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.	)

BRIEF OF EWIIAAPAAYP BAND OF KUMEYAAY INDIANS

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INTRODUCTION AND PROCEDURAL BACKGROUND

On April 23, 2019, the Pacific Regional Director of the Bureau of Indian Affairs ("BIA") approved for the fourth time the application of the Ewiiaapaayp Band of Kumeyaay Indians ("Ewiiaapaayp") to take into trust a 16.69-acre parcel of property (the "Walker Parcel") located near Alpine, California. The Regional Director approved the application pursuant to 25 C.F.R. § 151.10 on the basis that the parcel is "contiguous" to Ewiiaapaayp's existing trust land. All three appellants -- the County of San Diego ("County"), the Viejas Band of Kumeyaay Indians ("Viejas"), and the Sycuan Band of the Kumeyaay Nation ("Sycuan") -- challenge the conclusion that the parcel is contiguous to Ewiiaapaayp's existing trust land. In addition, Viejas and Sycuan contend that the Regional Director failed to adequately consider the § 151.10 criteria and respond to their comments.

Ewiiaapaayp originally applied in 2001 to convey the Walker Parcel into trust. The Regional Director approved the acquisition in 2002 but the Assistant Secretary-Indian Affairs ("AS-IA") withdrew the Regional Director's decision in order to conduct his own review. The AS-IA did not act and, in 2004, Ewiiaapaayp requested a delay of the final decision in order to pursue discussions with Viejas. In 2008, Viejas disclaimed interest in a prospective agreement that had been negotiated by the parties and Ewiiaapaayp requested reactivation of its application. The Regional Director thereafter approved Ewiiaapaayp' s application by a decision dated May 31, 2011. (Ex. 1 to Suppl. AR.) Viejas, Sycuan, the County and others appealed that decision to the Interior Board of Indian Appeals ("Board"), which vacated and remanded to the BIA for further consideration. *County of San Diego v. Pacific Regional Director*, 58 IBIA 11 (2013). The Regional Director again approved the application by a decision dated December 23, 2016. (Ex. 22 to Suppl. AR.) Viejas, Sycuan, and the County appealed again to the Board. More than

one year later, and well after the matter was fully briefed, the Principal Deputy Assistant Secretary – Indian Affairs on February 14, 2018 directed the Regional Director to request that the Board vacate the Regional Director's decision and remand it in order to address certain concerns and issue a new decision. On April 20, 2018, the Board did so. *County of San Diego v. Acting Pacific Regional Director*, 65 IBIA 188 (2018). After another review, the Regional Director on April 23, 2019 issued a Notice of Decision ("2019 NOD") which is the subject of the instant appeal.

FACTUAL BACKGROUND

The Ewiiaapaayp Reservation is located in Pine Valley in the Laguna Mountains in southeastern San Diego County. The Reservation is located in steep, rocky mountainous areas, between 4,800 - 6,300 feet in elevation, with a single, inadequate and unsafe access road, and is unsuitable for residential or commercial development.[1] In 1986 Ewiiaapaayp initiated the purchase of an 8.6 acre parcel near Alpine in east San Diego County and leased it to the Southern Indian Health Council (SIHC), a consortium of seven Kumeyaay tribes, for a health care clinic for their tribal citizens and the general public.[2] The lease runs for two 25-year terms, from 1987 to 2037, at a rent of $1 per term. In 1997 Ewiiaapaayp became the beneficial owner of a contiguous 1.4-acre parcel, which it also leased to SIHC for two 25-year terms, from 1998 to 2048, at a rent of $1 per term. The BIA accepted both of these parcels into trust for

[1] The Reservation covers 4,460 acres but only 10 are arable. No utility (electric, sewer, water) or communications service is available to the Reservation, including no wireless cellular or radio service. Once home to over 200, the Reservation today supports a minimal population (six tribal citizens among five families). Tribal membership has shrunk because of disenrollment due to lack of employment opportunities on or near the Reservation and because individuals eligible for membership choose to enroll in other tribes with safe roads, grid-connected utilities, and access to employment opportunities while residing on the reservation. .

