BEFORE THE
INTERIOR BOARD OF INDIAN APPEALS

COUNTY OF SAN DIEGO, CALIFORNIA and VIEJAS BAND OF KUMEYAAY INDIANS, Appellants,	)	APPELLANT VIEJAS BAND OF KUMEYAAY INDIANS' OPENING BRIEF ON THE MERITS
v.	)	Docket Nos. IBIA 11-136 11-137
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	November 4, 2011

APPELLANT VIEJAS BAND OF KUMEYAAY INDIANS
OPENING BRIEF ON THE MERITS

The Viejas Band of Kumeyaay Indians ("Viejas") hereby appeals the Bureau of Indian Affairs ("BIA") Pacific Regional Director's decision to take a 16.69-acre parcel of land in Alpine, California ("Walker Parcel") into trust for the Ewiiaapaayp Band of Kumeyaay Indians ("Ewiiaapaayp"). Viejas respectfully requests that the Board remand the decision to BIA for reconsideration in light of BIA's failure to comply with the law, as detailed below.

TABLE OF CONTENTS

TABLE OF CONTENTS 2

I. INTRODUCTION 3

II. BACKGROUND 5

A. The Ewiiaapaayp Band of Kumeyaay Indians 5

B. The Viejas Band of Kumeyaay Indians 8

C. The Southern Indian Health Council and Clinic 8

D. The Acquisition of Land in Alpine for the Health Clinic 9

E. Ewiaapaayp Efforts to Remove the SIHC Clinic from the Site 12

F. History of the Ewiiaapaayp Off-Reservation Casino Scheme 16

G. The Ewiiaapaayp/Viejas Joint Venture 21

H. Ewiiaapaayp Reactivates the Walker Parcel Request 22

I. The Renewed Reservation Proclamation 31

J. The Ewiiaapaayp Attempt to Terminate the SIHC Lease 34

K. The Walker Parcel Decision 35

III. ARGUMENT 39

A. Standard of Review 39

B. BIA Processed Ewiiaapaayp's Trust Application under the Incorrect Standards 40

1. BIA did not adequately explain its decision to process the trust application under 25 C.F.R. § 151.10. . 40

2. The Clinic Parcel is not the Ewiiaapaayp's reservation. 44

3. The Clinic Parcel is not contiguous with the Walker Parcel. 49

C. BIA's Decision Failed to Describe Adequately Its Basis for Acquiring the Walker Parcel in Trust on Behalf of the Ewiiaapaayp 53

1. BIA did not make a determination as to "need for additional land." 53

2. BIA did not adequately explain its conclusions regarding the purpose of the proposed trust acquisition 57

3. BIA did not sufficiently address jurisdictional concerns 59

D. BIA Failed to Address Comments Made in Opposition to the Walker Parcel Trust Acquisition 61

E. BIA Failed to Comply with the National Environmental Policy Act 63

1. BIA improperly processed Ewiiaapaayp's fee-to-trust application by relying on an outdated, deficient environmental assessment 63

2. BIA improperly segmented the National Environmental Policy Act review by considering the Walker Parcel trust request separately from Ewiiaapaayp's various pending trust requests and lease termination request 66

3. BIA relied on an improper statement of purpose and need and range of alternatives in the EA 69

4. BIA relied on a deficient analysis of direct and cumulative effects in the Environmental Assessment ... 71

F. BIA Violated the Endangered Species Act by Failing to Comply with Section 7(a)(2) 72

IV. CONCLUSION 75

I. INTRODUCTION

The Ewiiaapaayp Band of Kumeyaay Indians[1] has two immediate goals: (1) remove the Southern Indian Health Council ("SIHC") health clinic from its existing site; and (2) have that site formally designated Ewiiaapaayp Reservation land. In reaching the Walker Parcel decision, BIA never asked Ewiiaapaayp the obvious questions. Why would Ewiiaapaayp want to build another health clinic in the immediate vicinity of the existing tribal health clinic they worked so hard to help establish? The record in this case and the related pending action – (IBIA 11-062) – clearly answer that question: Ewiiaapaayp wants to construct a casino on the site of the existing clinic because it would be subject to a more lenient test for approval. Gaming now, or gaming in the near future, the underlying motivation for Ewiiaapaayp's trust land acquisition request.

The Ewiiaapaayp's plans are at the center of one of the most longstanding controversies in Indian country over the duty of the Secretary to apply trust land acquisition standards and related legal requirements in an objective, balanced, and legally sufficient way. The outcome of this matter will determine the cultural and economic viability of Viejas and the future of the SIHC health clinic. It also will determine whether the federal government will countenance abuse of the trust land acquisition process and establish precedent facilitating casino development on land that was acquired to improve the health and well-being of San Diego County's Indian population.

The land at issue in this appeal – the Walker Parcel – is key to Ewiiaapaayp's plan. The acquisition will enable Ewiiaapaayp to move the SIHC Clinic from the current site and take an important step for using the Clinic Parcel for its own economic development and gaming

enterprise. This appeal does not dispute the right of Ewiiaapaayp to pursue its economic goals, apply for trust land acquisition, or pursue Indian gaming, on- or off-reservation, in accordance with Federal law. What is at issue is the responsibility of the Secretary, through BIA, to apply the laws that govern federal decisions for acquiring land in trust in a fair and objective manner and requires full disclosure of the intended uses of the proposed trust land.

BIA has failed to satisfy those obligations in this case. Even if it is permissible for BIA to have ignored Ewiiaapaayp's underlying objective with the proposed acquisition and take their application at face value, BIA still failed to meet basic legal requirements in its decision. As a result of BIA's flawed decision-making, health care services for the Native American community in San Diego County, the cultural and economic viability of Viejas, the environment, land use planning of the local community, and the integrity of the trust land acquisition process are being undermined.

This appeal establishes that BIA abused its discretion and acted in an arbitrary and capricious manner in deciding to acquire the Walker Parcel in trust. It has done so by misapplying substantive standards, making flawed judgments under those standards, and failing to abide by procedural requirements. Specifically, BIA acted unlawfully by:

1. Failing to apply properly the trust land acquisition requirements in 25 C.F.R. Part 151 and explain the grounds for its decision;

2. Determining that the Walker Parcel is contiguous to the SIHC Parcel and failing to apply the correct trust land acquisition standard;

3. Failing to correctly evaluate tribal need for the trust land;

4. Failing to correctly evaluate the purpose for the trust land acquisition;

[1] The Ewiiaapaayp Band is also referred to as the Cuyapaipe Band, and both terms are used in this brief.

5. Segmenting the Ewiiaapaayp Alpine-based economic venture and thereby failing to conduct a sufficient review under the National Environmental Policy Act ("NEPA");

6. Relying on a flawed NEPA analysis, as set forth in a ten-year old environmental assessment ("EA"); and

7. Failing to reinitiate consultation under the Endangered Species Act ("ESA") as a result of the designation of the Walker Parcel as critical habitat for the arroyo toad.

Viejas always has been, and continues to be, willing to work with Ewiiaapaayp to preserve the health clinic and establish cooperative economic ventures that benefit both Tribes, including through gaming enterprises. Unfortunately, Ewiiaapaayp has abandoned all efforts to reach a cooperative solution, giving rise to the need for this appeal. BIA's failure to consider properly the facts before it and apply the appropriate legal standards warrants vacating and remanding BIA's decision.

II. BACKGROUND

The trust land decision at issue in this case has a long and complex history. The claims presented on appeal are deeply rooted in the factual background. As the history of the Walker Parcel decision confirms, the trust land acquisition on appeal is part of a longstanding off-reservation casino scheme initiated by the Ewiiaapaayp Band in the mid-1990s. The intent to use the Walker Parcel to facilitate that casino plan has never been disavowed by Ewiiaapaayp, and the numerous legal deficiencies presented by this appeal can be traced to the Band's desire to short-circuit federal trust land acquisition and gaming requirements and pave the way for a large-scale casino resort many miles away from its existing Reservation.

A. The Ewiiaapaayp Band of Kumeyaay Indians

The Ewiiaapaayp Band consists of five members. (Administrative Record ("AR") 20, at 12). Ewiiaapaayp has a 5,460-acre reservation near Pine Valley, California. Approximately

4,100 acres of that reservation were established in 1891 (AR 28, Ex. 1) and in December of 2000, Congress expanded the reservation by 1,360 acres (AR 28, Ex. 4) (attaching Title IX – California Indian Land Transfer)). The Reservation is located in the Laguna Mountains, approximately 68 miles east of San Diego and 10 miles north of Interstate 8 (I-8).[2]

Ewiiaapaayp frequently asserts that it is disadvantaged in serving its five members because its 5,460-acre reservation is purportedly remote and unsuitable for development. In fact, Ewiiaapaayp has developed a sophisticated economic development strategy that capitalizes on the exceptional renewable energy resources of its Reservation and identifies numerous other business endeavors and opportunities. (*See* AR 20). The Ewiiaapaayp Comprehensive Economic Development Strategy ("CEDS") of FY 2009-2014, submitted to the Department of Commerce[3], lists all of the following economic ventures:

1. On-reservation, utility-scale renewable energy;
2. Commercial lease of the Walker Parcel for healthcare, based on the assumption the SIHC would be forced to vacate the Clinic site in 2012 upon lease expiration;
3. Leasing at the SIHC Clinic site when it is vacated by the clinic upon lease expiration in 2012;
4. Taxation of any uses of leased premises on its land;
5. Tribal environmental management services to be contracted with federal agencies;
6. Broadband communications services; and
7. Long-term storage business.

(*Id.*, Summ. at 3).

---

[2] According to the CEDS, Ewiiaapaayp also owns numerous fee parcels in Alpine that are currently subject to trust land requests: 17 acres south of Interstate 8, approximately ½ mile east of the Willows Road exit; 1.72 acres located at 4160 Willows Road in Alpine; 18.95 acres located on Alpine Boulevard in Alpine; 0.34 acres, located at 4030 Willows Road in Alpine; 1.71 acres, located at 4026 Willows Road in Alpine; 2.22 acres, located at 4028 Willows Road in Alpine; and 4.47 acres, located at 4048 Willows Road in Alpine. AR 20, at 3.

[3] This is the second Ewiiaapaayp CEDS submitted to the Department of Commerce. The first report covered the period 2004-2009.

Most significantly, the CEDS acknowledges that gaming on the SIHC Clinic Parcel remains a part of its plans. Ewiiaapaayp asserts that the Clinic Parcel (which it erroneously refers to as the "West Ewiiaapaayp portion of its Ewiiaapaayp Indian Reservation"),[4] consists of "Indian lands eligible for tribal government gaming pursuant to the Indian Gaming Regulatory Act of 1988." (AR 20, Summ. at 3). Ewiiaapaayp denies any "specific plans" for gaming on the Clinic Parcel, noting that the land is "subject to a federal lease until 2012." (*Id.*). Nonetheless, Ewiiaapaayp confirms that it "would consider and evaluate a future gaming project should it be determined to be in the best interests of the Tribe and its tribal members and financeable." (*Id.*).

The Band has in fact moved forward with its CEDS plan. Ewiiaapaayp has made major strides to harness the wind energy potential of its Reservation. As stated in the CEDS report, its Reservation "has a class 7 wind resource (the highest category)," whereas other reservations and lands in the region have "a class 3 to 5 wind resource." (AR 20 at 25-26). (*See also* AR 104, at 9; Supplemental AR[5] ("SAR") 185 at 27-28 and SAR 201).

Iberdrola Renewables, Inc. proposes to develop an up to 200 MW wind energy project – Tule Wind. (SAR 205). Iberdrola has developed more than 12,700 MW of renewable energy in operation around the world, and more than 4,700 MW of that wind power is located in the United States. (*Id.*). Tule Wind will be located primarily on Bureau of Land Management land and Ewiiaapaayp tribal land, with small portions located on private and state land. (*Id.*). On October 14, 2011, the Bureau of Land Management and the California Public Utilities

[4] As discussed in section III.B.2 of this brief, the Clinic Site is not reservation land.

[5] The administrative record filed by BIA is seriously deficient, lacking in approximately 100 documents. Viejas has filed a *Motion to Supplement the Administrative Record* concurrently herewith, and has submitted additional relevant documents that have previously appeared before BIA for the Board's consideration. The documents are numbered beginning with "No. 109," in order to comport with the numbering designations of the AR provided by BIA. The fact that BIA's administrative record is missing so many documents, including many documents of great

Commission released the Final Environmental Impact Report/Statement for the Tule Wind Power Project. (SAR 206). Ewiiaapaayp also obtains funds to support governmental services for its members pursuant to the Tribal Revenue Sharing Trust Fund ("RSTF"). A required term in California Gaming Compacts mandates gaming tribes to contribute to a fund that is allocated among non-gaming tribes. Ewiiaapaayp receives $1.1 million per year under the fund. (AR 14(g), 17).

B. The Viejas Band of Kumeyaay Indians

The 1,609-acre Viejas Reservation, home to the 289 members of the Viejas Tribe, is located near the City of Alpine, California. (AR 14(g)). Established in 1934, the Reservation is approximately halfway between the City of San Diego and the Ewiiaapaayp Reservation – 30 miles east of downtown San Diego and 38 miles west of the Ewiiaapaayp Reservation. (*Id.*). The Viejas Casino, which is located on the Viejas Reservation, is the principal source of income for the Viejas Band. (*Id.*). The Viejas Casino is in immediate proximity to tribal housing, government operations, and other tribal facilities. (*Id.*).

C. The Southern Indian Health Council and Clinic

The SIHC is a consortium of seven federally-recognized Indian tribes: Barona Band of Mission Indians, Campo Kumeyaay Nation, Ewiiaapaayp Band of Kumeyaay Indians, Jamul Indian Village, La Posta Band of Mission Indians, Manzanita Band of the Kumeyaay Nation, and Viejas Band of Kumeyaay Indians. (SAR 207 at 2). SIHC manages a clinic that provides health care services on behalf of its member tribes to the approximately 10,000 Indians living on and

---

importance to the Walker decision, confirms that BIA acted in an arbitrary and capricious manner in taking the action now subject to this appeal.

near seven Indian reservations in southern San Diego County, through a self-determination contract with the Indian Health Service ("IHS") and other grants and contracts. (*Id.*).

Since its establishment, the SIHC Clinic, an accredited and Federally-Qualified Health Center, has been a valuable resource for the member tribes and the local community. In addition to general health care, the SIHC Clinic provides services related to environmental health and sanitation, domestic violence crisis intervention and counseling, Indian child welfare, meals-on-wheels and senior care, counseling on health practices, nutrition and general care of children and adults, and available health care options.[6] The Clinic provides service to an estimated 18,000 patients annually, both Indian and non-Indian fee-for-service patients. (*Id.*). For many area residents, the Clinic provides their primary access to health care. (*Id.*).

Annually, the SIHC receives approximately $6.2 million from IHS and approximately $2.5 million from other grants and contracts with other agencies and $2 million in third-party revenues. (*Id.*). The SIHC employs approximately 120 persons. (*Id.*).

The SIHC Clinic began in 1981 as a satellite operation of the Indian Health Council in Pauma Valley. (SAR 208 at 6). It originally operated out of trailers on the Sycuan Reservation. In November 1982, the SIHC incorporated as a nonprofit, public benefit corporation, and moved to the Barona Reservation. (SAR 110 at 7, 11). After several years of operating in temporary facilities, the SIHC decided in 1985 to build a permanent site for the clinic. (SAR 208 at 6).

