

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. )  
\_\_\_\_\_ )

COMMENTS OF EWIIAAPAAYP BAND OF KUMEYAAY INDIANS  
ON SUPPLEMENTS TO ADMINISTRATIVE RECORD

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STATE CLEARINGHOUSE

The Ewiiapaayp Band of Kumeyaay Indians ("Ewiiapaayp") submits the following comments on the four documents that the Assistant Secretary-Indian Affairs ("AS-IA") added to the record in this appeal by a notice dated January 17, 2020. As explained below, these documents either are irrelevant to the issues in this appeal or else support the April 23, 2019 Notice of Decision ("2019 NOD") of the Pacific Regional Director of the Bureau of Indian Affairs ("BIA") approving Ewiiapaayp's application, pursuant to 25 C.F.R. § 151.10, to take into trust a 16.69-acre parcel of property ( the "Walker Parcel") in Alpine, California.

### **ISSUES IN THIS APPEAL**

The three appellants -- the County of San Diego, the Viejas Band of Kumeyaay Indians ("Viejas"), and the Sycuan Band of the Kumeyaay Nation ("Sycuan") -- challenge the Regional Director's conclusion in the 2019 NOD that the Walker Parcel is contiguous to a 10 acre parcel of Ewiiapaayp trust land (the "Little Ewiiapaayp" section of the Ewiiapaayp Reservation) located in the unincorporated community of Alpine, California. In addition, Viejas and Sycuan contend that the Regional Director did not adequately analyze (1) Ewiiapaayp's need for new trust land (2) the "true purpose and use" for such land, and (3) the jurisdictional and land-use conflicts.

### **THE SUPPLEMENTARY DOCUMENTS**

The four documents that the AS-IA has added to the record in this appeal are:

1. A 1999 letter from the Chairman of Ewiiapaayp to Sen. Barbara Boxer thanking her for agreeing to introduce the California Indian Land Transfer Act, which proposed to transfer various parcels of Bureau Land Management ("BLM") public lands to expand the reservations of eight California tribes, including Ewiiapaayp. Approximately 1,360 acres were to be transferred to Ewiiapaayp to enlarge its main Reservation lands in the Laguna Mountains (the

“Big Ewiiapaayp” section of the Reservation), which is located 19 air miles due east of the “Little Ewiiapaayp” section in Alpine.

2. The record of a 2001 Hearing before the House Committee on Resources on proposed legislation which would have effectively prevented the amendment of a federal business lease on the Little Ewiiapaayp section of the Reservation in Alpine, under which Southern Indian Health Council, Inc. (“SIHC”), a non-profit tribal consortium comprised of seven Kumeyaay tribes, operates a health clinic there. The amendment relinquished a portion of the leased property back to Ewiiapaayp in exchange for Ewiiapaayp financing and constructing a new (and significantly larger) clinic facility on the remaining leasehold, and a much-needed new clinic facility for the SIHC’s use on the Campo Indian Reservation. At the Hearing, Ewiiapaayp testified in opposition to the blocking legislation and Congress took no further action on it.

3. A Department of the Interior notice of April 16, 2019, publishing the Ewiiapaayp Liquor Control Ordinance, which regulates the possession, sale, manufacture, distribution and taxation of liquor within Tribal Trust Lands in order to permit alcohol sales by tribally owned and operated enterprises and private lessees, and at tribally approved special events.

4. A 2014 pleading in support of Ewiiapaayp’s motion to intervene in litigation (*The Protect Our Communities Foundation v. Black*, No. 14CV2261H (S.D. Cal.)) which challenged the BIA’s approval of a Wind Lease Agreement between Ewiiapaayp and Tule Wind LLC for a wind energy project located on the Big Ewiiapaayp section of the Reservation.

## ARGUMENT

There is a threshold issue whether these additional documents should be considered by the AS-IA. Previously, the AS-IA has taken the position that it is not appropriate to consider

materials that were not before the Regional Director at the time of the decision under review. *See Kramer v. Pacific Regional Director* (AS-IA) (Jan. 19, 2017) at 19.

In any event, none of these four documents has any bearing on whether the Walker Parcel is contiguous to the Little Ewiiapaayp Reservation. Whatever relevance these documents may have relates, instead, only to the 25 C.F.R. § 151.10 criteria. None of the documents alters the conclusion that the Regional Director acted within her discretion in assessing the regulatory criteria and responding to the appellants' comments.

**A. The Regional Director Adequately Considered The Regulatory Criteria And The Comments By Viejas And Sycuan**

**1. Ewiiapaayp's need for additional land – 25 C.F.R. § 151.10(b)**

The only issue to which the first and fourth documents relate is the contention of Viejas and Sycuan that “[t]he BIA did not adequately describe Ewiiapaayp’s need for additional land.” (Viejas/Sycuan Br. at 22).