[2] The SIHC clinic needed a new location after it was removed from the Barona and Sycuan Reservations and Viejas declined to host it.

Ewiiaapaayp. *See Ewiiaapaayp Band of Kumeyaay Indians vs. Acting Pacific Regional Director,* 56 IBIA 163 (2013).

Ewiiaapaayp applied to have the Walker Parcel taken into trust for non-gaming economic development in the form of a health-related facility to meet the needs of the SIHC (whose long-term goals include constructing and operating a new and expanded health facility).

The Walker Parcel is adjacent to Ewiiaapaayp's existing trust land. They share a common boundary, being separated by three contiguous public roadways: a State highway (Interstate 8) and two County roads (Willows Road and Alpine Boulevard).

THE REGIONAL DIRECTOR'S DECISION

The 2019 NOD included a Contiguity Analysis which considered and rejected the argument that the Walker Parcel is not contiguous to the existing Alpine trust parcels because they are separated by roads owned in fee by another party.[3] The Regional Director concluded that, in deciding a fee-into-trust application under section 151.10, she should apply the definition of "contiguous" in 25 C.F.R. § 292.2, which provides that two parcels of land are contiguous if they "have[e] 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." She reasoned that, "[b]ecause the Gaming Rules [Part 292] 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." 2019 NOD at 14. This definition "encompasses land parcels with a common boundary in spite of public roads located on boundaries." *Id.* at 15. Thus, it is irrelevant "whether [the] ownership interest in [public] roads separating the properties

[3] In comments they provided to the Regional Director, appellants argued that the right-of-way corridors for the roadways are not merely surface easements but, instead, are owned in fee by the State of California and the County.

are held as public easements or in public fee." *Id.* at 12. Similarly, "[t]he 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 land County road." *Id.* at 15.

The Regional Director addressed each of the criteria specified in 25 C.F.R. § 151.10 for evaluating a request to accept contiguous land in trust and concluded that the Walker Parcel should be accepted into trust. 2019 NOD at 6-10.

ARGUMENT

A. The Regional Director Correctly Concluded That The Walker Parcel Is Contiguous To Ewiiaapaayp's Existing Trust Land

Appellants ask the AS-IA to "declare that [the] Part 292 definition of contiguousness is not an appropriate standard for Part 151 acquisitions," (Viejas/Sycuan Br. at 12) and, instead, approve the contiguity standard articulated by the Board in certain of its decisions. The AS-IA should decline to do so. For the following reasons, the definition of contiguity under Parts 151 and 292 should be identical. To the extent the Board's standard for assessing contiguity is at odds with the definition of "contiguous" promulgated in 25 C.F.R. § 292.2, it should be overruled.

1. The history of the contiguity provisions in Parts 151 and 292 demonstrates that they should be interpreted identically

In order to analyze the current dispute, it is essential to review the history and evolution of the BIA's regulations and practices governing taking land into trust. The land acquisition regulations that currently appear at 25 C.F.R. Part 151, were originally promulgated in 1980 as 25 C.F.R. Part 120a. *See* 45 Fed. Reg. 62034 (1980). At that time, 25 C.F.R. § 120a.3(a) stated that "[s]ubject to the provisions contained in the acts of Congress which authorize land

acquisitions, land may be acquired for a tribe in trust status (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 45 Fed. Reg. at 62036 (emphasis added). There was no mention of "contiguity;" the requirement was that a trust acquisition be "adjacent" to a tribe's reservation. 25 C.F.R. Part 120a was re-designated as Part 151 in 1982. 47 Fed. Reg. 13326, 13327 (1982).

In 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") and included a provision that, subject to certain limited exceptions, gaming "shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—(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). This statutory provision introduced the concept of "contiguity" into trust land acquisitions.