D. The Acquisition of Land in Alpine for the Health Clinic

In 1985, the SIHC applied to the Department of Housing and Urban Development ("HUD") for funds to develop a new health clinic. (SAR 110). The application described the

project and its participants, stating that "[t]he specific problem the project addresses is the need for a permanent Health Center which is centrally located and accessible to Cuyapaipe and the six other surrounding reservations." (*Id.* at 6). It further stated, "[t]he project to develop/construct a permanent Health Center will consolidate, centralize and expand existing services to over 4,000 Indian people served by SIHC. Everyone will be within a 30-minute travel time of the Alpine, California project site." (*Id.* at 9). The project administrative plan stated that "SIHC will oversee and provide support services to the project. Accounting, timekeeping, payroll, recordkeeping and supervision of the project superintendent." (*Id.*)

Member tribes contributed their funding eligibility to the project. The Barona, Viejas, Jamul and La Posta Bands did not apply for their FY 1985 community block grant funds, but instead asked to have their eligibility considered as part of this proposal. (SAR 110 at 60-66). While the grant application requested funding for the acquisition of the land and the construction of the buildings, the HUD grant ultimately was limited to construction of the buildings. (*Id.*). The SIHC borrowed and repaid $85,000 for the purpose of securing land for the health facilities. (SAR 208 Ex. 4).

In late 1984, the SIHC Board of Directors acquired private land in Alpine ("Original Site"). (SAR 110). The SIHC Board decided to have Ewiiaapaayp apply to have the land acquired in its name to expedite the acquisition, because the BIA trust land regulations do not accommodate a trust acquisition on behalf of multiple tribes or a tribal organization. The trust land application letter described the purpose of the acquisition as follows: 'The land shall be used to develop/construct a new permanent Health Center for the tribe and the tribe will lease the land to the [SIHC] for 99 years for the sum of one (1) dollar." (SAR 109).

---

[6] http://www.sihc.org

In a memorandum dated December 16, 1985, Assistant Secretary for Indian Affairs Ross Swimmer authorized the Sacramento Area Director to "accept the conveyance of the ... land in trust, noting that [t]he Cuyapaipe Band proposes to utilize the land as a health facility." (SAR 111, at 2). In a letter dated January 2, 1986, the Assistant Secretary again confirmed that the land was to be used solely as a healthcare facility for the seven area tribes by writing to the SIHC that

> on December 16, I authorized the Sacramento Area Director to accept into trust status, 8.6 acres of land, for the benefit of the Cuyapaipe Band, *to use as a medical health facility*. I would like to extend my best wishes and continued success to the Band and the Southern Indian Health Council in the construction and operation of this much needed facility.

(SAR 112 (emphasis added),185 at 21).

Ewiiaapaayp and the SIHC entered into a business lease on May 23, 1986, for the Original Site. (AR 114). The term of the lease is 25 years, with an automatic option to renew for an additional 25 years. (*Id.* at 2). Ewiiaapaayp and the SIHC changed the term of the proposed lease because regulations prohibit leases of 99 years absent Congressional approval. The rent is $1.00 per 25-year period, and the lease can be terminated only in the event of default by the SIHC. (*Id.*).

The Secretary acquired title to the Original Site on April 1, 1986. (AR 25; SAR 113). On February 24, 1987, the Secretary approved the lease between the SIHC and the Ewiiaapaayp, pursuant to 25 C.F.R. § 162.5(b)(2). (SAR 115). The Clinic's initial operation revenue came via the IHS, under the Indian Self-Determination and Education Assistance Act.

In 1993, the SIHC purchased the 1.42-acre Group Home Parcel (hereinafter referred to with the Original Site as "Clinic Parcel"). The Group Home Parcel is adjacent to the Original Site. SIHC acquired the Parcel to establish a group home for adolescents. The SIHC transferred the Group Home Parcel to the BIA to acquire in trust in Ewiiaapaayp's name. (AR 28). The Secretary placed this second parcel in trust under the name of the Ewiiaapaayp Band on October 29, 1997. (*Id.*). Ewiiaapaayp and the SIHC entered into a second lease on August 26, 1996, that encumbers the new parcel on the same terms as the first lease. (SAR 120). BIA Approved the lease on October 29, 1997. Ewiiaapaayp is now attempting to block the automatic renewal of this lease at the end of its first 25-year term. (IBIA 11-062)

E. Ewiaapaayp Efforts to Remove the SIHC Clinic from the Site

For over 16 years, Ewiiaapaayp has been attempting to have the SIHC Clinic removed from the Clinic Parcel. Its reason for doing so has been to take advantage of the fact that the United States acquired the Original Site in trust prior to October 17, 1988 and, as a result, gaming is permissible on the site pursuant to the Indian Gaming Regulatory Act ("IGRA").[7]

Ewiiaapaayp first approached the SIHC Board in 1994 to propose relocating the SIHC Clinic to the Walker Parcel. In an SIHC Board meeting on April 25, 1994, Ewiiaapaayp Tribal Chairman Tony Pinto (also an SIHC Board Member) made a presentation calling for the transfer of the SIHC Clinic to the Walker Parcel. (SAR 116). As indicated by the SIHC meeting notes, Mr. William Micklin of Native American Investments ("NAI") accompanied Mr. Pinto. (*Id.*). They proposed a business relationship among Ewiiaapaayp, NAI and SIHC. (*Id.*). One of the

[7] Under the two-part determination, off-reservation land may be used for gaming only when the Secretary, after consultation with the tribe and state and local officials, finds that the casino would be "in the best interest of the Indian tribe" and "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Governor must concur in the Secretary's finding. BIA's regulations implementing section 20 are found at 25 C.F.R.

SIHC Directors asked if there was to be a gaming operation on the Clinic Parcel if the health facility moved to the Walker Parcel. (*Id.*). "Tony Pinto replied that at the present time, no decisions have been made regarding gaming or any type of business." (*Id.*).

Soon thereafter, on May 6, 1994, NAI wrote Chairman Pinto and the SIHC. NIA set forth a more detailed proposal. (SAR 117). Mr. Micklin indicated that in 1993 NIA had entered into an agreement with Chairman Pinto "for business investments involving the entertainment industry." (*Id.* at 1). The letter explained that "[t]his business enterprise will significantly improve the health, education, welfare, and economic development of the Cuyapaipe Band of Mission Indians." (*Id.*).

The letter explained that NAI and Cuyapaipe decided to propose a course of action that would result in a "$2 million donation of services to the Southern Indian Health Council, Inc., in an improvement in the Southern Indian Health facility, in an expansion of the Southern Indian Health Council facility, and a donation of 5% of NAI's net profit from the business partnership with the Cuyapaipe Band of Mission Indians." (*Id.* at 1-2). The proposal called for relocating the Clinic to the Walker Parcel, which would be purchased for $250,000 "paid for by NAI and with repayment for this purchase made by the Cuyapaipe Band of Mission Indians from their future earnings from our business enterprise." (*Id.* at 2). The Walker Parcel land would be placed in trust for Ewiiaapaayp, with "legal expenses" paid by NAI, to be repaid by Ewiiaapaayp from their future earnings from the "business enterprise." (*Id.*). Mr. Micklin stated that "NAI estimates that this process will take from six to twelve months at the outside (a pessimistic time

---

Part 292. In the 23 years since the enactment of IGRA, only 5 casinos have been approved under the two-part determination. www.bia.gov/idc/groups/public/documents/text/idc009878.pdf.

estimate – the process could be much quicker)." (*Id.*). An EA would be paid for by NAI and reimbursed by Ewiiaapaayp. (*Id.*).

At no point does the May 6 letter discuss what the "entertainment industry" business would be. Gaming is never mentioned. (*Id.*). Mr. Micklin asked the SIHC to respond within 60 days. (*Id.*).

On May 22, 1994, Mr. Micklin again wrote to Chairman Pinto and the SIHC Board on behalf of NAI. (SAR 118). NIA wrote the letter to "clarify the purposes for which the partnership of NAI and the Cuyapaipe Band of Mission Indians will use the existing Alpine facility and the land on which it stands after the construction of the new facility and the relocation of the existing operations from the existing facility to the new and improved facility." (*Id.* at 1).

Micklin explained that "the property on which the new facility will be built will be conveyed into trust" and that "[o]nce this is accomplished, the property at 4038 Willows Road (the Clinic Parcel) will be converted into use for a Class II Indian Gaming operation." It would be used for Class II gaming, "until such time as the State of California approves a Class III compact." (*Id.*).

The next day, May 23, the Ewiiaapaayp Tribal Council passed a resolution to ask the Secretary to take the Walker Parcel into trust. (SAR 119). The resolution described the Walker Parcel as "adjacent to the Band's existing trust property that it now leases to the Southern Indian Health Council, Inc." (*Id.*). It also approved leasing the Walker Parcel to the SIHC for health clinic purposes. (*See also* AR 38 (May 11, 2001, letter from Senator Battin describing the deal between the SIHC and the Ewiiaapaayp to move the SIHC from the Clinic Parcel to the Walker

Parcel in exchange for a new facility and a portion of the gaming revenues generated on the Clinic Parcel)).

At some point subsequent to these proposals, Mr. Micklin became Executive Director for the Ewiiaapaayp Band. He has served in that, or a similar capacity, to this day. In fact, Mr. Micklin is the representative of Ewiiaapaayp on the appeal of the BIA decision on the SIHC lease relinquishment (IBIA 11-062). (*See, e.g.*, SAR 193).

On March 3, 1999, Ewiiaapaayp asked BIA to designate the Clinic Parcel as the "Cuyapaipe Band Reservation," provided documents to support the request, and passed a tribal resolution for that purpose. (SAR 122). Ewiiaapaayp also approached the SIHC on October 11, 1999, asking it to relinquish the irrevocable lease. (SAR 128, at 2).

Sometime during the 1999 – 2000 timeframe, Ewiiaapaayp entered into contracts with gaming financial backers. The details of Ewiiaapaayp's negotiations and contracts with financiers are not available. General information can be found, however, in court documents for a lawsuit by the Ewiiaapaayp's apparent backer, Luna Gaming – San Diego, LLC, against Ewiaapaayp's legal counsel, Dorsey & Whitney, LLP. (SAR 174).

According to the facts in this case, Detroit-based casino backer Tom Celani worked with Dorsey in 1999 to identify potential California gaming opportunities. Dorsey had worked with Celani in connection with an Indian gaming enterprise in Manistee, Michigan. (*Id.* at 2). Dorsey brought the Ewiiaapaayp opportunity to the attention of Celani in January 2000. (*Id.* at 3). Dorsey advised Celani that a previous financial supporter, Alliance Gaming, had backed out. (*Id.*).

Celani and a competing investor, First Nations Gaming ("FNG"), submitted proposals to Ewiiaapaayp, which selected FNG. By March, 2000 FNG backed out. (*Id.*). The papers indicate that Dorsey advised Celani in March 2000 that he could get a deal immediately with Ewiiaapaayp. (*Id.* at 4). Dorsey also is reported to have told Celani that the law firm could get the land into trust within 12 months, and the casino would be open in 24 months. (*Id.*). Celani formed Action Gaming for this purpose, which later became Luna Gaming – San Diego, an entity owned by Celani. Project agreements were signed on March 29, 2000. (*Id.* at 2, n. 1).

According to the court papers filed by Celani, as the "project dragged on," Luna began to look for a partner to share the expenses. By June 2003, Luna had spent $15 million on the Ewiiaapaayp venture. (*Id.* at 7). The court papers reveal the apparent decision around that time to make a "change in strategy to include Viejas in the Project." This change in strategy led to the Ewiiaapaayp/Viejas joint venture approach. At some point after these events, Luna's relationship with Ewiiaapaayp came to an end. Ewiiaapaayp does not appear to have a financial backer at this time, but Viejas does not know whether that is the case.

F. History of the Ewiiaapaayp Off-Reservation Casino Scheme

After its agreement with Luna, Ewiiaapaayp began to move forward aggressively with an off-reservation gaming scheme, premised on the assumption that the SIHC facility would be moved to the Walker Parcel to clear the pre-1988 trust land at the Clinic Parcel for a gaming enterprise that would not have to meet the two-part determination test of section 20 of IGRA.

In December 2000, the SIHC and Ewiiaapaayp signed a Lease Relinquishment Agreement ("LRA"), which, if it had taken effect, would have terminated the Clinic Parcel lease in exchange for the construction of a new health care facility to clear the way for an off-

reservation casino. (SAR 129). Viejas filed a lawsuit in Superior Court for the County of San Diego challenging the SIHC's actions in relinquishing the lease for the health clinic. The LRA never came into effect, and the SIHC rescinded the agreement in March 2005.

On March 21, 2001, Ewiiaapaayp filed its initial fee-to-trust request for the 16.69-acre Walker Parcel. (AR 1). The Walker Parcel is separated from the Clinic Parcel by Alpine Boulevard, I-8, and local service roads. The Walker Parcel can be reached from the Clinic Site only by driving approximately 1.3 miles. (*Id.* at 2). Ewiiaapaayp stated in the trust land application that it planned to use the Walker Parcel for a 26,400-square-foot intertribal health clinic that would replace the existing SIHC Clinic and be operated by the SIHC. (*Id.* at 1). Once the Walker Parcel was taken into trust, the SIHC Clinic would be moved to that land. (*Id.*).

BIA issued an EA under NEPA for the Walker Parcel on August 22, 2001. (AR 49). Ewiiaapaayp's consultant, Analytical Environmental Services ("AES"), prepared the EA. (*Id.*). Viejas and other parties commented on the deficiencies on the EA. (AR 48). AES prepared a revised EA (AR 58), and BIA issued a finding of no significant impact ("FONSI") on November 7, 2001 (AR 59). Viejas filed an appeal of the EA/FONSI with IBIA on December 21, 2001. (AR 98). IBIA stayed the appeal pending a final decision on the trust request. (*Id.*).

While the Walker Parcel EA was undergoing comment, on August 8, 2001, Ewiiaapaayp asked BIA to place an 18.95-acre parcel called the Salerno Parcel, also in Alpine, into trust. (SAR 135, 136). Although the Ewiiaapaayp stated that "[t]here is no development, physical alteration or change of land use planned or known after the acquisition of title 'in trust,'" it also asserted that the purpose of the request was to "to provide increased long-term economic security for the Band through land acquisition to benefit the Band's efforts of enhancing self-

determination." (SAR 136, at 2). Ewiiaapaayp also requested that the Salerno Parcel be designated as a formal reservation. (SAR 135; 136, at 1).

The BIA Regional Office announced its intent to place the Walker Parcel in trust on June 27, 2002. (AR 6). Assistant Secretary McCaleb withdrew that decision on July 22, 2002, however, to evaluate Ewiiaapaayp's proposal. (AR 6; SAR 143). He also withdrew decision-making authority from the Regional Office so review would occur at the Central Office. (*Id.*).

On July 1, 2002, the Ewiiaapaayp filed yet another trust request involving property in Alpine, approximately 10.5 acres of land (the Willows Road Parcels) located adjacent to the Clinic Parcel.