The first document refers to the California Land Transfer Act, which became Title IX of the Omnibus Indian Advancement Act, P.L. 106-568, 114 Stat. 2868, 2921-23 (Dec. 27, 2000), and added approximately 1,360 acres to the Big Ewiiapaayp Reservation. Of this acreage, 928 acres simply restored trust land that had been removed on paper by errant BLM surveys, and the additional 432 acres was located on ridge tops or steep slopes. *See Hearing on H.R. 1239 and H.R. 2742 Before the House Comm. on Resources*, 107th Cong. 42 n. 4 (2001). This additional land currently has no economic use or prospects.

The fourth document relates to litigation over the Wind Lease Agreement between Ewiiapaayp and Tule Wind LLC for a wind energy project on the Big Ewiiapaayp section of the Reservation, which was part of Ewiiapaayp’s plan for economic development there. The lease was approved by the BIA in 2013 but this decision was challenged in federal court. The

litigation dragged on for six years and only concluded recently. *See Protect Our Communities Foundation v. LaCounte*, 939 F.3d 1029 (9th Cir. 2019). At the time the lease was executed, electricity was being purchased at long-term rates that, when combined with federal tax credits, made the project economically viable. During the years of delay that ensued, however, energy market prices have declined and waivers are now required to maintain the federal tax credits and the California Public Utility Commission queue slot that permits the project's sale of its energy production. Consequently, the project's viability is now uncertain.

These past developments relating to the Big Ewiiapaayp section of the Reservation do not affect whether the Regional Director properly concluded in 2019 that the Walker Parcel was needed to achieve tribal self-sufficiency and economic development. 2019 NOD at 8. "All that Section 151.10(b) requires is for the Regional Director to express the Tribe's needs and conclude generally that IRA purposes are served by the acquisition." *Kramer, supra* at 15. "(A) tribe need not be landless or suffering financial difficulties to need additional land." *Id.; accord Application of Shakopee Mdewakanton Sioux Community*, (AS-IA) (June 7, 2007) at 3-4. Furthermore, it is "not necessary under these regulations for the Regional Director to examine how the Tribe has used or intends to use other property held in fee or in trust." *Kramer* at 17. "[T]he existence of other land does not undercut [a tribe's] 'need' for [a particular] parcel." *Cachil Dehe Band of Wintun Indians of Colusa Ind. Comm. v. Zinke*, 889 F.3d 584, 597 (9th Cir. 2018). Thus, the letter to Sen. Boxer and the Wind Lease pleading – both of which relate to the Big Ewiiapaayp section of the Reservation, and the use that Ewiiapaayp has attempted to make of that land -- are irrelevant to the Regional Director's determination regarding the Walker Parcel.

**2. Purposes for which the land will be used – 25 C.F.R. § 151.10(c)**

The second and third documents relate to arguments that Viejas and Sycuan have made with respect to the purposes for which the Walker Parcel will be used. They have long contended that the parcel would be used for gaming, but the Regional Director noted that the proposed use of the land is the operation of a health clinic, 2019 NOD at 8, and concluded that “[n]othing in the record suggests that the Walker Parcel will be used for gaming purposes.” *Id.* at 10. The Regional Director “is not required to speculate about potential future changes in land use under [25 C.F.R. § 151.10(c)].” *Kramer, supra* at 17-18. “[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.” *Id.* at 18 (citation omitted).

The second document, the 2001 Legislative Hearing, buttresses the Regional Director’s conclusion that the Walker Parcel has never been proposed for gaming. In 2001, Ewiiapaayp had recently purchased the Walker Parcel and submitted an application to have it accepted into trust. At that time, Ewiiapaayp’s plan was to erect a gaming facility on the Little Ewiiapaayp section of the Reservation by first amending its lease with SIHC, and then building a \$1.5 million replacement clinic on the Campo Reservation for SIHC and a \$5 million replacement clinic on part of the Little Ewiiapaayp section of the Reservation for SIHC, before proceeding to remove the old clinic buildings and construct a gaming facility on the remainder of the Little Ewiiapaayp section. *See Hearing on H.R. 1239 and H.R. 2742 Before the House Comm. on Resources*, 107th Cong. 35, 40 (2001). Ewiiapaayp’s representative testified at the hearing that, if the Walker Parcel was accepted into trust before construction of the replacement clinic on the Little Ewiiapaayp section of the Reservation, Ewiiapaayp would instead construct a larger, \$10

million clinic on the Walker Parcel for SIHC. *See id.* at 40-41. Thus, ever since 2001, the proposed use of the Walker Parcel has been the operation of a health clinic, not a gaming facility.

The third document, the Liquor Control Ordinance, states, in part, “[t]he Tribe is the beneficial owner of Tribal Trust Lands, upon which the Tribe plans to construct and operate a gaming facility and related entertainment and lodging facilities.” 84 FR 15,631. This provision refers to the Little Ewiiapaayp section of the Reservation, not to the Walker Parcel, because the Walker Parcel has not yet been taken into trust. The ordinance, which Ewiiapaayp adopted in May 2018, reaffirms Ewiiapaayp’s plan to conduct gaming on the Little Ewiiapaayp section of the Reservation once it is unencumbered by the SIHC lease.