In July 1990, the Secretary of the Interior announced a new policy for the placement of lands in trust status for Indian tribes when such lands are located outside of and noncontiguous to a tribe's existing reservation boundaries. The following year, in July 1991, the BIA proposed new regulations to modify 25 C.F.R. Part 151 (Land Acquisitions) and create a new section which would contain additional criteria and requirements to be used in evaluating requests for the acquisition of tribal lands in trust when such lands are located outside of and noncontiguous to the tribes' existing reservation boundaries. *See* 56 Fed. Reg. 32278 (1991). The BIA explained the impetus for this regulatory change as follows:

> In recent years, the Bureau has witnessed a number of requests by tribes for the acquisition of land, in trust, located outside of 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.

Id. As part of these changes, "Section 151.10 [would] be modified to clarify that listed criteria presently found in this section pertain only to requests for the acquisition of tribal and individual lands in trust when such lands are located within or contiguous to the tribe's reservation. *Id.*

These changes to 25 C.F.R. Part 151 were adopted in 1995. *See* 60 Fed. Reg. 32874 (1995). But no definition of "contiguous" was added to Part 151. In 2008, however, the BIA promulgated regulations implementing section 2719 of the IGRA, which did include definitions of key terms used in the statute and the new regulations. 73 Fed. Reg. 29354 (2008). "Contiguous" was defined in 25 C.F.R. § 292.2 as follows: "Contiguous means 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 (2008). The commentary to the Final Rule makes clear that this definition was the result of careful consideration:

> 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."

73 Fed. Reg. at 29355.

Since the genesis of the "contiguity" provision in 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. This is the approach that the BIA has taken in trust acquisitions under Part 151, including this case.

On May 20, 2008, the same day that it issued its final Part 292 regulations, the BIA also issued a handbook titled "Acquisition of Title to Land Held in Fee or Restricted Fee," commonly known as the BIA "Fee-To-Trust Handbook." Updated versions of this Handbook were issued in 2011, 2013, and 2016. (Copies of these Handbook versions are attached as Exhibits A-D). A July 13, 2011 memorandum from the BIA Director to all Regional Directors instructed that all acquisitions of land into trust are to be processed in accordance with the guidance in this Handbook. (Exhibit B). Section 2 of the Handbook provides a definition of terms that supplements those provided in 25 C.F.R. Part 151. This section includes the following definition: "Contiguous parcels: Two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way, including parcels that touch at a point. Also referred to as 'adjacent parcels.'" (emphasis added). Thus, the BIA, per the directive of the BIA Director, utilizes the same definition of "contiguous" under both Part 151 and Part 292 of its regulations.

2. The Regional Director's contiguity decision was correct

The history of the contiguity provisions in Parts 151 and 292 demonstrates that the Regional Director was absolutely correct in deciding that, "[b]ecause the Gaming Rules [Part 292] 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." 2019 NOD at 14.

This definition of "contiguous" makes it irrelevant who owns the subsurface rights beneath the public road or right-of-way. As the Regional Director explained:

> 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 [only] 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 ....

2019 NOD at 14.

Although the Regional Director did not cite the Fee-To-Trust Handbook in her analysis, she reached the same conclusion that the BIA reached in 2008, when it issued the original Handbook, and has reaffirmed in three subsequent versions: that the same definition of "contiguous" should apply under Part 151 as under Part 292. This definition establishes a bright-line rule that is easy to understand and apply, and avoids the need for complex, time-consuming investigations of chains of title or the precise nature of right-of-way grants or who holds subsurface rights under a public road or a non-navigable body of water. It defines adjacent

parcels as being contiguous "notwithstanding the existence of non-navigable waters or a public road or right-of-way" between them.

3. The Board decisions relied on by appellants are inapposite or unpersuasive

In challenging the Regional Director's contiguity analysis, appellants rely on Board decisions that are either inapposite or unpersuasive. As shown below, the Board's decisions on contiguity have ignored: (1) the need to construe the contiguity provision in Part 151 consistently with Part 292; (2) the deference to which the Fee-To-Trust Handbook's reasonable interpretation of the contiguity requirement is entitled; (3) the fact that the BIA Director has directed Regional Directors to process all acquisitions of land into trust in accordance with the Handbook; and (4) the applicable canon of construction.