Finally, on May 8, 2003, the National Indian Gaming Commission ("NIGC") published an EA purporting to cover various proposed actions under a casino development plan for the Clinic Site, as well as a gaming management contract approval, and trust land acquisition of the Willows Road Parcels. (SAR 165). The NIGC EA clarified the scope of Ewiiaapaayp's plans, which involved building a casino on the Clinic Parcel and moving the SIHC Clinic to the Walker Parcel. (*Id.*). BIA was a cooperating agency in the EA. (*Id.*).

A map depicting the various components of the Ewiiaapaayp proposed casino plans for Alpine is set forth on the following pages, 19-20

Once Ewiiaapaayp's plans to build a casino resort complex in Alpine became clear, an outcry of opposition emerged. Viejas filed extensive comments in opposition to all aspects of the Ewiiaapaayp plan. (SAR 166). Viejas explained how its Reservation life would be severely


2
3
8
9
6
1
5

CUYAPAIPE / EWIIAAPAAYP LAND OWNERSHIP

Number	Address	Use & Previous Owner	APN	Acre	Trust Application Date
1	4160 Willows Road	Residential (Berg)	404-060-39	1.72	July 1, 2002
2	4028 Willows Road	Residential (Fordney Trust)	404-061-04	2.22	July 1, 2002
3	4026 Willows Road	Residential (Haydon-Jacobs)	404-061-05	1.71	July 1, 2002
4	4030 Willows Road	Residential (Beck)	404-061-06	@.33	July 1, 2002
5	0000 Alpine Blvd.	Vacant Land (**SALERNO**)	404-090-07	18.95	February 14, 2002
6	0000 Willows Road	Southern Indian Health Clinic (in trust for Cuyapaipe)	404-061-01	8.78	April 11, 1986
7	4054 Willows Road	Southern Indian Health Clinic (in trust for Cuyapaipe)* * SIHC transferred to US Government March 30, 1998 *Purchased by SIHC from Opteyndt June 18, 1993	404-061-02	1.43	Acceptance of Conveyance October 29, 1997
8	4048 Willows Road	Residential – Ruis/Curo Cuyapaipe option to purchase from 75% Ruis/25% Curo.	404-061-03	4.47	July 1, 2002
9	0000 Alpine Blvd.	Vacant Land (**WALKER**)	404-080-24 and/or 404-080-26	16.68	May 22, 2001

harmed by a distant tribe moving within a mile of its lands to build one of the largest casinos in California. (*Id.*). Opposition came forward from virtually every quarter, including the State, San Diego County, Alpine governmental entities, federal and state elected officials, citizen groups, and the general public. (*See, e.g.*, AR 73, 77, 80, 82, 89, 90, 93 and SAR 155, 156, 157, 158, 159, 161, 166, 167, 170). The Conference of Western Attorneys General, including now Secretary of the Interior Ken Salazar, wrote to Secretary Norton on April 9, 2003, objecting to the emerging casino scheme. (SAR 164).

On February 14, 2003, Ewiiaapaayp presented Acting Assistant Secretary Aurene Martin with its "estimated timeline to decisions." (SAR 162). It called for an opinion from the Solicitor's Office on the contiguous nature of the Clinic Parcel to the Walker Parcel "to confirm that the Reservation Proclamation has no legal effect on other decisions;" a final NIGC EA by June 15, 2003; action by BIA on the LRA by June 15; and a fee-to-trust decision by October 15, 2003. (*Id.*). When the continued controversy and opposition from Viejas, the County, the State, members of Congress, and other parties made it clear that these deadlines would not be met, Ewiiaapaayp conceded the inter-related nature of the various components of its gaming scheme and, by letter of July 22, 2003, asked BIA to prepare an environmental impact statement ("EIS"). (SAR 168).

G. The Ewiiaapaayp/Viejas Joint Venture

In response to an apparent directive from its financial backer, Ewiiaapaayp agreed to enter into negotiations with Viejas. (SAR 174, at 10). The two Tribes met to discuss a proposal in August 2003, and on September 10, 2003, Ewiiaapaayp wrote to Secretary Norton on behalf of both Bands to request that all work on the requested BIA actions cease while the joint venture effort was underway. (*Id.*). The Tribes entered into a nonbinding agreement to pursue a joint

initiative on January 8, 2004, (Ewiiaapaayp refused to sign a binding agreement), and formally asked the Secretary to suspend work on the trust land requests in a letter of January 9, 2004. (SAR 185, at 24-27).

Viejas and Ewiiaapaayp worked hard to develop a mutually beneficial approach to gaming in Alpine. The Tribes developed a proposal that would allow for the development of a Ewiiaapaayp casino on Viejas land under joint management arrangements. (*Id.*). Unfortunately, BIA indicated in June 2005 that it would not support the proposal. (*Id.*). The two Tribes resumed efforts to develop a consensus proposal. For example, Ewiaapaayp submitted a gaming compact to the Secretary to carry out the joint venture proposal on March 17, 2008, which BIA rejected on March 18, 2000. (SAR 175). Their efforts also included developing and supporting federal legislation, H.R. 3907 that would have allowed Viejas to lease Viejas Reservation land to the Ewiiaapaayp and would have given Ewiiaapaayp sole proprietary interest and governance to satisfy IGRA, thus authorizing the proposed joint venture. H. R. 3709 (110th Cong. 1st) (Oct. 1, 2007).

H. Ewiiaapaayp Reactivates the Walker Parcel Request

On May 1, 2008, Ewiiaapaayp asked Assistant Secretary Artman to reactivate the Walker Parcel trust application. (AR 7). Ewiiaapaayp did not give Viejas notice of its action. Ewiiaapaayp stated in its letter to Artman that the Walker Parcel trust acquisition is limited to healthcare and has nothing to do with gaming. (*Id.*). Ewiiaapaayp has consistently refused, however, to condition the Walker Parcel such that it could not be used to facilitate gaming at the Clinic Site. By memorandum of May 16, 2008, Artman ordered BIA to place the Walker Parcel request into active consideration. (AR 9). He also reversed Assistant Secretary McCaleb's 2003

decision to review the application in the Central Office and returned it to the Regional Office for processing. (*Id.*).

Even though Ewiiaapaayp had unilaterally reactivated the Walker Parcel request in May 2008, by letters of August 19 (SAR 177), August 20 (SAR 178), and September 8, 2008 (SAR 179), Ewiiaapaayp continued to urge Viejas to pursue the joint venture opportunity. Ewiiaapaayp never informed Viejas that the Walker Parcel request was again under active review. In its letter of September 8, 2008, Ewiiaapaayp asked Viejas to take certain actions in furtherance of the joint venture. (SAR 179). One of the requested actions was entering into a lease agreement within 60 days for a Ewiiaapaayp gaming facility on Viejas lands. (*Id.*).

On October 27, Viejas received formal notice from the BIA Regional Office that BIA was actively considering the Walker Parcel application again and that comments had to be submitted within 30 days. (AR 13).

Viejas responded to Ewiiaapaayp by letter of October 30, 2008, expressing continued support for the joint venture. (SAR 182). Viejas stated "[a]though Ewiiaapaayp declined to sign the joint venture agreement . . . Viejas has and will continue to take all appropriate steps in furtherance of the joint venture project." (*Id.* at 1). Viejas nonetheless expressed that it was "surprised and disappointed" to receive BIA's notice that the Walker Parcel was again under review. (*Id.*). Viejas asked Ewiiaapaayp to "reconsider its recent actions" and called for moving forward with the joint venture project." Ewiiaapaayp never responded. (*Id.*).

BIA's review of the reactivated Walker Parcel application mirrors the original review. BIA's October 20, 2008, notice precipitated extensive and uniformly strong opposition from the same range of parties as the initial proposal. (AR 14(a), (b)-(h); SAR 183). In its comments,

Viejas demonstrated that there was no basis to conclude that Ewiiaapaayp did not still intend to pursue gaming on the Clinic Site. (AR 14(g), at 5-12). Viejas also restated the legal grounds for denying the Walker Parcel request, including the fact that BIA was relying on an EA prepared seven years earlier and only updated by a short, insufficient "update" memorandum issued on July 9, 2008, by the same consulting firm, AES. (*Id.* at 12-45). Viejas filed supplemental comments on January 22, 2009, confirming that the Walker Parcel request had to be denied on the basis of BIA's January 7, 2009, decision denying the trust land request of the Menominee Tribe on the grounds that a tribe with a sufficiently large reservation for its membership did not need more land in trust status. (AR 14(h)).

Ewiiaapaayp submitted a response to the Viejas comments on the renewed Walker Parcel request on April 21, 2009, (AR 15), and Viejas submitted supplemental comments on July 15, 2009. (AR 104). Viejas objected that Ewiiaapaayp had altered the purpose and need statement from the 2001 EA, changing the purported purpose of the Walker Parcel from healthcare to economic development. (*Id.* at 2-8). The supplemental comments cited other new circumstances that invalidated the 2001 EA, and the July 2008 AES update memorandum, including significant changes in surrounding land use. (*Id.* at 8-10).

On May 28, 2009, Ewiiaapaayp submitted a report to BIA regarding its transportation needs. (AR 18). That report states that the roads surrounding the Ewiiaapaayp Reservation are functioning well, (*id.* at 3-1), but that there are four needed roadway improvements, including the following: "A future Ewiiaapaayp tribal casino development in Alpine may impact the adjacent roadways and Interstate 8 ramps, which may need to be improved in terms of capacity and safety." (*Id.* at 4-3). In fact, the Ewiiaapaayp included roads in Alpine on its Long Range Transportation Plan Master Inventory. (*Id.*, App. A). On November 9, 2009, Acting Principal

Deputy Assistant Secretary Skibine issued a memorandum to the Regional Office stating that the final decision on the Walker Parcel trust request would be made by the Assistant Secretary. (AR 22).

On November 23, 2009, Viejas submitted detailed rebuttal comments to the Ewiiaapaayp April 21, 2009 responses to Viejas and San Diego County comments. (SAR 185).[8] The Viejas comments questioned, among other things, the claim that there was a need for more healthcare facilities in the Alpine area. (*Id.* at 27-28). At that time, Viejas submitted a detailed economic analysis of the demand for additional healthcare facilities in the Alpine area prepared by the expert consulting firm ECONorthwest. (*Id.*, Ex. 4). The report concluded that the Ewiiaapaayp plan for a new healthcare facility on the Walker Parcel "makes little economic sense from a health planning perspective." (*Id.*, Ex. 4, at 9). Ewiiaapaayp did not include any site-specific economic analysis to support its proposal, relying instead only on anecdotal stories and broad regional reports. (*Id.*).

By letter of April 14, 2010, Viejas wrote to Assistant Secretary Echo Hawk to submit new evidence regarding the Original Site trust acquisition obtained under a Freedom of Information Act request. (SAR 190). Those documents confirmed that the Original Site was limited by Assistant Secretary Swimmer in his 1985 decision and 1986 correspondence to *healthcare only*. In an effort to resolve the renewed controversy over the Walker Parcel being used to facilitate gaming on the Original Site, Viejas asked Assistant Secretary Echo Hawk to confirm the 1985/86 Swimmer limitations. (*Id.*). To date, Assistant Secretary Echo Hawk has not responded to this request.

Throughout the Walker Parcel reactivated review, Viejas and many other commentors have contended that nothing has changed from the previous Ewiiaapaayp plan to use the Walker Parcel to move the SIHC Clinic and exploit the pre-1988 trust land status of the Original Site for a casino. (AR 101, 103, 104, and SAR 185, 186, 190, 195) By letter of November 5, 2010, Viejas wrote to Assistant Secretary Echo Hawk to connect all of the dots between "then" and "now." (SAR 195). The Viejas letter included a chronology of events and a "side-by-side" chart demonstrating how nothing had changed, except the apparent absence of a Ewiiaapaayp financial backer (a new backer would be very likely to come forward if an arrangement is in place to move the SIHC Clinic to the Walker Parcel). (*Id.*). That chart is reproduced on pages, 27-30.

In submitting this evidence, Viejas tied together all of the Ewiiaapaayp actions, including its effort to force termination of the SIHC lease. Viejas described the two choices available to Assistant Secretary Echo Hawk: (1) reject the Walker Parcel request or return it to the Ewiiaapaayp to be revised to reflect the true intent and accurate information and deny the Ewiiaapaayp request to terminate the SIHC lease; or (2) restart the entire review process for *all aspects* of the Ewiiaapaayp casino plan together as part of the same action, as Ewiiaapaayp itself proposed by its letter of July 22, 2003, calling for an EIS. (*Id.*). Viejas explained that simply renewing the SIHC lease would not solve the conflict because Ewiiaapaayp had previously developed an LRA to end the lease and move the Clinic to the Walker Parcel. (*Id.*).

Viejas also met with BIA Deputy Bureau Director-Field Operations Mike Smith on January 21, 2011, and provided additional information as to why the Ewiaapaayp actions on the

[8] The transmittal letter for the April 21, 2009 comments appears in the AR (AR 23), but the substantive comments appear to have been omitted from the AR, and therefore appear not to have been considered.

Comparison of Current Ewiiaapaayp Trust Land Acquisition Proposal With Previous Off-Reservation Casino Plan

1985 – SIHC Parcel placed into trust for health care purposes for San Diego area tribes; Ewiiaapaayp Band used as subject of acquisition solely for purposes of administrative convenience

↓

1988 – IGRA Enacted

↓

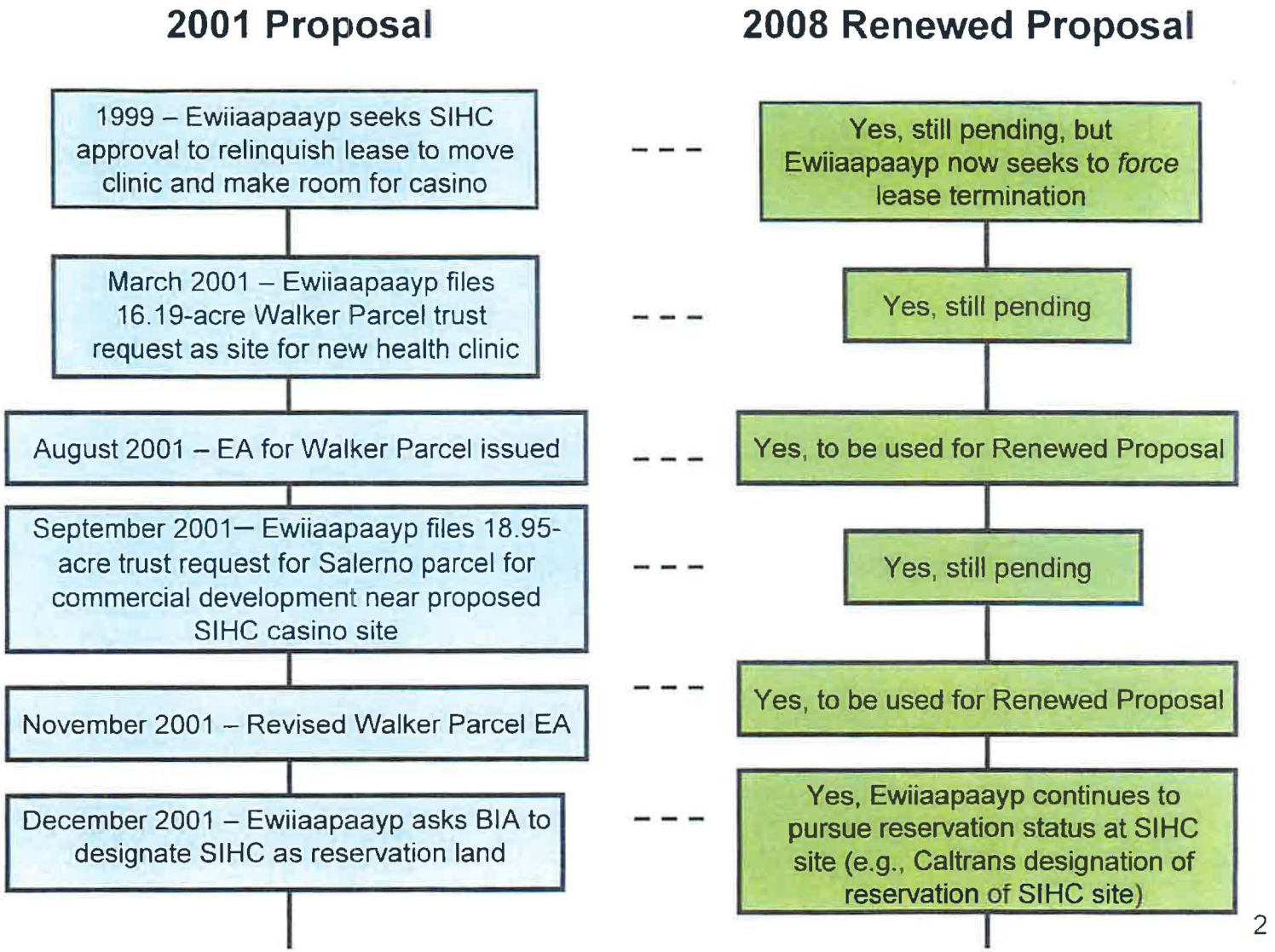
1993 – Ewiiaapaayp purchases 1.42-acre parcel adjacent to SIHC with use of HUD funds granted for health care purposes

