiguous to the reservation. The Indian Gaming Regulatory Act generally prohibits gaming on land taken into trust after 1988 that is not contiguous to the reservation. The statute (the Indian Gaming Regulatory Act) and the regulation (Sections 151.10/151.11) do not address the same subject or matter. The regulation specifies the two different criteria that apply to applications to take land into trust, while the statute (the Indian Gaming Regulatory Act) generally prohibits gaming on parcels taken into trust that are not

contiguous. Moreover, the BIA could have amended Section 151 to define contiguous in the same manner that this term is defined in the Indian Gaming Regulatory Act, but chose not to. That decision could not have been accidental.

Ewiiaapaayp also cites authority for the proposition that "if it can be gathered from a **subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and will govern the construction of the first statute.**" (*Branch v. Smith*, 538 U.S. 254, 281 (2003) (emphasis added.)

*In pari materia* simply means "on the same subject." As discussed above, Section 2719 of the Indian Gaming Regulatory Act and Section 151 do not cover the same subject. Moreover, we are not dealing with the interpretation of two statutes in this case. We are dealing with interpretation of a statute and a regulation. Thus, the cases upon which Ewiiaapaayp relies simply do not apply. Further, there is no indication that the BIA wanted the term contiguous as used in Section 151 to be defined in the same way that term is used in Section 2917. Had the BIA wanted the terms to be defined the same way, it would have proposed an amendment to Section 151.

### C. The Prior Decision Of The Interior Board Of Indian Appeals Is Consistent With The Plain Meaning Of The Term Contiguous.

Ewiiaapaayp urges the Assistant Secretary to overturn part of the Interior Board of Indian Affairs decision in the earlier appeal in this case. *County of San Diego v. Pacific Regional Director*, 58 IBIA 11 (2013). Specifically, Ewiiaapaayp urges the Assistant Secretary to adopt a bright line rule that parcels are contiguous when separated by any

number of roads even when an Indian tribe is not the fee owner of the property where the road rights-of-way are located. The Assistant Secretary should decline Ewiiaapaayp's request. In *County of San Diego*, the Board held that "to be contiguous under § 151.10, 'at a minimum, the lands must touch.'" *Id.*, at 26 (quoting *Jefferson County v. Northwest Regional Director*, 47 IBIA 187, 206 (2008). The Board also noted that "[s]ubsequently, in *Jefferson County*, the Board suggested that the relevant consideration may be 'the ownership of the road's surface or subsurface by easement, fee, lease or grant." (*County of San Diego*, 58 IBIA at 26-27.) (footnote omitted).

As discussed in detail below, Ewiiaapaayp argues that the prior decision of the Interior Board of Indian Appeals is "law of the case." If Ewiiaapaayp is correct, its argument if foreclosed. Moreover, words used in a regulation 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 (emphasis added).) 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. This is particularly true where the underlying fee interest in the roads is owned by an entity other than the Tribe.

## III. THE FEE-TO-TRUST HANDBOOK IS ENTITLED TO NO WEIGHT

Ewiiaapaayp urges the Assistant Secretary to overturn the decision of the Interior Board of Indian Appeals in the prior appeal of this case holding that the definition of "Contiguous **parcels**" contained in a handbook titled Acquisition of Title to Land Held in Fee or Restricted Fee Status ("Fee-To-Trust Handbook") is entitled to no weight in

determining the meaning of the term contiguous contained in 25 C.F.R. § 151.10.[2] Ewiiaapaayp's request should be denied.

First, the term that is defined in the Fee-to-Trust Handbook – "**Contiguous parcels**" is not contained in 25 C.F.R. § 151.10. Section 151.10 provides that "[t]he Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status **when the land is located within or contiguous** to an Indian reservation." (emphasis added.) Thus, the Fee-to-Trust Handbook does not define the actual term used in Section 151.10 – contiguous—that is at issue here.

Second, the Fee-to-Trust Handbook states that "[t]erms **used in this handbook** have specific definitions. For the definition of terms **used in this handbook**, refer to the definitions in 25 CFR Part 151[3] and t**hose provided in this section**." (*Id.* at p. 3.) (emphasis added.) Thus, the definitions contained in the Handbook **define terms used in the Handbook itself, not terms used in federal regulations**. Thus, the authority Ewiiaapaayp cites for the proposition that an agency has the authority to interpret its own regulations through manuals/memoranda has no applicability.