In *Jefferson County v. Northwest Regional Director*, 47 IBIA 187 (2008), the Board ruled that, to be contiguous under Part 151, "at a minimum, the lands must touch." *Id.* at 206. Although the Board noted the existence of a newly promulgated definition of "contiguous" in Part 292, *id.* at n. 11, it did not acknowledge that the contiguity provision in Part 151 it was construing derives from the IGRA and so should be interpreted consistently with Part 292. Nor did the Board discuss the newly promulgated Fee-To-Trust Handbook, which had adopted the Part 292 definition of "contiguous" for all acquisitions of trust land.

Moreover, the facts of *Jefferson County* render its discussion of contiguity inapposite to this case. In *Jefferson County*, the BIA had not determined the precise boundary of either the trust land or the property at issue, nor was it possible for the Board to do so on the record before it. The parties agreed that the question depended on the ownership of the bed of the former Metolius River, which ran between the properties and which may have been navigable at the relevant time. *See id.* at 202-03. Under these circumstances, the Board properly focused on

whether the lands touched – this would appear to be the dispositive issue even under the definition of "contiguous" in Part 292 and the Handbook. Thus, *Jefferson County* sheds no light on this case.

In *County of San Diego v. Pacific Regional Director*, 58 IBIA 11 (2013), the Board vacated and remanded for further consideration the Regional Director's original decision that the Walker parcel is contiguous to the Alpine trust lands. *Id.* at 28. Relying on *Jefferson County*, the Board opined that lands must touch to be contiguous under 25 C.F.R. § 151.10. *Id.* at 26. The Board noted the definition of "contiguous parcels" in the Fee-To-Trust Handbook. 58 IBIA at 28. But it gave no weight to this definition, commenting that "[t]he handbook cannot, of course, carry any legal force or effect against a party in the absence of notice-and-comment rulemaking." *Id.* at n. 22.

Subsequently, in *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278 (2014), the Board cited *County of San Diego* for the proposition that "it is not necessarily permissible for BIA to simply assume that the existence of highways separating two parcels is irrelevant, and that parcels on each side of the highways necessarily are contiguous—i.e. that they necessarily do share a common boundary. ... Instead, the existence of a highway may require a careful analysis of title records." 58 IBIA at 309. In the *Los Olivos* case "[a]ppellants contend[ed] that the definition of "contiguous" in 25 C.F.R. § 292.2 ... should be applied to trust acquisitions." 58 IBIA at 312 n. 33. The Board noted this argument but did not further analyze it.

The Board's most recent decision on contiguity, in *County of Santa Barbara v. Pacific Regional Director*, 65 IBIA 204 (2018), persists in its blinkered approach. In that case, the Regional Director cited the definition of contiguity in the Fee-to-Trust Handbook to support her

conclusion that the parcel at issue was contiguous to the tribe's trust land. The Board, citing *County of San Diego*, again ignored this definition and asserted that "the handbook definition cannot carry any legal force or effect against a party in the absence of notice-and-comment rulemaking." *Id.* at 225. The Board added that "it is not necessarily permissible for BIA to simply assume that the existence of a highway is irrelevant, and [instead] a careful analysis of title records may be required." *Id.* The Board found it unclear whether the Regional Director had examined the ownership of the subsurface interests and was unable to determine ownership of the subsurface interests from the existing record. Accordingly, it vacated the Regional Director's decision and remanded the matter for further consideration *Id.* at 225-26.

The Board's analysis of contiguity in these decisions is flawed and unpersuasive. First, the Board has failed to trace the history of the contiguity provision in Part 151 and has failed to acknowledge that it derives from the BIA's regulatory response to IGRA and so should be construed consistently with the contiguity provision in Part 292. *See United States v. Moss*, 872 F.3d 304, 310 (5th Cir. 2017) (when two regulations operate *in pari materia*, they should not be read in isolation, but must be construed together); *Navajo Health Foundation—Sage Memorial Hospital, Inc v.Burwell*, 220 F.Supp.3d 1190, 1261 (D.N.M. 2016) ("regulations on the same matter or subject are to be construed together if possible").