↓

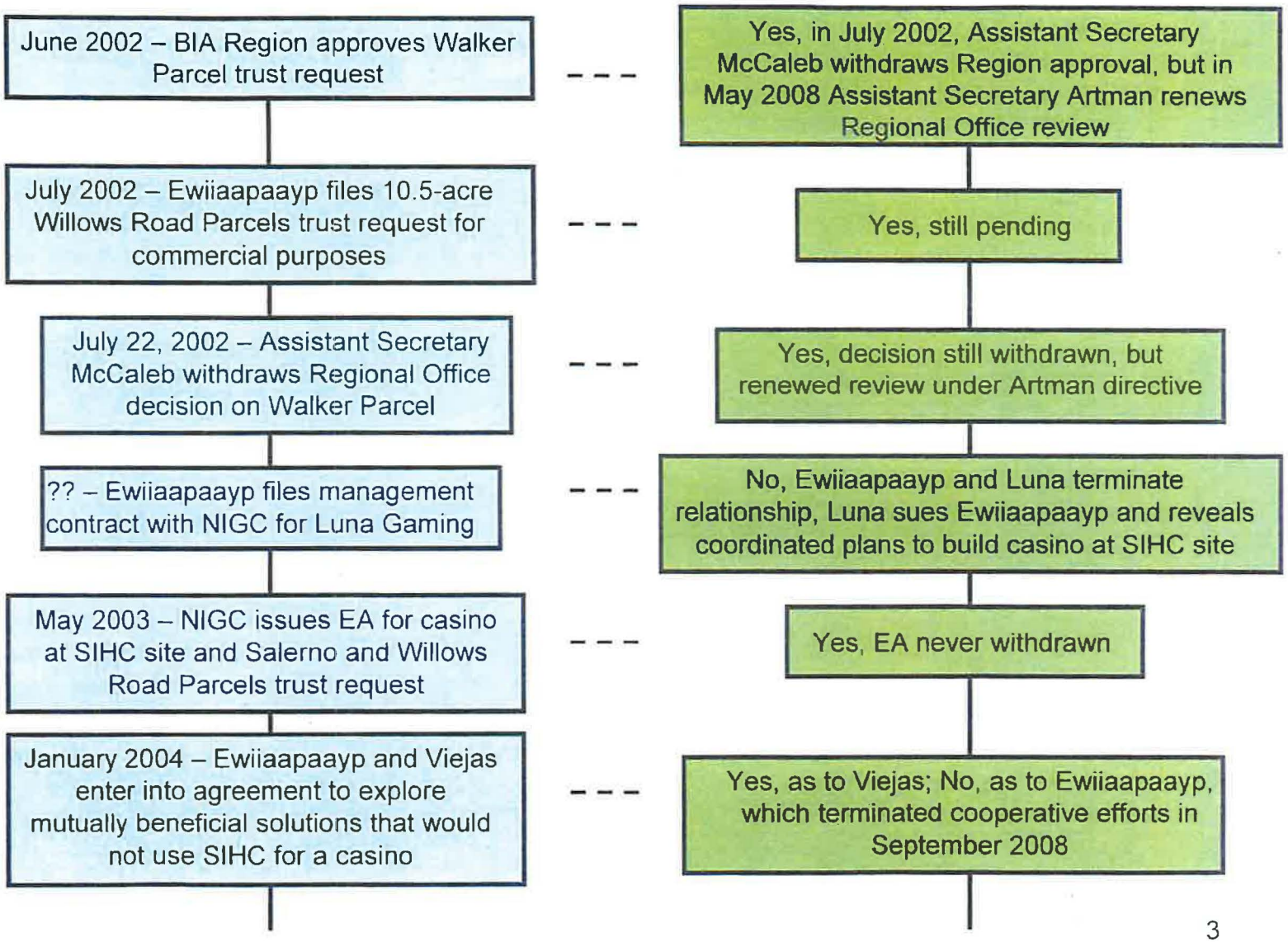
1994 – Ewiiaapaayp begins discussions with SIHC in effort to move the health clinic so a casino can be built on pre-1988 lands

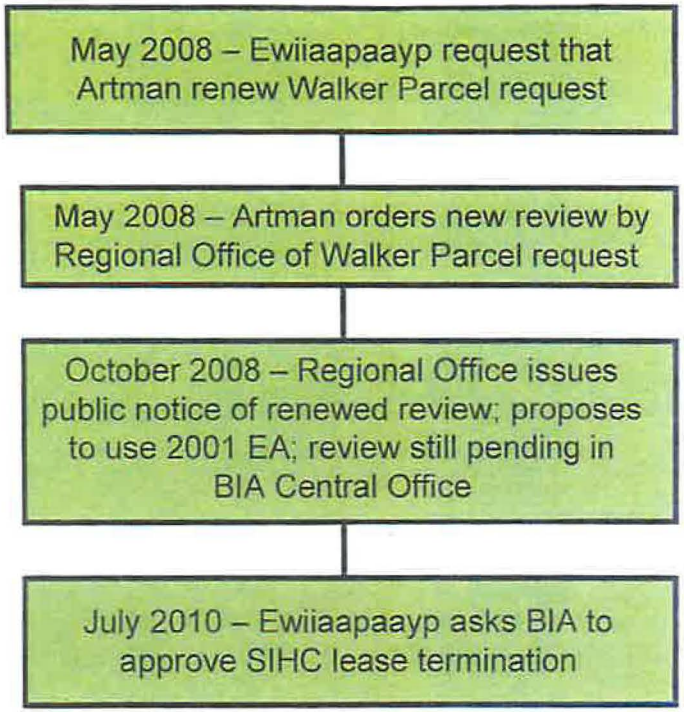


38551-0001/LEGAL21863477.1



2


June 2002 – BIA Region approves Walker Parcel trust request
Yes, in July 2002, Assistant Secretary McCaleb withdraws Region approval, but in May 2008 Assistant Secretary Artman renews Regional Office review
July 2002 – Ewiiaapaayp files 10.5-acre Willows Road Parcels trust request for commercial purposes
Yes, still pending
July 22, 2002 – Assistant Secretary McCaleb withdraws Regional Office decision on Walker Parcel
Yes, decision still withdrawn, but renewed review under Artman directive
?? – Ewiiaapaayp files management contract with NIGC for Luna Gaming
No, Ewiiaapaayp and Luna terminate relationship, Luna sues Ewiiaapaayp and reveals coordinated plans to build casino at SIHC site
May 2003 – NIGC issues EA for casino at SIHC site and Salerno and Willows Road Parcels trust request
Yes, EA never withdrawn
January 2004 – Ewiiaapaayp and Viejas enter into agreement to explore mutually beneficial solutions that would not use SIHC for a casino
Yes, as to Viejas; No, as to Ewiiaapaayp, which terminated cooperative efforts in September 2008


May 2008 – Ewiiaapaayp request that Artman renew Walker Parcel request
May 2008 – Artman orders new review by Regional Office of Walker Parcel request
October 2008 – Regional Office issues public notice of renewed review; proposes to use 2001 EA; review still pending in BIA Central Office
July 2010 – Ewiiaapaayp asks BIA to approve SIHC lease termination

Walker Parcel, reservation designation, and SIHC lease termination attempt were all inter-related. (SAR 194). Viejas specifically requested: (1) denial of the reservation request; (2) confirmation of the healthcare limitation for the trust land acquisition for the Original Site; (3) a determination that the Walker Parcel is not contiguous to the Clinic Parcel; and (4) if the Walker Parcel request was not denied outright, preparation of an EIS considering all aspects of the Ewiiaapaayp plan. (*Id.*)

In a final effort to avoid a protracted legal dispute, Viejas again wrote to Assistant Secretary Echo Hawk on March 29, 2011. (SAR 200). Viejas wrote because the Ewiiaapaayp IBIA appeal of BIA's lease termination decision confirmed that reasonable, negotiated solutions could not be achieved while the prospect of unrestricted trust acquisition of the Walker Parcel remained available. (*Id.*). As Viejas noted, "the Ewiiaapaayp's appeal perpetuates the threat to the SIHC clinic and extends indefinitely the conflict over off-reservation gaming." (*Id.*). Viejas asked BIA to "remove definitively the underlying cause of the conflict over the SIHC land." (*Id.*). Viejas requested that BIA take four actions: (1) review the Walker Parcel request in the Central Office because of its gaming connection and national policy implications; (2) reaffirm the healthcare-only purpose of the Original Site trust land decision; (3) require an EIS for the Walker Parcel request; and (4) deny the reservation proclamation. To date, a response to this letter has not been received. (*Id.*).

I. The Renewed Reservation Proclamation

Throughout its campaign to remove the SIHC health facility from the Clinic Site, Ewiiaapaayp also made a concerted effort to achieve formal reservation status for that land. Having an actual reservation at the Clinic Parcel would improve Ewiiaapaayp's ability to have

additional land, such as the Willows Road and Salerno parcels, taken into trust. Under BIA's regulations, the burden is on a tribe to justify additional trust land, with BIA applying greater scrutiny as the distance of such property increases from the tribe's reservation.[9] At the same time, deference to concerns of local communities is stronger the greater that distance, and the requesting tribe must provide a formal business plan to justify the need for acquisition by the United States.[10] In addition, formal status of the Clinic Parcel as a reservation would help Ewiiaapaayp avoid the label of "off-reservation" under IGRA for purposes of building a casino on that site, and it would eliminate the strong and legitimate claim from the other six SIHC tribes that the land was, in fact, acquired in trust for their common benefit, not solely for Ewiiaapaayp to use for its own purposes.

BIA itself acknowledged the importance of reservation status at the Clinic Site for the Ewiiaapaayp's casino development plan. In a memorandum dated September 29, 2010, the BIA Acting Pacific Regional Director stated "any effort to subsequently establish a gaming facility on the parcels would likely result in the Band having to obtain a separate Indian lands determination under IGRA and to otherwise comply with its current gaming compact with the State of California including an environmental analysis." Thus, as recently as one year ago, the BIA Regional Office confirmed the continued viability of the Ewiiaapaayp gaming scheme.

Ewiiaapaayp has requested reservation status many times, underscoring the apparent importance of that determination for its plans in the Alpine area. At least a partial list of Ewiiaapaayp requests for reservation status include: March 3, 1999, letter to Area Director (SAR 122); April 29, 1999, Council Resolution (SAR 125); January 30, 2001, letter to Pacific Regional

[9] 25 C.F.R. § 151.11 (b).
[10] *Id.* § 151.11(c).

Director (SAR 130); February 20, 2001, Council Resolution (SAR 131); July 20, 2001, letter to BIA Realty Officer (SAR 132); July 26, 2001, letter to BIA Realty Officer (SAR 133); August 7, 2001, letter to BIA Realty Officer (SAR 134); October 25, 2001, letter to Regional Director (SAR 137); January 29, 2002, Council Resolution (SAR 138); February 6, 2002, letter to BIA Realty Officer (SAR 139); February 28, 2002, letter to Superintendent and Regional Director commenting on objections from Viejas and California Attorney General (AR 85); May 24, 2002, letter to Secretary Norton commenting on objections from Congressman Hunter (AR 96); February 14, 2003, timeline presented to Acting Assistant Secretary Aurene Martin (SAR 162); May 2003 NIGC EA prepared by Ewiiaapaayp consultant AES (SAR 165); 2004 CEDS, referring to Clinic Site as already "west portion" of Ewiiaapaayp Reservation (AR 20); December 21, 2009, letter to Assistant Secretary Echo Hawk (AR 24); August 16, 2010, letter to Assistant Secretary Echo Hawk (SAR 194); and November 22, 2010, letter to Assistant Secretary Echo Hawk (SAR 196).

Ewiiaapaayp's desire for reservation status is also evidenced by its 2010 request to the California Department of Transportation (CalTrans) for the installation of signs on I-8 at the West Willows interchange indicating an exit for the "Ewiiaapaayp Indian Reservation." Ewiiaapaayp did not discuss the placement of that sign with Viejas, which has its Reservation at the same interchange, as noted by existing CalTrans signage.

Viejas objected to this signage as incorrect based on the clear fact that Ewiiaapaayp itself acknowledges the lack of reservation status for the Clinic Parcel in its numerous letters and requests to BIA. On June 16, 2010, Assistant Secretary Echo Hawk wrote to CalTrans to

confirm that the Ewiiaapaayp reservation proclamation remained under review. (SAR 193). In July 2011, CalTrans removed the Ewiiaapaayp Reservation sign.[11]

To date, the reservation proclamation remains pending in the BIA Central Office. When the Assistant Secretary returned the Walker Parcel application to the Regional Office for final processing, he noted that the reservation proclamation request was not complete and was returned to the Regional Office with instructions. (AR 31, 61, 65). For purposes of this appeal, the continuing insistence of Ewiiaapaayp for action on that request, and BIA's own recognition of the importance of such a proclamation for IGRA purposes, strongly suggests that Ewiiaapaayp has not given up its desire to pursue its casino development plans and reliance on the Walker Parcel trust decision as an integral part of that plan.