Third, Ewiiaapaayp admits that "[t]he Regional Director did not cite the Fee-To-Trust Handbook in her analysis . . . ." (Ewiiaapaayp Brief, at p. 8.) Thus, Ewiiaapaayp's contention that "the [Interior] Board [of Indian Appeals] erred by ignoring the Fee-To-Trust Handbook" is absurd. (Ewiiaapaayp Brief, at p. 12.) It is the Regional Director –

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[2] The Fee-To-Trust Handbook was issued by the Division of Real Estate Service of the Bureau of Indian Affairs in 2008. It was reissued in 2011, 2013 and 2016.

[3] As discussed above, Part 151 has no definition of contiguous.

not the Interior Board of Indian Appeals – who ignored the Fee-To-Trust Handbook. Ewiiaapaayp does not contend that the Regional Director erred by not relying on the definition of "continuous parcels" contained in the Fee-To-Trust Handbook. Moreover, it would be inappropriate for the Assistant Secretary to affirm the Regional Director's decision based on a document that the Regional Director did not rely on. Ewiiaapaayp admits as much in another context:

> First, they contend that it was arbitrary and capricious for the Regional Director to rely on a memorandum from Interior's Bureau of Land Management Indian Land Surveyor stating that the Walker Parcel is considered contiguous to the Alpine trust land. But the Regional Director cited this only as additional support for her conclusion that the lands are contiguous. **Her determination is not predicated on this memorandum and so the attack on it is beside the point.** (Ewiiaapaayp Brief, at p. 15 (emphasis added).)

Thus, Ewiiaapaayp admits that it is only appropriate to consider on appeal materials upon which the Regional Director actually relied. It is undisputed that the Regional Director did not rely on the Fee-To-Trust Handbook.

Finally, Ewiiaapaayp takes inconsistent positions on the law of case doctrine. Ewiiaapaayp admits that it the prior appeal in this case, the Interior Board of Appeals rejected the very argument it is making regarding the "Fee-To-Trust" Handbook. According to Ewiiaapaayp, "The Board noted the definition of 'contiguous parcels' in the Fee-Trust-Handbook. But it gave no weight to this definition, commenting that '[t]he hand book cannot, of course, carry any legal force or effect against a party in the absence of notice—and comment rulemaking." Ewiiaapaayp Brief, at p. 10 (citing *County of San Diego v. Pacific Regional Director*, 58 IBIA 11, 28 and n.22 (2013)). Nonetheless,

Ewiiaapaayp seeks to overturn this part of the Interior Board of Indian Appeal decision with no mention of the law of the case doctrine. Ewiiaapaayp takes the opposite position with respect to the County's argument that the property where the SIHC clinic is currently located is not part of the reservation. According to Ewiiaapaayp, appellants "argue that the Secretary has never proclaimed the Alpine land to be part of the Ewiiaapaayp Reservation pursuant to 25 U.S.C. § 5110. But, as they acknowledge, the Board has previously rejected this argument in this case. . . . **The Board's rulings are the law of this case** and appellants have not provided any basis for revisiting those rulings."[4] Ewiiaapaayp Brief, at pp. 16-17 (emphasis added) (footnote omitted.) What is good for the goose is good for the gander. Ewiiaapaayp cannot argue law of the case with respect to portions of the prior Interior Board of Indian Appeals decision which it agrees and assert at the same time that portions of the prior decision with which it disagrees should be overruled. The Assistant Secretary must take a consistent position requiring the law of the case doctrine in reviewing the Interior Board of Appeals prior rulings.

## IV. CONCLUSION

For all of these reasons and the reasons discussed in the County's Opening Brief, 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

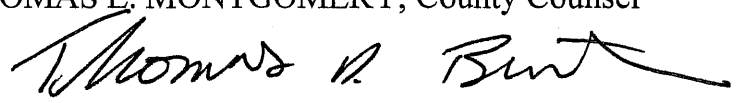
[4] The County provided numerous reasons why the Interior Board of Indian Appeals decision was incorrect in this respect. (County's Opening Brief, Section II.A., at pp. 3-4.) Ewiiaapaayp does not address any of those arguments in its brief.

application applying the standard applicable to applications to take "off reservation" lands into trust (25 C.F.R. § 151.11).

DATED: November 21, 2019

Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By 

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## 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 November 21, 2019, I served the following documents: **APPELLANT COUNTY OF SAN DIEGO'S REPLY BRIEF** in the following manner:

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☒ **(BY MAIL)** I caused a true copy thereof, enclosed in a sealed envelope, with postage fully prepaid, for each addressee named below and depositing each in the U. S. Mail at San Diego, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 21, 2019, at San Diego, California.

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