"There can be no doubt that the ordinary rules of statutory construction apply when interpreting agency regulations." (County Br. at 7). And the most rudimentary rule of statutory construction is that provisions *in pari materia* should be construed in the same fashion:

> [I]t is, of course, the most rudimentary rule of statutory construction ... that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes:
>
> > The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of

> them.... If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute ...; and 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) (Scalia, J.)(quoting *United States v. Freeman*, 3 How. 556, 564–565 (1845)). Likewise, the Board itself has recognized that, when two statutes are *in pari materia*, "[p]rovisions in one act which are omitted in another on the same subject matter will be applied when the purposes of the two acts are consistent." *White Mountain Apache Tribe v. Acting Phoenix Area Director*, 16 IBIA 51, 59 (1988) (internal quotations marks and citation omitted). Thus, the definition of "contiguous" promulgated in Part 292 in 2008 should also be applied to the earlier-promulgated 25 C.F.R. § 151.10.

Second, the Board erred by ignoring the Fee-To-Trust Handbook. While the Handbook does not have the force and effect of law as regulations do, nonetheless it is highly relevant to interpreting contiguity for purposes of Part 151. Although the BIA cannot amend regulations through unpublished documents, *see Pretty Paint v. Rocky Mountain Regional Director*, 38 IBIA 177, 180-81 (2002), the agency is entitled to interpret its own regulations through manuals and internal directives. *See Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008). "It is a well-recognized principle of administrative law that a governmental agency has inherent authority to, without formal notice and comment procedures, issue interpretative internal memoranda consistent with statutory directives for purposes of ensuring their fair implementation." *Timothy Afcan, Sr.,* 157 IBLA 210, 215 (2002). An agency's definition of a statutory or regulatory term is "the quintessential example of an interpretive rule." *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993); *see also Michigan v. Thomas*, 805 F.2d 176, 183 (6th Cir. 1986).

The Board, itself, previously has upheld the validity of certain requirements set forth in the BIA Manual, ruling that they were a reasonable construction of applicable statutory provisions and that they constituted an interpretative rule that need not be published in the Federal Register (as opposed to a substantive rule). *See White Mountain Apache Tribe v. Acting Phoenix Area Director*, 16 IBIA 51, 57-59 (1988). The same conclusion obtains here. The definition of "contiguous" in the Fee-To-Trust Handbook is an interpretative rule that need not be published and that should be upheld because it is a reasonable interpretation of the contiguity requirement in Parts 151 and 292.

Furthermore, a Bureau "is generally obligated to follow its own Manual, Handbook, and Departmental policies." *Pueblo of San Felipe*, 191 IBLA 53, 65 (2017). In fact, the BIA Director has directed all Regional Directors to process all acquisitions of land into trust in accordance with the guidance in the Handbook. (Exhibit B). Yet the Board made no reference to this directive in any of its decisions and apparently was unaware of it. In other cases, however, the Board has treated policy memoranda issued by the BIA Director as binding. *See Runsabove v. Rocky Mountain Regional Director*, 46 IBIA 175, 182 n. 11 (2008). The Board's failure to identify the Handbook definition as an interpretive rule that the BIA is required to follow, and to assess its implications as such, renders the Board's analysis of "contiguity" incomplete and entirely unpersuasive.