J. The Ewiiaapaayp Attempt to Terminate the SIHC Lease

By letter dated January 26, 2010, SIHC exercised its option to renew the lease for a second 25-year term. (SAR 187). On February 12, 2010, Ewiiaapaayp objected to SIHC's exercise of its option to renew and asked the BIA to provide "written confirmation of the nonrenewal of the lease." (SAR 188-189). The Assistant Regional Solicitor determined that:

> The Bureau is bound to accept the renewal by SIHC because it does not conflict with Department regulations and the conditions triggering the automatic renewal provision have been satisfied. Since there are no other conditions preventing SIHC from exercising its option set forth in the contract, the terms of the contract require renewal upon SIHC's exercise of the renewal option, and there is no authority in the Lease for the Tribe to establish alternate terms for renewal or nonrenewal. Any conclusion to the contrary would be adverse to the terms of the Lease and prior holdings by the Interior Board of Indian Appeals. Accordingly, there are no grounds for denial of SIHC's option to renew.

(SAR 192).

[11] On August 9, 2011, Ewiiaapaayp petitioned the Caltrans Native American Advisory Committee to establish a new

On December 22, 2010, the Regional Director declined Ewiiaapaayp's request of non-renewal of the lease. (SAR 197). The Regional Director found that Ewiiaapaayp applied to the BIA to acquire the Original Site in trust "for the purpose of establishing a healthcare facility," and that the Assistant Secretary authorized the Sacramento Area Director to accept the conveyance of the 8.6 acres into trust "for health facility purposes." (*Id.*). The Regional Director also found that the purpose of the Lease was "to enable the construction, development and operation of the Southern Indian Health Center." (*Id.*). The Regional Director examined Article 4 and Addendum 5 of the Lease addressing the renewal and found "SIHC could notify the Band and the Secretary of the exercise of the option to renew the lease anytime before February 23, 2011," and "as the SIHC gave notice to the Band and the Agency Superintendent on January 26, 2010, said notice by the SIHC was timely filed." (*Id.*). Ewiiaapaayp appealed this decision to IBIA on February 1, 2011. (SAR 199). Viejas and the SIHC and its Member Tribes filed opposition briefs on June 27, 2011. (SAR 202-203). Ewiiaapaayp did not reply.

K. The Walker Parcel Decision

On May 31, 2011, the Regional Director issued a notice of decision ("ND") to acquire the Walker Parcel in trust on behalf of Ewiiaapaayp. (AR 33). The ND describes the land, and states that the Secretary may acquire land in trust "(1) when such lands are within the exterior boundaries of a tribe's reservation; 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 self-determination, economic development, or tribal housing." (*Id.* at 3). The ND states that the acquisition of the Walker parcel meets all three requirements. (*Id.*).

---

policy that would result in reinstallation of the signs. (SAR 197).

The ND states that the Regional Director reviewed the acquisition request under 25 C.F.R. § 151.10. (*Id.* at 8). It did not refer to 25 C.F.R. § 151.11. The ND does not state the basis for concluding that 25 C.F.R. § 151.10 alone is applicable.

The notice provided a cursory summary of comments received regarding the Ewiiaapaayp's application. (*Id.* at 3-6). Those comments generally set forth concerns regarding: (1) Ewiiaapaayp's casino plan, (*id.* at 33, 3, 5, 6); (2) whether the SIHC would relocate to a clinic built on the Walker parcel, (*id.* at 4); (3) zoning conflicts, (*id.*); (4) the inadequacy of the environmental review, (*id.* at 4, 6); (5) cultural or historical connections to the land, (*id.*); (6) the authority the BIA would use to review the application, (*id.* at 4, 6); (7) lack of financial incentive for the acquisition if it actually be used as proposed, (*id.* at 5); (8) impacts on adjacent homes and improper use of easements, (*id.* at 5-6); (9) Ewiiaapaayp's failure to meet the trust criteria (*id.* at 6) at (10) impacts of permitting Ewiiaapaayp to acquire land in Viejas territory (*id.*); (11) other BIA decisions that do not support acquiring the Walker parcel (*id.*).

The ND describes Ewiiaapaayp's response to those comments, which were set forth in the April 21, 2009 letter (*id.* at 6-8) described above, but the ND *does not include any response from BIA to those points*, including whether it was simply adopting the Ewiiaapaayp's statements (*see id. generally*). The ND evaluates six factors, including: (1) need 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 roles; (4) jurisdictional problems and potential conflict of land use which may arise; (5) whether the BIA is equipped to discharge its additional responsibilities resulting from the acquisition; and (6) existence of contaminants or hazardous substances on the property. (*Id.* at 8-12). The ND also briefly addresses NEPA.

A. Need for Land

As to the Ewiiaapaayp's need for land, the ND describes Ewiiaapaayp's existing 5,460 acres of reservation land. The description states that the land's "current use is the same as time immemorial, unsuitable for residential or commercial development." (*Id.* at 9). The ND also states that Ewiiaapaayp has 10.02 acres of land currently being used for the SIHC clinic and tribal offices. (*Id.* at 9). The ND also provides:

> According to the Band's application, 'present trust land in Alpine, California, has proven to be inadequate for the SIHC's future goals and objectives. . . . Since 1986, SIHC has constructed three health clinic buildings with the Department of Housing and Urban Development Indian Community Development Block Grant funds obtained by the 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 approximately 16.69-acre parcel will provide the Tribe 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 Tribe 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.

(*Id.* at 9-10) (outer quotation omitted from ROD leaving it unclear what the ROD is quoting versus what constitutes the BIA's explanation). The ND does not describe Ewiiaapaayp's needs or how the acquisition will satisfy those needs. (*Id.* at 9-10).

B. Proposed Land Use

The ND describes the proposed land use for the Walker Parcel as follows: "[T]he Band intends to use the Walker Site for operation of a health clinic by the [SIHC] pursuant to a 25 year land lease that contains a 25-year option to renew. This application was amended by tribal resolution dated May 8, 2009 to specific that tenant eligibility for the proposed health clinic shall extend to any healthcare entity (no longer limited to SIHC)." (*Id.* at 10). The ND does not evaluate the proposed land use. (*See id. generally*).

C. Impact of State and Local Government's Tax Base

The ND states that the loss to county and local governments is less than $8,051.94 and that there is some possibility of the County generating income if the facility is leased to a non-Indian. (*Id.* at 10). The ND concludes that "based on the relatively insignificant amount collected on the subject property, it does not appear that removal from the tax roles will cause a major impact on the County's financial situation." (*Id.*).

D. Jurisdictional Problems/Potential Conflicts

The ND states that the development is inconsistent with the Forest Conservation Initiative and would require a "Major Use Permit." (*Id.* at 10-11). The ND concludes that "if the property is accepted into trust, compliance with local zoning ordinances would not be applicable." (*Id.* at 11). With respect to concerns expressed by nearby property owners, the ND provides that Ewiiaapaayp has stated that it will repair damage to the property owner's access road, will build a fence and a gate, and seek to avoid damaging, and repair and restore any damage to, the property owners' water pipes. (*Id.* at 11-12). The ND does not state whether these commitments affected BIA's analysis of potential conflicts.

E. Whether BIA is Equipped to Discharge the Additional Responsibilities

The ND concludes that there will be little change to BIA's existing functions if the Walker Parcel is acquired in trust. (*Id.* at 12).

F. Whether or Not Contaminants or Hazardous Substances are Present

The ND states that the Regional Director "[has] concluded that no hazardous substances, or other environmental hazards, are present on both subject parcels." (*Id.* at 12).

G. National Environmental Policy Act

The ND addresses comments on the NEPA document as follows: "A revised EA, dated November 2001, reflecting consideration of comments received during the previous EA public review and comment period, and a [FONSI], dated November 7, 2011, were distributed on November 16, 2001." (*Id.* at 12). The ND states that "[m]ost of the comments received during the NEPA process were regarding the lease termination and the subsequent construction of a casino," but that "the previously proposed lease relinquishment and the Indian gaming management contract are not part of this decision nor were they included in the aforementioned EA." (*Id.* at 12-13). The ND also states that compliance with the Endangered Species Act was completed on April 10, 2002 with a biological opinion and subsequent Memorandum of Agreement ("MOA") entered into by the U.S. Fish and Wildlife Service (FWS), Ewiiaapaayp and BIA regarding the arroyo toad. Finally, the ND also states that there was a request of AES to review independently whether there has been a change in the acquisition purpose or whether there have been any changes in circumstances. (*Id.* at 13). Because the AES report concluded that there was no change in circumstances and the lease purpose changed slightly, BIA determined there was no further NEPA compliance needed. (*Id.* at 13).

Viejas appealed the Walker Parcel decision on June 30, 2011.[12]

III. ARGUMENT

A. Standard of Review

A decision on appeal before the Board is not final for the Department unless and until the Board affirms it.[13] Appellant has the burden of proving that the Regional Director's decision

[12] The County of San Diego filed an appeal on the same day.
[13] *See* 25 C.F.R. § 2.6(a).

was erroneous or not supported by substantial evidence.[14] The Board reviews questions of law and the sufficiency of the evidence.[15] The Board is not to substitute its judgment for that of BIA, but may review whether *BIA adequately explained its decision and gave proper consideration to all legal prerequisites in the exercise of its discretion*, including any regulatory standards.[16]

B. BIA Processed Ewiiaapaayp's Trust Application under the Incorrect Standards.

BIA's review of Ewiiaapaayp's application to have the Walker Parcel acquired in trust under only 25 C.F.R. § 151.10 fails for three reasons. First, BIA did not explain its decision to review the application only under the authority applicable to on-reservation trust acquisitions. Second, the SIHC Parcel is not contiguous with the Walker Parcel, and thus must be reviewed under section 151.11. Third, the SIHC Parcel is not Ewiiaapaayp reservation land, and thus must be reviewed under section 151.11.

1. BIA did not adequately explain its decision to process the trust application under 25 C.F.R. § 151.10.

The Regional Director erred by failing to make any finding about the legal propriety of the standard she chose to apply. Throughout the last decade, the parties have vigorously contested the status of the SIHC land and the proper authority for reviewing the proposed Walker Parcel acquisition. (*See, e.g.*, AR 14c, 14e, 14g). Various parties submitted multiple legal analyses during that period addressing the alleged "contiguity" of the two parcels and the non-reservation status of the SIHC Parcel. The ND acknowledges that the Governor's Office (AR

---

[14] *See Chuchua v. Pacific Regional Director*, 42 IBIA 1, *5 (2005) (citations omitted).
[15] *See Aloha Lumber Corp. v. Alaska Area Director*, 41 IBIA 147, 156 (2005).
[16] *See Chuchua*, 42 IBIA 1, *5-6 (2005) (citations omitted); *S & H Concrete Construction, Inc. v. Acting Phoenix Area Director*, 19 IBIA 69 (1990) (stating that "the Board does have responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion") (citation omitted); *see also Ross v. Acting Muskogee Area Director*, 18 IBIA 31 (1989) (stating that the Board "does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of discretionary authority").

33, 4), Viejas (AR 33, 6), and the County, (AR 33, 4) all raised this issue during the comment period, and in fact, all of these parties previously raised concerns regarding this issue. (*See, e.g.*, SAR 147). Indeed, the only evidence that BIA considered the question of contiguity was long before the parties presented their legal and factual arguments regarding the issue. (AR 5 (treating the SIHC Parcel as a "reservation" without explanation and failing to consider the effects of multiple intervening roads with different ownership on "contiguity")).

This question is critically important because if the Walker Parcel is noncontiguous, or if the Clinic Parcel is not Ewiiaapaayp reservation land, the heightened burdens of 25 C.F.R. § 151.11 also apply. The ND makes no finding on the section 151.11 standards of the burden on Ewiiaapaayp to justify need for trust land commensurate with distance from its reservation, the greater deference to local government, and the existence and sufficiency of a tribal business plan.[17]

BIA did not address the question of legal authority in any way in the ND, and thereby failed to meet the most basic agency obligation of explaining its decision. The ND does not provide any explanation or justification as to why it determined that 25 C.F.R. § 151.10 alone was the proper legal authority. The only statement BIA makes on this point is to state that it is processing the Walker Parcel application using the on-reservation regulation: "Pursuant to 25 C.F.R. 151.10, the following factors were considered in formulating our recommendation. . ." (AR 33 at 8).

The Regional Director's failure to address the question of the proper legal standard for the acquisition renders the decision arbitrary and capricious under the Administrative Procedure

[17] *Id.* § 151.11(b), (c).

Act (APA).[18] Under the APA, an agency "must examine the relevant data and *articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.*[19] An agency decision is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem,* offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.[20]

In reviewing a case in which the agency provided no explanation for its decision, the Supreme Court has stated:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice. . . . Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.[21]

BIA failed to meet this basic obligation in the ND. Whether a trust land request should be reviewed as an on-reservation request or an off-reservation request is a mixture of fact and law; the agency's response to both questions should have been addressed in its decision. The Regional Director, however, addressed neither. Although the Board's review of legal questions, including the proper construction of the terms "contiguous," "noncontiguous" and

---

[18] 5 U.S.C. § 706.
[19] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).
[20] *Motor Vehicle Mfrs. Assn v. State Farm Mut.*, 463 U.S. 29, 43 (1983) (citations omitted).
[21] *Burlington Truck Lines, Inc. v. United States*, 371 U.S., 167 (citation omitted).

"reservation,"[22] is a legal question, the application of those definitions to the facts is one that must first be addressed by BIA. BIA failed to produce any explanation for its action.

The decision in *Maahs v. Acting Portland Area Director* demonstrates why the ND violates this requirement. In *Maahs*, the Board vacated a decision of the Area Director which concluded that land subject to a proposed trust acquisition was not "adjacent" to a tribe's reservation within the meaning of 25 C.F.R. § 151.3. The Board found the decision insufficient because "the record does not include an exact statement of the lot's location, vis-a-vis the reservation boundary, or a discussion of reasons for the Area Director's conclusion that the lot is not adjacent to the reservation, [therefore] the Board cannot sustain that conclusion."[23] While the *Maahs* decision was decided before the adoption of the present land into trust regulations, the Board recognized that the definition of governing regulatory terms should control and that the record must support a conclusion that land to be acquired meets the definition.[24]

Viejas submitted several comments explaining why BIA was processing the Walker Parcel application under the incorrect authority by relying solely on section 151.10. (AR 14(g); SAR 185). Viejas also explained why BIA would have to deny the request under section 151.11. (*Id.*). Further, Viejas provided additional facts that demonstrated why information provided by Ewiiaapaayp relevant to the legal standard for review was incorrect. (*See, e.g.*, SAR 185). BIA has never addressed Viejas's legal arguments or factual submissions at any point. The absence of any explanation from BIA on the grounds for its decision to apply only the standards in section 151.10 requires the ND to be vacated and remanded.

---

[22] *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director, Bureau of Indian Affairs*, 47 IBIA 187 (2008). *See also Maahs v. Acting Portland Area Director*, 22 IBIA 294, 295 (1992).
[23] 22 IBIA 294, 295 (1992).
[24] *See Jefferson County*, 47 IBIA at 204.

2. The Clinic Parcel is not the Ewiiaapaayp's reservation.

The ND does not state the Regional Director's basis for determining that the Clinic Parcel qualifies as reservation land, thereby failing to justify the Director's decision to review the Walker Parcel as contiguous land under only section 151.10. For this reason alone, the decision should be vacated and remanded.[25] Moreover, as a legal and factual matter, the Clinic Parcel is not Ewiiaapaayp reservation land.