Viejas and Sycuan contend that the ordinance nonetheless requires an update of the Environmental Assessment for the Walker Parcel. In 2013 the Interior Board of Indian Appeals (“Board”) found that the establishment of a casino on the Little Ewiiapaayp section of the Reservation “is speculative and unconnected to the action concerning the Walker Parcel for purposes of the EA [Environmental Assessment].” *County of San Diego v. Pacific Regional Director*, 58 IBIA 11, 12 (2013). Viejas and Sycuan contend that the Liquor Control Ordinance demonstrates that gaming “is ... no longer merely speculative.” (Viejas/Sycuan Br. at 23). But this argument does not withstand closer scrutiny.

In finding that the potential establishment of a gaming facility on the Little Ewiiapaayp section of the Reservation need not be considered as part of an Environmental Assessment of the Walker Parcel, the Board followed Supreme Court guidance. *See* 58 IBIA at 32 (citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)). In *Kleppe*, the Court stated:

[NEPA] speaks solely in terms of Proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into

account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects.

*Id.* at 410 n. 20 (emphasis added). The Board deemed the establishment of a casino to be “speculative” because, although it was contemplated by Ewiiapaayp, it was not imminent. Indeed, earlier that same year, the Board had ruled that the Little Ewiiapaayp section of the Reservation is encumbered by the lease to SIHC until at least 2037. *See Ewiiapaayp Band of Kumeyaay Indians v. Acting Pacific Regional Director*, 56 IBIA 163 (2013). That lease encumbrance remains in place. Thus, the establishment of a gaming facility on the Little Ewiiapaayp section of the Reservation still is not imminent and so does not require consideration as part of an Environmental Assessment of the Walker Parcel.

Furthermore, the Board concluded in 2013 that the establishment of a casino “is speculative and unconnected to the action concerning the Walker Parcel for purposes of the EA [Environmental Assessment].” *County of San Diego*, 58 IBIA at 12 (emphasis added). The two actions remain unconnected. The impediment to constructing a casino on the Little Ewiiapaayp section of the Reservation is the lease encumbrance. Taking the Walker Parcel into trust will not remove that encumbrance. Conversely, if the lease encumbrance on the Little Ewiiapaayp section of the Reservation is removed, construction of a casino can proceed regardless of whether the Walker Parcel is taken into trust. This lack of connection constitutes a second, distinct reason why there is no need to re-visit the Environmental Assessment regarding the Walker Parcel based on the adoption of the liquor ordinance.

Accordingly, neither the 2001 Legislative Hearing nor the Liquor Control Ordinance undercuts the Regional Director’s assessment of the 25 C.F.R. § 151.10 criteria with respect to the Walker Parcel.



## CONCLUSION

“Taking land into trust is one of the most important functions Interior undertakes on behalf of the tribes. Acquisition of land in trust is essential to tribal self-determination.”

<https://www.bia.gov/bia/ots/fee-to-trust>. Ewiiapaayp originally applied in 2001 to convey the Walker Parcel into trust. It is long past time for Ewiiapaayp to receive a final decision on its application.<sup>1</sup> After nearly 20 years, Ewiiapaayp deserves an answer.

The 2019 NOD should be affirmed. The four additional documents have no bearing on whether the Walker Parcel is “contiguous” to the Little Ewiiapaayp section of the Reservation under 25 C.F.R. § 151.10. Nor do these documents affect the conclusion that the Regional Director acted within her discretion in assessing the 25 C.F.R. § 151.10 criteria and responding to the appellants’ comments. Accordingly, the BIA should proceed to accept the Walker Parcel into trust for Ewiiapaayp.

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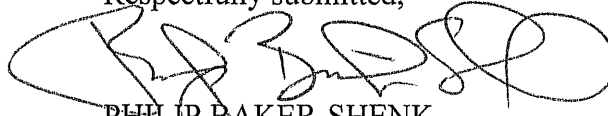
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<sup>1</sup> In comparison, during the 19-year period that Ewiiapaayp has awaited a final decision on the Walker parcel, appellants Sycuan and Viejas have had a number of fee-to-trust applications approved without undue delay:

- Sycuan - Gentile application (December 22, 2005) was approved on April 17, 2007 for 2.26 acres more or less.
- Sycuan - Spinali application (October 2, 2006) was approved on October 1, 2008 for 8.00 acres more or less.
- Sycuan - Thiel/Sycuan Square application (March 11, 2009) was approved on March 28, 2011 for 48.64 acres more or less.
- Viejas - Viejas Grade NW application (August 11, 2010) was approved on January 26, 2012 for 90.00 acres more or less.
- Sycuan – Reservation expansion (application May 12, 2009, amended May 2011) was approved April 23, 2013 for 1,357 acres.
- Sycuan - Lumn application (August 29, 2016) was approved on June 7, 2019 for 5.23 acres more or less.

January 31, 2020

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of January, 2020, I caused to be served by the means identified below to the parties and persons listed below a copy of these Comments of Ewiiapaayp Band of Kumeyaay Indians on the Assistant Secretary – Indian Affairs Supplements to Administrative Record.

Respectfully submitted,



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