Finally, where regulations involving Indians are concerned, the BIA's interpretation must not only be reasonable but must also resolve any ambiguities in favor of the Indians. *See Reno-Sparks Indian Colony v. Phoenix Area Director*, 24 IBIA 199, 202 (1993). Thus, even if the Board's narrower interpretation of contiguity is reasonable, it must yield to the broader interpretation of "contiguous" in Part 292 and in the Handbook because that broader

interpretation favors tribes seeking to have land taken into trust. Provisions that "are designed to promote the economic viability of Indian Tribes" must be construed broadly pursuant to the Indian canon. *See Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 471 (D.C. Cir. 2007); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003); *Koi Nation of N. Calif. v. U.S. Dept. of Interior*, 361 F.Supp.3d 14, 48-51 (D.D.C. 2019).[4]

The Board's restrictive interpretation of the "contiguity" provision in section 151.10 forces an often time-consuming and expensive analysis of title records in order to determine whether lands are contiguous. This is exactly what the bright-line definition of "contiguous" in Part 292 and the Handbook seeks to avoid. Where adjoining parcels are separated by a road or right-of-way, it makes no relevant difference to the fee-into-trust decision to ascertain who owns the subsurface rights beneath that road or right-of-way. Yet the Board's interpretation of contiguity makes this consideration determinative. In consequence, a contiguity determination under Part 151 becomes far more difficult and complex than a contiguity decision under Part 292. This is nonsensical. Both logic and the law counsel that contiguity inquiries under either Part should be identical.

4. The additional Viejas and Sycuan contiguity arguments all fail

Viejas and Sycuan make a series of additional arguments about contiguity, all of which fail.

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[4] The Indian canon applies here although there are tribes on both sides of this particular dispute. The canon does not apply when it would benefit one tribe at the direct expense of another tribe. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) (declining to apply canon in construing competing fishing rights of two tribes). But the issue here is how contiguity should be interpreted in all trust acquisitions under Part 151, regardless of who may oppose the acquisition. The Indian canon requires that it be defined in favor of tribes, who will always be the applicants (but only occasionally may oppose such an acquisition). *See Koi Nation*, 361 F.Supp.3d at 50 (rejecting argument that Indian canon was inapplicable because the purported detrimental impact on other tribes if one tribe acquires land is highly speculative and falls far short of showing an impact that is detrimental to Indian tribes generally).

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.

Conversely, Viejas and Sycuan criticize the Regional Director for not addressing a 2008 memorandum by a BIA cartographer which concluded that the Walker Parcel was not contiguous to the Alpine trust land. However, that cartographer's analysis of subsurface interests is irrelevant under the definition of contiguity that the Regional Director correctly employed.

Next Viejas and Sycuan contend that the Regional Director "wrongly assumed that if one public road does not destroy contiguity, then three roads cannot do so either." (Viejas/Sycuan Br. at 19). The Regional Director did not "assume" anything. Rather, she provided a reasoned explanation that "[t]he 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 land County road." 2019 NOD at 15. Viejas and Sycuan do not explain why this analysis is incorrect, although they bear the burden of proving that BIA's decision was in error. *See Shawano County v. Acting Midwest Regional Director*, 53 IBIA, 62, 69 (2011). Instead, they simply repeat their contention that the Regional Director should have requested "a more thorough analysis of Caltrans' ownership interest in the [roadway]." (Viejas/Sycuan Br. at 19). But, as discussed above, such an analysis is irrelevant under the definition of contiguity that the Regional Director correctly employed.

Finally, Viejas and Sycuan argue that, even if the Part 292 definition of "contiguous" governs the determination here, the Regional Director misapplied it.[5] Viejas and Sycuan assert that the definition means that "contiguity is not defeated by an intervening road [only] if there is nonetheless a common boundary in the subsurface." (Viejas/Sycuan Br. at 20). This inventive argument turns the definition on its head. 25 C.F.R. § 292.2 provides that: "Contiguous means 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." As the Regional Director explained, "[t]he term 'notwithstanding' is defined by both Black's Law Dictionary and Webster's to mean 'in spite of.' [Part 292] define[s] 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." 2019 NOD at 14. In other words, a public road or right-of-way is to be disregarded in determining whether the parcels have a common boundary and so are contiguous.