The history of the Clinic Parcel is quite clear. BIA acquired this land *in trust* in Ewiiaapaayp's name for one reason only – to expedite the acquisition of land in trust for a tribal clinic. (SAR 109, 110, 112 and 185 at 21). BIA acquired the land for the limited purpose of providing healthcare for San Diego County tribes, which were severely underserved at the time. (*Id.*). Ewiiaapaayp's own actions further demonstrate that the intended purpose of the acquisition was for health care only – *i.e.*, Ewiiaapaayp originally resolved to offer the SIHC a lease for a term of 99 years, and Ewiiaapaayp only changed the term to two 25-year terms when BIA informed Ewiiaapaayp that it was prohibited from entering a 99-year lease. (SAR 109, 110, 114, 115).

The SIHC Parcel has never been treated as a reservation. In fact, Ewiiaapaayp began to seek a reservation proclamation only when it decided to develop a casino in Alpine in 1999, instead of using its own reservation for gaming development. (*See, e.g.*, SAR 122, 125, 130, 131). Ewiiaapaayp's repeated efforts to have BIA proclaim the Clinic Parcel its reservation land indicates that both BIA and Ewiiaapaayp are well-aware that the land does not, in fact, qualify as

[25] *See Chuchua*, 42 IBIA 1, *5-6 (2005) (citations omitted); *S & H Concrete Construction, Inc. v. Acting Phoenix Area Director*, 19 IBIA 69 (1990) (stating that "the Board does have responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion") (citation omitted). *See also Ross v. Acting Muskogee Area Director*, 18 IBIA 31 (1989) (stating that the Board "does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of discretionary authority.").

a reservation for purposes of section 151.10. (*See* AR 24, 85, 96, 162, and SAR 122, 125, 130, 131, 132, 133, 134, 137, 138, 139, 165, 194, 195).

To the extent that BIA treats trust lands as reservation lands for purposes of 25 C.F.R. Part 151, it is in error to do so. The Indian Reorganization Act of 1934 (IRA), which is the source of BIA's authority to acquire land, distinguishes between reservation and trust land, and consequently so too must the implementing regulations. Section 5 of the IRA authorizes the Secretary to acquire land in trust.[26] Section 5 states that "[t]itle to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States *in trust* for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."[27] Land acquired pursuant to section 5 is trust land only.

To be designated a tribal "reservation," an additional step must be taken. Section 7 of the IRA authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations."[28] The "lands acquired pursuant to any authority conferred by this Act" in section 7 refers to those lands acquired pursuant to section 5 – that is, trust lands. Thus, section 7 authorizes the Secretary to designate "trust" lands as "reservation" lands, but the lands must be acquired in trust first.

---

[26] 25 U.S.C. § 465.
[27] *Id.* § 465 (emphasis added).
[28] *Id.* § 467.

The Clinic Parcel was taken into trust, pursuant to section 5 of the IRA (AR 25; SAR 113), but was never designated as reservation land pursuant to IRA section 7. BIA has not designated the land as Ewiiaapaayp's reservation, a fact plainly confirmed by Ewiiaapaayp's multiple requests to have the Clinic Parcel designated a reservation under 25 U.S.C. § 467 for over ten years. (*See* AR 24, 85, 96, and SAR 122, 125, 130, 131, 132, 133, 134, 137, 138, 139, 162, 165, 194, 195). Indeed, the Assistant Secretary confirmed by letter of June 16, 2010, that the Ewiiaapaayp reservation proclamation request was under review. (SAR 193). To date, no decision has been made. (*Id.*). Thus, as a matter of law, the land cannot be treated as a reservation.

Ewiiaapaayp appear to be relying on some ambiguity in the regulations to argue that the land qualifies as a reservation and that the Clinic and Walker Parcels are contiguous. (AR 14(e), Ex. 1). BIA may have accepted that theory in 2002 (at least with respect to contiguity) (AR 5), but BIA has not addressed or responded in any way to the Viejas' or any other party's arguments to the contrary since that time. In fact, the record does not demonstrate that BIA considered Viejas's arguments on this issue at any time and further does not demonstrate that BIA ever considered the definition of "reservation" under the regulations.

The IRA and implementing regulations do not support an interpretation that treats reservation and trust lands as synonymous. Part 151 implements section 5 of the IRA. The regulations implementing the IRA must be consistent with the Act itself. Because the Act incorporates an explicit distinction between the processes for acquiring land in trust and designating such land as a reservation, that distinction must be retained when interpreting the Part 151 regulations.

It is only due to an artifact of the history of the rulemaking process that there is any ambiguity in the definition of "reservation" in Part 151. Part 151 defines "reservation" as follows:

> Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction . . . .[29]

Upon a superficial read, this language may appear broad. However, the definition must be read consistent with the IRA and with the history of the rulemaking process. When properly interpreted, it is clear that the term "reservation" was not intended to encompass all trust land.

The addition of the 1980 definition addressed concerns regarding allotted lands; it was not intended to expand the definition of reservation to include all trust lands. The Federal Register explains the provenance of the reservation definition as follows:

> Problems with the definition of an "Indian reservation" contained in proposed § 120a.2(g), now (f), were perceived by many because of the possible implication that the disestablishment or total allotment of a reservation necessarily extinguished the reservation, or because the question of the boundaries of some reservations is pending determination. Revised language has been inserted to resolve these problems.[30]

BIA modified the language to ensure that allotted lands that were part of a reservation would still qualify as "reservation lands" for the purposes of Part 151 trust acquisition. BIA's purpose was not to enable the Department to treat all existing trust lands as reservation lands.

Moreover, the 1995 amendments to Part 151 emphasize the importance of the distinction between "trust" and "reservation" lands. The amendments were initially proposed in 1990 to ensure that trust acquisition requests for land located outside reservation boundaries were

---

[29] 25 C.F.R. § 151.2.
[30] 45 Fed. Reg. 62,034, 62,035 (Sept. 18, 1980).

considered with substantial deference to affected local governments. The summary for the Proposed Rule states:

> On July 19, 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 proposed regulations will modify an existing section within Part 151 (Land Acquisitions) and create a new section which will contain additional criteria and requirements to be used by the Secretary 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.[31]

The 1995 Final Rule thus defines "off-reservation" as "meaning lands 'outside of and noncontiguous to' boundaries of an existing reservation."[32]

That BIA took such pains to create a separate acquisition policy for off-reservation acquisitions illustrates that it viewed trust lands and reservation lands as distinct. The regulations reflect BIA's conclusion that off-reservation acquisitions have different impacts on affected parties relating to expectations, and as a consequence, require different treatment in the review process. By treating the Clinic Parcel as reservation land, BIA is operating contrary to the intent of its regulations, and inconsistently with its authority under the IRA.

The importance between the two designations is carried through to the regulations implementing IGRA. In 2008, the Department promulgated regulations to implement section 20 of IGRA (25 C.F.R. Part 292), which governs when lands acquired in trust after 1988 can be used for gaming. The approach adopted by those rules supports the legal interpretation that a reservation requires a specific, express proclamation by the Secretary or historical designation prior to the enactment of the IRA. IGRA defines "reservation" to mean:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.[33]

Each element of the definition found in Part 292 requires specific action beyond mere trust designation. The regulations adopted by the Department parallel the distinction found in the IRA between reservation and trust lands. If BIA concluded that "reservation" is synonymous with "trust" land – and BIA does not provide any such explanation – it was legal error to do so. Moreover, it was legal error for BIA to fail to address this question, which Viejas raised. (SAR 185 at 7-9).

The ND should be vacated and remanded for explanation of this point. If it is determined BIA somehow provided an adequate explanation, the Board should vacate the ND for incorrectly considering the Clinic Parcel as Ewiiaapaayp Reservation land.

3. The Clinic Parcel is not contiguous with the Walker Parcel.

Not only is the Clinic Parcel not Ewiiaapaayp reservation land, it is not contiguous to the Walker Parcel. Again, BIA did not address the question of contiguity in the ND. BIA wholly ignored the dispute regarding this question. (*See* SAR 185 at 7-9; AR 33 (failing to address this question in the ND)). Instead, BIA proceeded with its decision as if there were no question at

---

[31] 56 Fed. Reg. 32,278 (July 15, 1991).
[32] 60 Fed. Reg. 32,874 (June 23, 1995).
[33] 25 C.F.R. § 292.2.

all. *Id.* That approach violates the APA and the Board's precedent. Had BIA properly reviewed the facts, it should have concluded that the parcels are not contiguous.

a. BIA did not define contiguity in the ND, but as a matter of law, it does not mean parcels in close proximity.

Part 151 does not define the terms "contiguous" or "noncontiguous."[34] IBIA, however, has interpreted the terms for purposes of consideration of land into trust applications. It is clear that lands that adjoin or abut are contiguous. The Board stated:

> [T]his Department has long construed "contiguous" to mean adjoining or abutting. This definition is similar to that in Black's Law Dictionary, (8th Ed. 2004), at 338 definition 1, defining the word to mean "[t]ouching at a point or along a boundary; ADJOINING <Texas and Oklahoma are contiguous>." We see no reason to adopt a different meaning from such common sense constructions, and therefore hold that lands which are "contiguous" for purposes of 25 C.F.R. § 151.10 are lands that adjoin or abut, and lands which are "noncontiguous" for purposes of 25 C.F.R. § 151.11 are lands which do not adjoin or abut.[35]

Consistent with this definition, the Board ultimately held that lands in "close proximity" across a riverbed would not fit the definition of contiguous land that is adjoining or abutting.[36]

Where BIA is in error regarding "contiguity" and therefore fails to address certain criteria, as is the case here, the Board cannot rectify that error or decide in the first instance whether an applicant would meet the applicable criteria. This Board has stated:

> [W]e do not agree with the Tribe that the failure to apply the terms of 25 C.F.R. § 151.11 in a case where an acquired parcel may be noncontiguous with the tribe's reservation can be corrected by our affirming the application of the criteria in 25 C.F.R. § 151.10 and determining in the first instance that the two additional factors of section 151.11(b) and (c) have been sufficiently addressed. We reject the Tribe's suggestion that, under 25 C.F.R. § 151.11(b), that the lands are so close that BIA may simply ignore the "greater scrutiny" called for in that subsection. We will not construe section 151.11(b) to be meaningless in some

[34] 60 Fed. Reg. 32874 (June 23, 1995) (final rule); 56 Fed. Reg. 32278 (July 15, 1991) (proposed rule).
[35] *Jefferson County*, 47 IBIA at 205.
[36] *See id.* at 206.

> undefined set of cases where parcels are noncontiguous but close. We think section 151.11(b) must be read to add something to the criteria in section 151.10, however small. Likewise, we will not interpret that section in the first instance on the facts of this case, as this determination is for the Regional Director to make.[37]

Thus, if BIA erroneously determined that the Walker Parcel was contiguous with the SIHC Parcel, as it has done in this case, the Board should vacate the FD and remand the matter to BIA to apply section 151.11.

b. The facts demonstrate that the Walker Parcel is not contiguous to the Clinic Parcel.

In fact, the Walker Parcel is not contiguous to the Clinic Parcel.[38] The Walker Parcel is separated from the Clinic Parcel not "solely by a public roadway or other public right-of-way," but rather by three major road systems – an interstate highway and two county roads with intervening ownership – Willows Road (owned by the County of San Diego), Interstate 8 (owned by the State of California), and Alpine Boulevard (owned by County of San Diego). It may be the case that direct access is not required for contiguity, but no case has held that parcels are contiguous when separated by multiple roads owned by different entities that prevent direct access and impose a significant distance between the two parcels. One can reach the Walker Parcel from the Clinic Parcel only by driving 1.3 miles over Alpine Road and Interstate 8. (SAR 185, Ex.2).

Nor have the Clinic Parcel and Walker Parcel ever shared a common boundary. Viejas filed a report detailing the history of the ownership of the two parcels and the various grants of rights-of-way that demonstrates that the parcels do not and have never shared a common boundary. (SAR 185 at 11) The CalTrans Right-of-Way Map XI-sd-8, PM31.7 indicates private

---

[37] *Id.* at 207.

ownership existed between the Walker Parcel and the existing right-of-way corridor (U.S. 80 at that time), which is evidenced by Grants of Access Rights to the individual property owners, provided after the land was granted to the State for I-8. (*Id.*). Portions of those rights-of-access were eventually relinquished to Mr. Walker after the grants by the intervening owners were made to the State. (*Id.*). The parcels did not share a common boundary and were not in any sense "communal." (*Id.*). There is no sense of common ownership, as exists in many cases where obviously communal land is divided by a right-of-way.[39] Certainly, noncontiguous properties cannot be made contiguous when the intervening parcels are purchased by state and local governments for public highway purposes.

Moreover, the intervening roadways are not merely "surface easements," but rather consist of property held in the fee. (*Id.*). California owns the I-8 land, not simply the surface rights. (*Id.*). Similarly, San Diego County owns the land encompassing Alpine Boulevard and Willows Road. (*Id.*). This is not a situation where there is a surface easement conveyed to a state or local government, thereby preserving any pre-existing contiguity that might have previously existed (which was, in any case, lacking here).[40]

The ND does not address any of these questions or the report that Viejas provided. The Board cannot determine on what basis BIA made its determination, because BIA does not explain its determination. BIA is clearly wrong on the law and the facts, but even were that not

---

[38] As illustrated by the map, the only basis upon which Ewiiaapaayp was able to establish its alleged contiguity was by carving out a narrow sliver of land to connect the Walker Parcel to the local road system.

[39] *See Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director Regional Director, BIA*, 17 IBIA 78 (1989).

[40] *See Sauk County v. Midwest Regional Director*, 45 IBIA 201, 213 (2007), *aff'd, Sauk County v. United States Dep't of the Interior*, No. 07-cv-543-bbc (W.D. Wisc. 2008) (explaining that an intervening road founded on a surface easement that separates the actual land surfaces does not destroy contiguity).

so, its decision would be insufficient because it provides no rational conclusion that the parcels are contiguous.

C. BIA's Decision Failed to Describe Adequately Its Basis for Acquiring the Walker Parcel in Trust on Behalf of the Ewiiaapaayp.

The ND's explanation of the grounds upon which the Part 151 standards are met by the Ewiiaapayp request is inadequate with respect to at least three criteria: need for additional land, the proposed land use, and jurisdictional problems. The Board must review whether BIA explained its decision and gave proper consideration to all legal prerequisites in the exercise of its discretion, including any regulatory standards.[41] Here, BIA plainly did not.

1. BIA did not make a determination as to "need for additional land."

The ND sets forth no finding regarding Ewiiaapaayp's need to have the land acquired in trust. At no point in the ND does the Regional Director describe what Ewiiaapaayp's needs are or how development of another health clinic at the Walker Parcel would help meet that need. BIA failed to explain its decision on a most basic level. Further, BIA failed to address arguments demonstrating that the Ewiiaapaayp did not meet the need requirement in the IRA. (*See* AR 33. *See also* AR 14g, 15-20; AR 14g, Ex. 8; AR 14e, 2).

Instead, the ND describes the following only: 1) the 4,100-acre Ewiiaapaayp Reservation; 2) the addition of 1,360 acres to the reservation pursuant to the California Lands Transfer Act; 3) the current use of the land, which is "the same use as time immemorial, unsuitable for residential or commercial development"; 4) that Ewiiaapaayp has an 8.6-acre parcel of trust land in Alpine

[41] *See Chuchua*, 42 IBIA 1, *5-6 (2005) (citations omitted); *S & H Concrete Construction, Inc. v. Acting Phoenix Area Director*, 19 IBIA 69 (1990) (stating that "the Board does have responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion") (citation omitted); *see also Ross v. Acting Muskogee Area Director*, 18 IBIA 31 (1989) (stating that the Board "does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of discretionary authority".

that is currently being used for health care purposes;[42] 5) that Ewiiaapaayp is using another 1.42-acre parcel of trust land, which is adjacent to the 8.6-acre parcel its tribal government, despite the stated purpose of its acquisition being for health care and social services; and 6) a description of Ewiiaapaayp's stated purpose in its Walker Parcel application. (AR 33 at 9-10).

The APA and Board precedent require BIA to explain its determinations adequately.[43] This ND does not. There is no discussion of tribal need, no statement as to sovereignty or self-determination, and no finding as to whether this acquisition in particular advances those goals. In fact, much of the discussion in the "need" section is actually Ewiiaapaayp's stated purpose for the acquisition, without any indication whether BIA agrees. For that reason alone, the decision should be vacated.

Moreover, Ewiiaapaayp cannot meet the need requirement set forth in the IRA and its implementing regulations. The purpose of the IRA is "to rehabilitate the Indian's economic life and to give him [sic] a chance to develop the initiative destroyed by a century of oppression and paternalism."[44] Although the IRA does not limit the acquisition of land to landless tribes only, the concept of "need" is critical in determining whether trust acquisition is appropriate.[45]

Acquiring land on behalf of the Ewiiaapaayp Band exceeds the authority Congress granted to the Secretary. Ewiiaapaayp has no need for land. (*See* AR 14g, 15-20; AR 14g, Ex.

---

[42] It appears that BIA may be confused regarding the use of the SIHC parcel. In the ND, the Regional Director states that "[the proposed and current use of this property was/is the development/construction of a permanent and adequate health center . . ." (AR 33 at 9). The SIHC has long been and continues to be used by the SIHC for its health clinic. In fact, the SIHC is defending its right to renew its lease before the Board in (IBIA 11-062).

[43] *See Chuchua*, 42 IBIA 1, *5-6 (2005) (citations omitted); *S & H Concrete Construction, Inc. v. Acting Phoenix Area Director*, 19 IBIA 69 (1990) (stating that "the Board does have responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion") (citation omitted) *See also Ross v. Acting Muskogee Area Director*, 18 IBIA 31 (1989) (stating that the Board "does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of discretionary authority").

[44] *Mescalero Apache Community v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73 Cong., 2d Sess., 6 (1934)).

8; AR 14e, 2). The Tribe consists of only five members, and those five members have a 5,460-acre reservation. As set forth in BIA's January 7, 2009 decision denying the Menominee Tribe's off-reservation trust land request, to be acquired a showing must be made that "the Tribe's current Reservation land base is unable to support additional economic development." (AR 14h, 1-3). Nowhere does Ewiiaapaayp make the required "convincing" showing that its existing 5,465-acre reservation cannot be used to meet the economic needs of its five members. (*Id.*) To the contrary, the record shows that those reservation lands are being developed to meet these needs.

Indeed, several of the statements made in the ND are contradicted by the record. For example, the ND states that the Ewiiaapaayp Reservation is "unsuitable for residential or commercial development." (AR 33 at 9). To the contrary, the Ewiiaapaayp CEDS Report clearly indicates that Ewiiaapaayp is prioritizing improving its roads to its existing reservation and developing its reservation land for residential purposes. (AR 20 at 45). Moreover, utility-scale wind energy development is being planned for the land (*id.*), and final approval of that proposed project appears to be imminent.[46] In addition to the economic development taking place on its Reservation, every California Indian tribe has the option of participating in the State's Indian Gaming Revenue Sharing Trust Fund.[47] Under the RSTF, Ewiiaapaayp is entitled to receive $1.1 million per year.[48] (AR 14(g) at 17).

---

[45] *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005).

[46] *See* Announcement of Iberdrolar Project, available at: http://www.iberdrolarenewables.us/rel_11.10.14.html. *See also* AR 20, 45 (describing Ewiiaapaayp's economic plan to develop a wind energy project, with the ""[p]otential for the Tribe to earn a percentum of the project's net revenues (projected to exceed $6 million over the term of the agreement) and a percentage of equity share (dependent on its ability to monetize tax credits)").

[47] California Government Code § 12012.75

[48] *See* California Gambling Control Comm'n Indian Gaming Revenue Sharing Trust Fund website quarterly report for the Quarter ended 6/30/11. http://www.cgcc.ca.gov/?pageID=rstfi

Even assuming, for argument, that Ewiiaapaayp does not intend to conduct gaming on the Clinic Parcel, there is no indication or evaluation by BIA that the purported purpose of the acquisition – healthcare development on the Walker Parcel – will help Ewiiaapaayp meet its needs, and there is no reconciliation of the apparent contradictions in the record. First, there already is a successful and fully adequate healthcare clinic and daycare facility that more than satisfies the intended purpose of the proposed acquisition at the Clinic Parcel on existing Ewiiaapaayp trust land. The 2001 application includes statements that are clearly belied by history. For example, the application states that "[i]t is imperative that the Walker Site be taken into trust for the benefit of the Band to ensure that the SIHC continues to operate on tribal lands." (AR 1 at 4). This statement clearly misrepresents the facts, as the SIHC lease committed the Clinic Parcel to clinic use at least until 2012 (SAR 114, 120, 187, 192) and now until 2037. (*Id.*).

Moreover, the statement of need for the trust land in the 2001 application is simply not applicable under the current circumstances. The 2001 application states, in support of the acquisition, that "the social benefit of operating [a tribal clinic] on tribal lands has a positive effect on Indian patients and their willingness to seek medical treatment at the SIHC facilities. Finally, it is consistent with the principles of self-determination to operate tribal programs on tribal lands."[49] (AR 1 at 4). While that statement of need might have been partially accurate in 2001 – because the SIHC was planning to move the clinic to the Walker Parcel – it makes no sense in 2011, when Ewiiaapaayp is no longer committing the Walker Parcel to the SIHC. (*See, e.g,.* AR 27, 30, and SAR 188). A change in tenant eligibility substantially affects the nature of the application because the justification for the acquisition was dependent largely on the

operation of a *tribal clinic*. (*See* AR 8 (stating that there will be no change in the health care facility "except that tenant eligibility shall extend to any healthcare entity (no longer limited to the [SIHC])").

Moreover, as Viejas has demonstrated in the record, there is no need for another healthcare facility 1.3 miles from the existing SIHC Clinic. (SAR 185, Ex. 4). The need for another healthcare clinic in Alpine arises only if the SIHC Clinic is terminated. As the history of this dispute shows, if the SIHC Clinic is terminated, the Clinic Parcel will be used for casino development. Thus, BIA cannot give credence to a legitimate need for healthcare unless it also assumes the facts that would lead to casino development. The record reveals no such consideration by the Regional Directorl; therefore, the ND must be vacated and remanded.

2. BIA did not adequately explain its conclusions regarding the purpose of the proposed trust acquisition.

The ND notes that many commentors were concerned that the proposed Walker Parcel acquisition was part of a long-term plan to develop a casino on the Clinic Parcel. (AR 33 at 3-6). Yet, BIA does not address this disputed issue except to state that "[m]ost of the comments received during the NEPA process were regarding the lease termination and the subsequent construction of a casino. However, the previously proposed lease relinquishment and the Indian gaming management contract are not part of this decision nor were they included in the aforementioned EA." (*Id.* at 12-13). This response is wholly insufficient.

First, the fact that the EA does not address the lease relinquishment or the gaming contract says nothing as to whether Ewiiaapaayp has a plan to use the Clinic Parcel for gaming

[49] Notably, the Ewiiaapaayp's request to reactivate the Walker trust application did not indicate any change in proposed use. (AR 7).

purposes. In fact, Ewiiaapaayp omitted its gaming plans from its initial application for the Walker Parcel and the associated EA. (AR 1) (*Compare* AR 61, 65). Ewiiaapaayp later conceded the need for an EIS for all elements of its gaming plan. (SAR 168). Similarly, Ewiiaapaayp is before the Board now challenging BIA's refusal to prevent the SIHC from exercising its right to renew the Clinic lease. (IBIA 11-062). At the very least, the ND should note that Ewiiaapaayp is seeking to remove the SIHC from the Clinic Parcel so that it may engage in economic development on that site.

Second, there is no valid purpose for additional healthcare facilities, particularly in the immediate vicinity of the existing SIHC facilities. As an economic development measure, the Ewiiaapaayp's plan is ill-conceived. An agency is required to determine the accuracy of data used to support a proposal. Viejas provided an expert report that assessed the demand for additional medical facilities in Alpine in response to Ewiiaapaayp's stated purpose and need. Contrary to Ewiiaapaayp's unsupported assertions, there is more than adequate capacity in the region's health services. In fact, the Alpine area has greater healthcare provider availability than most places in California with similar populations and demographics. (SAR 185, Ex. 4). BIA never addressed this point.

Further calling into question the veracity of Ewiiaapaayp's stated purpose, the record on the reactivated Walker Parcel request references Ewiiaapaayp's desire to develop the Clinic Parcel, possibly even for gaming. For example, the CEDS report states that although Ewiiaapaayp "currently has no specific plans or project for its Indian lands eligible for tribal government gaming," Ewiiaapaayp's "lands eligible for tribal government gaming [] is subject to a federal lease until 2012." (AR 20, Summ. at 3). Moreover, BIA itself acknowledged the likely

use of the Clinic Parcel for gaming in the Regional Director's September 29, 2010, memorandum.

The Walker Parcel proposal ultimately makes no sense unless gaming is part of the plan. If the Ewiiaapaayp wish to develop a healthcare facility, why are they trying to evict the SIHC? If non-gaming economic development were truly a goal, why not use the Walker Parcel for that purpose? It simply makes no sense to develop a health clinic on one site when it already exists on another, and insist on removing the existing health clinic unless the Ewiiaapaayp want to engage in an activity that is permissible on only one site in Alpine, which is an off-reservation casino on the pre-1988 Original Site for the SIHC Clinic. BIA may wish to take an application at face value, but where the stated purpose is untenable and there is a long and consistent track record confirming another intended purpose, BIA cannot turn a blind eye to the evidence.[50] Accepting the Ewiiaapaayp's stated purpose strains credulity. BIA was obligated to address these concerns, but did not in its ND. Accordingly, a remand is required. (AR 33 at 10).

3. BIA did not sufficiently address jurisdictional concerns.

BIA failed with respect to its jurisdictional analysis as well, in two ways. First, the ND describes what Ewiiaapaayp promised to the Harringtons, but does not actually reach any conclusion as to whether the criterion is satisfied. (AR 33 at 4-6) In addition, the ND does not address Viejas's concerns in any way. Jurisdictional and land use conflict concerns were raised multiple times in the proceedings below. (*See, e.g.*, AR 14(g) at 20-21, 90, 93). Yet, the ND

---

[50] *See* 5 U.S.C. § 706(2)(A); *Sierra Club v. Jacobs*, Slip Copy, 2005 WL 6247793, at *9 (S.D. Tex. 2005). "An EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing decision-makers and the public an accurate assessment upon which to evaluate the proposed project." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1157 (W.D. Wash. 2002). *See also Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 811-812 (9th Cir. 2005) (citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir.1996) ("Inaccurate economic information may

does not mention those comments at all. Indeed, the ND's cursory summary of Viejas' concerns fails to adequately describe the jurisdictional and land use conflict concerns. (AR 33 at 6) (stating that "granting the request will revive a highly controversial 2001 casino proposal and greatly hurt Viejas").

The APA requires more of BIA. When an off-reservation acquisition is involved under 25 C.F.R. § 151.11(b), such as here, the Secretary is to give greater weight to the concerns raised by the affected local governments and to more closely scrutinize Ewiiaapaayp's justification as the distance of the land relative to the tribe's reservation increases.[51] But regardless of whether BIA is proceeding under section 151.10 or section 151.11, it must address jurisdictional concerns.[52]

Viejas has repeatedly noted that acquiring land for another tribe in the immediate vicinity of the Viejas Reservation will severely impact Viejas sovereignty, jurisdiction, economic viability, and its ability to work with the City of Alpine. (*See, e.g.*, AR 14(g), 80). It also provided evidence of land use conflicts that would arise. *Id.* BIA should have considered and addressed the potential for this trust acquisition to negatively impact Viejas's interests. There is no justified need for the proposed acquisition in trust on behalf of Ewiiaapaayp and this application has already generated significant inter-tribal conflict and adverse effects to Viejas. Those effects will only be enhanced should BIA choose to acquire the Walker Parcel in trust.

---

defeat the purpose of an EIS by impairing the agency's consideration of the adverse environmental effects and by skewing the public's evaluation of the proposed agency action.")).

[51] *Id.* § 151.11(b).

[52] *See* 25 C.F.R. §§ 151.10(e), (f), & 151.11 (requiring consideration of "the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments," and "jurisdictional problems and potential conflicts of land use which may arise").

Even if Ewiiaapaayp only intends to operate a non-gaming economic enterprise on land within the immediate vicinity of the Viejas Reservation, BIA must consider Viejas' concerns in its analysis. BIA is well-aware of the problems that can arise when one tribe, which has a sufficient land base in another location, is allowed to intercede with additional trust lands in the midst of another Tribe's territory over the objection of the second Tribe. At a minimum, BIA had a duty to evaluate the Viejas concerns and respond to them in the ND.

D. BIA Failed to Address Comments Made in Opposition to the Walker Parcel Trust Acquisition.

The ND is also facially insufficient for another reason. To the extent that BIA described the comments provided by various parties, including Viejas, its response to those comments is nonexistent. On pages 3 – 6 of the ND, BIA purports to summarize comments provided by various parties. (AR 33 at 3-5). Although BIA's summary of the other comments is inadequate, with respect to Viejas' comments, the ND does not even use whole sentences, instead referring to its comments as "The need," "Menominee decision," "off-reservation application," and "environmental (FONSI)." (*Id.* at 6). (*See also* AR 14g, 14h). BIA's summary of Viejas' concerns is so cursory as to be dismissive.

The ND describes Ewiiaapaayp's response to the comments made by Viejas and others, but says nothing regarding BIA's position on those concerns. (*Id.* at 6-8). Did BIA adopt the Ewiiaapaayp's position? Did BIA assess Ewiiaapaayp's comments against those of the commenters? The ND says nothing on this point, leaving the parties to guess what BIA intended or how it assessed the various arguments. This failure goes to more than a duty to respond to comments. The criticisms of the Walker Parcel acquisition from Viejas and other parties go to

the heart of the decision criteria. By ignoring these comments, BIA fails to articulate the grounds for its decision.[53]

Further, because BIA erroneously reviewed the Ewiiaapaayp's trust application under the factors set forth only at 25 C.F.R. § 151.10, it did not address the factors under 25 C.F.R. § 151.11. As a consequence, BIA failed to consider the following critieria:

> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.
>
> (c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.[54]

The Regional Director did not consider the foregoing factors in making her decision in this matter.