5. The Ewiiaapaayp trust land in Alpine qualifies as a "reservation"

Appellants also contend that the Ewiiaapaayp trust land in Alpine does not qualify as a "reservation" within the meaning of 25 C.F.R. § 151.10, which requires that the parcel be "contiguous to an Indian reservation." They 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. Appellants

[5] Ironically, appellants argue that the Walker trust acquisition is for gaming purposes but that the Regional Director should not have applied the contiguity definition that appears in the Part 292 gaming land regulations. Appellants cannot reasonably have it both ways.

repeat the argument now simply to preserve it for court review. The Board's rulings are the law of this case and appellants have not provided any basis for revisiting those rulings.[6]

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

Viejas and Sycuan (but not the County) make a cursory argument that the Regional Director failed to adequately consider the section 151.10 criteria and respond to their comments. They contend that she did not adequately analyze "(1) Ewiiaapaayp's need for new trust land (2) its true purpose and use for such land, and (3) the jurisdictional and land-use conflicts in her 2019 NOD." (Viejas/Sycuan Br. at 22).

Before addressing the merits of these contentions, it is useful to consider the applicable standard of review. "An appellant bears the burden of proving that the Regional Director did not properly exercise her discretion. Simple disagreement with or bare assertions concerning the BIA's decisions are insufficient to carry this burden of proof." *Kramer v. Pacific Regional Director* (AS-IA) (Jan. 19, 2017) at 11. "When evaluating tribal applications for trust acquisitions the record must show the Regional Director considered the criteria set forth in 25 C.F.R § 151.10, but there is no requirement that the BIA reach a particular conclusion with respect to each factor. The factors need not be weighed or balanced in any particular way or exhaustively analyzed. However, it must be discernable from the Regional Director's decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties." *Id.* at 12 (internal quotation marks and citations omitted).

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[6] The Board has rejected this argument in other cases as well. *See, e.g., Desert Water Agency v. Acting Pacific Regional Director*, 59 IBIA 119, 125 (2014) ("when land proposed for trust acquisition is contiguous to a parcel that is held in trust for the tribe, the land is considered to be contiguous to an Indian reservation for purposes of Part 151."). Furthermore, 25 C.F.R. § 151.2(f) defines an Indian reservation as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction."

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

Viejas and Sycuan assert that "[t]he BIA did not adequately describe Ewiiaapaayp's need for additional land with over $2.2 million[7] in annual revenues it is currently bring in for five members, or how the development of another health clinic at the Walker Parcel would help meet that need." (Viejas/Sycuan Br. at 22). But "[a]ll 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. ... a tribe need not be landless or suffering financial difficulties to need additional land." *Kramer, supra* at 15. "[I]t [is] not an abuse of the Regional Director's discretion not to have memorialized any consideration of whether the [tribe's] existing trust properties were adequate to meet the [tribe's] needs." *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 213 n. 13 (2007). The 2019 NOD noted all of the comments that have been received in response to the fee-into-trust application, including those that disputed the need for additional trust land. The Regional Director concluded that the Walker Parcel was needed to achieve tribal self-sufficiency and economic development. 2019 NOD at 8. Nothing more was required and the disagreement with this conclusion by Viejas and Sycuan does not demonstrate any error.

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

25 C.F.R. § 151.10(c) requires the Regional Director to consider the purposes for which the land will be used. But she "is not required to speculate about potential future changes in land use under this provision." *Kramer, supra* at 17-18. Here the Regional Director correctly noted that the proposed use of the land is the operation of a health clinic, and clarified that an accompanying day care facility is no longer contemplated by Ewiiaapaayp. 2019 NOD at 8. The

[7] In fact, Ewiiaapaayp receives $1.1 million annually, consisting of quarterly payments of $275,000. http://www.cgcc.ca.gov/documents/rstfi/2019/13_RSTF_Distrib_71st_CommStaffReport_6-30-19_FINAL.pdf

stated intent to utilize the site to enhance tribal economic development is sufficient to satisfy the requirements of § 151.10(c). *See State of Kansas v. Acting Eastern Oklahoma Regional Director,* 62 IBIA 225, 237 (2016). Although Viejas and Sycuan have long contended that the Walker Parcel would be used for gaming, the Regional Director correctly concluded that "[n]othing in the record suggests that the Walker Parcel will be used for gaming purposes." 2019 NOD at 10.

Viejas and Sycuan contend that gaming "is ... no longer merely speculative" (Viejas/Sycuan Br. at 23) because, on April 16, 2019 (i.e. one week before the 2019 NOD was issued), the BIA published an Ewiiaapaayp Liquor Control Ordinance which states, in one section, that "[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 Fed. Reg. 15630, 15631 (2019). But this provision clearly does not refer to the Walker Parcel because it speaks of existing trust lands and the Walker Parcel is not yet trust land.

Viejas and Sycuan also argue that this reference in the Liquor Control Ordinance to Ewiiaapaayp's plans to construct a gaming facility on the existing Alpine trust lands requires that an Environmental Assessment for the Walker Parcel be updated "to include such new uses and their cumulative effects." (Viejas/Sycuan Br. at 23). But the Board previously rejected their "contention that the FONSI [Finding of No Significant Impact] is defective because the EA [Walker Parcel Environmental Assessment] did not analyze the environmental consequences of a gaming establishment on the SIHC Parcel. That project is speculative and not 'connected' to Ewiiaapaayp's amended application." *County of San Diego*, 58 IBIA at 31.

In so ruling, the Board was well aware of its previous determination that the Alpine trust land is encumbered by a lease to SIHC until at least 2037. *See Ewiiaapaayp Band,* 56 IBIA 163

(2013). Even if a future gaming project on that lease-encumbered land is now slightly less speculative in 2019 than it was in 2013, it remains unconnected to the application regarding the Walker Parcel. If a gaming facility is ever actually proposed by Ewiiaapaayp for the existing Alpine trust parcel, it will then become appropriate to assess the environmental impact of that project. But that has nothing to do with the instant application to accept in trust the Walker Parcel.

3. Jurisdictional Impacts - 25 C.F.R. § 151.l0(f)

Under 25 C.F.R. § 151.10(f), the BIA must consider jurisdictional problems and potential conflicts of land use which may arise from the acquisition of the property in trust. "While these problems and potential conflicts need to be considered, the BIA is not required to resolve these problems or conflicts. BIA, therefore, fulfills its obligation under § 151.10(f) as long as it 'undertake[s] an evaluation of potential problems.'" *Kramer, supra* at 21. The 2019 NOD lists the potential jurisdictional problems and land use issues that were identified during the comment process and notes the solutions that had been proposed. This satisfied the regulatory requirements.

Viejas and Sycuan assert, in conclusory terms, that "the BIA failed to address jurisdictional concerns adequately, including impacts to Viejas sovereignty, jurisdiction, economic viability, and Ewiiaapaayp's ability to work with the town of Alpine." (Viejas/Sycuan Br. at 23). But the alleged "impacts" on "Viejas sovereignty, jurisdiction, and economic viability" are not the sort of jurisdictional or land use conflicts that this provision addresses. And Viejas and Sycuan lack standing to assert harms stemming from any alleged jurisdictional impact on the County or the town of Alpine. *See Kramer, supra* at 21. Moreover, appellants' "mere

disagreement with [the] decision is not sufficient to demonstrate the Regional Director abused her discretion" regarding this factor. *Id.* at 24.

CONCLUSION

The 2019 NOD should be affirmed. The Regional Director correctly concluded that the definition of "contiguous" in 25 C.F.R. § 292.2 (and in the Fee-To-Trust Handbook) should be applied in deciding a fee-into-trust application under 25 C.F.R. § 151.10. Indeed, it would be arbitrary to define "contiguous" differently for Part 151 than for Part 292. Further, the Regional Director acted within her discretion is 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 Ewiiaapaayp.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief Of Ewiiaapaayp Band of Kumeyaay Indians was served on each of the following parties on this 9th day of October, 2019.

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