California, San Diego County and Viejas raised substantial concerns under section 151.11(b) to the BIA. The Ewiaapaayp Reservation is 38 miles from the Walker Parcel. This difference demands that BIA more closely scrutinize Ewiiaapaayp's justification for the trust land request and give greater weight to the County's concerns. BIA failed to do so. BIA also failed to identify any Ewiiaapaayp business plan, as required under 25 C.F.R. § 151.11(c). BIA has not addressed these decision factors at all.[55]

---

[53] The woefully inadequate administrative record filed by BIA confirms it did not consider comments adequately. BIA did not even have many of the key comments in its decision-making records.

[54] 25 C.F.R. § 151.11.

[55] *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director, Bureau of Indian Affairs*, 47 IBIA 187 (2008).

E. BIA Failed to Comply with the National Environmental Policy Act.

BIA's reliance on an EA from 2001 (AR 1) that does not address changes in the region in the intervening decade and that continues to have the deficiencies complained of in 2001 violates NEPA. (*See, e.g.*, AR 39, 44, 50, 57, 60, 80).

1. BIA improperly processed Ewiiaapaayp's fee-to-trust application by relying on an outdated, deficient environmental assessment.

The ND relies on an outdated, inadequate, more than nine-year-old EA. The ND states that the Regional Office asked "AES, a consultant to independently review whether there has been a change in the acquisition purpose or whether there are changes in circumstances." (AR 33 at 13). That review was completed on July 9, 2008 (not 2009, as cited in the ND). (AR 100). The ND further states that the conclusion of the independent review was that "there is no change in circumstances and the purpose has changed slightly. . ." (AR 33 at 13). AES's conclusion is demonstrably incorrect, as subsequent comments from Viejas demonstrated. (AR 104 at 8-10). BIA did not address any of those comments and apparently did not ask AES to address those comments. Instead, the ND refers to the conclusions in AES's 2008 review, and simply concludes that "no further NEPA compliance is needed." (AR 33 at 13). This approach does not satisfy NEPA.

In addition to the deficiencies discussed below, Viejas identified significant new circumstances and information that bears directly on the environmental impacts of the proposed project after Ewiiaapaayp prepared the initial EA. (AR 104 at 8-10). BIA could have

determined whether those new circumstances required additional review, but instead, it failed to respond to those comments at all.[56] BIA ignored Viejas' NEPA comments altogether.

- Viejas noted, for example that a new 47,000-square-foot grocery store opened in Alpine after the 2001 EA. (AR 104 at 9). That project significantly increased traffic in the vicinity of the Walker Parcel. The EA/AES update/ND did not address this change or respond to this comment. The original EA states that it did NOT consider the impacts of the project because they were too speculative. (AR 65 at 2).

- Viejas noted that in April 2007, the office of the San Diego County Sheriff built its Alpine Substation. (SAR 185 at 6). The EA/AES update/ND did not address this change or respond to this comment.

- Viejas noted that on June 11, 2009, the Grossmont Union High School District's Governing Board approved a site for the acquisition and development of a new high school to serve students in the Alpine and Blossom Valley neighborhoods. (SAR 185 at 6). Viejas also noted that the site is 90 acres and is located within 1.69 miles of the Walker Parcel. Traffic associated with the construction and operation of the school was not considered in the 2001 EA. In fact, the community of Alpine met with the Grossmont Union School Board to discuss redistricting. The Board plans to survey Mountain Empire, Alpine, Grossmont, Steal Canyon, and El Cajon to determine whether those communities should be served by the new school. If Mountain Empire is included, it will dramatically increase traffic from East County into Alpine from both Willows Road exits. (AR rebuttal). The EA/AES update/ND did not address this change or respond to this comment.

- Viejas has conducted an extensive mapping of lands surrounding the Viejas Reservation and has determined that portion of Viejas Creek running through the Walker property as highly likely to contain important/significant cultural resources. (SAR 185 at 6 -7). As the indigenous tribe to the area, the Viejas Band is the most knowledgeable tribe in the area and was not consulted during the 2001 EA. The EA/AES update/ND did not address this change or respond to this comment.

- Consecutive years of drought have changed the groundwater tables. (SAR 185 at 7). The increased groundwater demand of a second clinic was not evaluated in the 2001 EA. The

[56] Courts have consistently held that while agencies should apply a "rule of reason" to the decision of whether supplemental NEPA documents are necessary, certain circumstances give rise to the need for new NEPA analysis. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989). In *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), the Ninth Circuit adopted a set of factors to rely on in determining whether supplementation of NEPA documents is required. The court held that the question of whether supplemental NEPA review was required would depend on the environmental significance of new information, the probability of its accuracy, the degree to which the agency considered and evaluated the impacts of the new information, and the degree to which the agency provided support for its decision not to supplement its NEPA documents with any explanations or additional data. This approach has been adopted in a number of other cases. *See, e.g., State of California v. Watt*, 683 F.2d 1253 (9th Cir. 1982).

addition of the Walker Parcel facility will add to the stress on existing water supplies, with cumulative effects throughout the area, and the seven-year-old EA fails to account for this information. The EA/AES update/ND did not address this change or respond to this comment.

All of these major new developments have dramatically changed the environmental analysis required in the NEPA review and invalidate the 2001 EA as the basis for BIA action. The EA/AES update/ND did not address these changes or respond to any of these comments.

Moreover, the EA was deficient in 2001, when it was first released. BIA has never addressed those problems. As noted in various comments, the following problems with the analysis were readily apparent in the 2001 EA:

- Traffic impacts and impacts to County roads, highways and intersections (AR 39 at 2; AR 44 at 4);
- Infrastructure capacity, including drainage facilities and improvements (AR 39 at 2);
- Land use and zoning impacts (AR 39 at 2);
- Impacts on biological and wetland impacts to Viejas Creek (AR 39 at 3);
- Analysis of surface water hydrology impacts (AR 39 at 3; AR 44);
- Impacts on groundwater supply and quality (AR 39 at 3; AR 44);
- Visual, light and aesthetic impacts (AR 39 at 3; AR 50 at 3);
- Noise generation (AR 39 at 3; AR 50 at 2);
- Air quality (AR 39 at 3; AR 44 at 5); and
- Public services (AR 39 at 3).

These issues were not adequately addressed in the 2001 EA and not corrected by the cursory "review" conducted by AES.

2. BIA improperly segmented the National Environmental Policy Act review by considering the Walker Parcel trust request separately from Ewiiaapaayp's various pending trust requests and lease termination request.

Despite comments objecting to BIA's segmentation of its NEPA review (AR 33 at 4, 6), the ND neither addresses the issue nor corrects the problem. Yet again, BIA failed to address concerns raised by Viejas and others in its ND, or otherwise in the record.

As Viejas argued in its comments, BIA has improperly allowed the Ewiiaapaayp's proposals to be segmented. NEPA strictly prohibits segmentation of a project to avoid thorough environmental review. The July 2008 AES "Independent Review Report" references only the 2001 EA, but the 2001 EA was followed by the May 2003 EA for the Casino/SIHC Clinic Lease Amendment/FTT Acquisitions (SAR 165) and the July 2003 Ewiiaapaayp request for an EIS (SAR 168). Although the 2003 EA did not address the 2001 EA, Viejas argued that there was one project and that Ewiiaapaayp was impermissibly segmenting the environmental review. The new 2008 project is again an attempt to push through, piecemeal, a project that is part of a proposal for casino development on the existing clinic site. (AR 104).

BIA is well aware of the several actions pending on behalf of the Ewiiaapaayp. The Ewiiaapaayp's proposed actions include:

1. A fee-to-trust request for the 16.69-acre Walker Parcel;
2. A fee-to-trust acquisition and reservation proclamation request for the 18.95-acre Salerno Parcel;
3. A reservation designation request for the SIHC Parcel; and
4. A fee-to-trust acquisition and reservation proclamation request for the approximately 10.45 acres called the Willows Road Parcels.

In fact, the CEDS report includes a partial list of the Ewiiaapaayp's pending applications. (*See* AR 20 at 3). That the pending requests are related is made clear by the Ewiiaapaayp's letter of December 21, 2009, in which the Ewiiaapaayp request that the Assistant Secretary take the following actions: 1) exercise his authority to approve the pending Walker trust acquisition on behalf of the Department to avoid the Board appeals process; 2) issue a reservation proclamation for the Clinic Parcel; and 3) affirm the Ewiiaapaayp's argument that the Ewiiaapaayp may reject the SIHC's exercise of its option to renew the lease for the health clinic. (AR 24). Likewise, when the Assistant Secretary returned the Walker Parcel application to the Regional Office for final processing, he also explained that the reservation proclamation request was not complete and was likewise returned to the Regional Office with instructions. (AR 31, 61, 65).

Federal law clearly requires the consideration of all of these proposed actions in one NEPA document. Multiple actions must be addressed together if they are "connected," "cumulative," or "similar" actions.[57] Such joint consideration is necessary to prevent an agency from "dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact."[58]

Agency actions are viewed as "connected" if they: 1) "[a]utomatically trigger other actions which may require environmental impact statements"; 2) "[c]annot or will not proceed unless other actions are taken previously or simultaneously"; or 3) "[a]re interdependent parts of a larger action and depend on the larger action for their justification."[59] Further, agency actions are deemed "cumulative" for purposes of the single NEPA document rule if, "when viewed with

---

[57] *See* 40 C.F.R. § 1508.25(a)(1)-(3); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894-95 (9th Cir. 2002); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), *cert. denied*, 534 U.S. 815.

[58] *Native Ecosystems*, 304 F.3d at 894 (*quoting Wetlands Action*, 222 F.3d at 1118) (internal quotations omitted).

[59] *See* 40 C.F.R. § 1508.25(a)(1).

other proposed actions," they have "cumulatively significant impacts."[60] Because "[b]oth connected actions and unrelated, but reasonably foreseeable, future actions may result in cumulative impacts," a single EIS is required for cumulative actions even if the actions are not deemed "connected."[61] Finally, "similar actions" are those that "when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography."[62] Under each of these rules – and only one need be applicable for the single EIS rule to be triggered – all of Ewiiaapaayp's proposed actions are related, and must be discussed in a single EIS.[63]

The Willows Road Parcels are adjacent to the SIHC parcel. The Salerno and Walker Parcels are located across Interstate 8, Willows Road, and Alpine Boulevard, not far from the Joint Clinic Parcel. All are within the immediate vicinity of the proposed development. These actions share common geography, and therefore qualify as similar actions. Second, these actions are "cumulative" for purposes of the single NEPA document rule because they will have "cumulatively significant impacts."[64]

Finally, Ewiiaapaayp's proposed actions are obviously "connected." If health clinic expansion truly was Ewiiaapaayp's objective, the current site would be more than adequate for that purpose. Even if the Clinic Parcel were not adequate for an expansion, Ewiiaapaayp already own land in fee adjacent to the Clinic Parcel (*i.e.*, the Willows Road Parcels). As noted above, Ewiiaapaayp's plan does not make sense, unless Ewiiaapaayp intends to use the Clinic Parcel for

---

[60] 40 C.F.R. § 1508.25(a)(2).
[61] *Save the Yaak Committee v. Block*, 840 F.2d 714, 721 (9th Cir. 1988).
[62] 40 C.F.R. § 1508.25(a)(3). *Northwest Resource Info. Ctr. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1067 (9th Cir. 1995).
[63] *See, e.g., Shoshone-Paiute Tribe v. United States*, 889 F.Supp. 1297, 1308 (D. Idaho 1994)

gaming purposes. BIA cannot view a single action in isolation – doing so violates NEPA and is arbitrary and capricious decision-making.

Had BIA conducted the proper review, it would have appropriately concluded that the proposed actions must be considered together, almost certainly in an EIS. It is virtually certain that Ewiiaapaayp wants to build a casino on the Clinic Parcel. Such development brings substantial traffic, noise, water, pollution, crime and quality-of-life impacts. The Ewiiaapaayp proposal is complicated by the fact that it also requires relocation of the existing health clinic, which could impair health care accessibility, particularly when the new casino traffic is considered.

Despite the obvious, inter-related nature of each of these proposed actions, BIA limited its review to the 2001 EA. That document offers no justification for the agency's decision to omit the other obviously related actions. Indeed, the EA assiduously avoids mentioning the relationship between the Walker Parcel application and the other actions. It was precisely for this reason that the Assistant Secretary withdrew the Regional Office's 2002 notice of intent to acquire the land in trust. BIA's decision should be vacated and remanded for reconsideration under the appropriate NEPA analysis.

3. BIA relied on an improper statement of purpose and need and range of alternatives in the EA.

As Viejas demonstrated in its letter of July 15, 2009, to BIA, the EA relies on an out-of-date and inaccurate purpose and need statement. (AR 104). A correct statement of purpose and need is important, because the statement of purpose and need dictates the scope of the NEPA

[64] See 40 C.F.R. § 1508.25(a)(2).

analysis.[65] The scope for the reactivated application is broader than for the original application because the purpose of this application is economic development, as opposed to moving a healthcare clinic.

If the purpose and need of an action is to provide healthcare, the questions that must be addressed in the environmental document are: 1) is there actual need for healthcare?; and 2) what are other reasonable alternatives for providing the needed healthcare? Where the purpose and need of an action is economic development, as the ND now states to be the case, the questions the environmental document must focus on are: 1) is there need for economic development (and will the specific action provide the economic development?); and 2) what are other reasonable alternatives for enabling economic development? Depending on the actual purpose and need for the proposal, the environmental reviews would be different.

As noted above, the purpose and need statement for the 2001 EA focused on providing healthcare and governmental offices. The renewed application relies on much broader economic development as justification for the proposed trust acquisition. Ewiiaapaayp CEO Will Micklin

[65] Under NEPA, the purpose and need statement of a trust application provides the foundation for the environmental review. The purpose of the NEPA process is to provide decisionmakers with an environmental disclosure sufficiently detailed to aid in the substantive decision of whether to proceed with an action in light of its consequences and alternatives, to provide the public with information on the impacts of the project, and to encourage public participation in the development of that information. *Trout Unlimited v. Morton*, 509 F.2d 1282 (9th Cir. 1974). In order to appropriately frame the NEPA review, the action agency must first reasonably and fairly define the project's purpose. *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-6 (D.C. Cir. 1991)). The CEQ regulations require that, when preparing NEPA documents, agencies develop purpose and need statements that "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1052.13. In preparing a NEPA document, NEPA requires agencies to take three steps: first, the agency must identify the purpose and need of the proposed project; second, given that purpose, the agency must identify reasonable alternatives to the proposed project; and third, the agency must identify the extent to which alternatives should be explored. *Simmonsi*, 120 F.3d at 666. When, as here, an agency misstates the purpose and need, the resulting NEPA review is based on false and flawed premises. Appropriate alternatives cannot be identified or analyzed and decisionmakers are presented with a review that does not represent a true or complete examination of the proposed project and its impacts.

has stated that "[t]he purpose of [the Walker Parcel request] is economic development."[66] The 2001 EA does not reference "economic development."[67]

Despite the different focus, AES concludes that "[t]he purpose and need of the Tribe remains the same today as it did when the EA was prepared and the FONSI was issued." (AR 100). Yet that position conflicts with the purpose clearly stated by Ewiiaapaayp Executive Director Micklin. This issue is critical, as it directly impacts what NEPA requires to be considered in the alternatives analysis of the document. Given that the purpose of Ewiiaapaayp's present proposal is plainly general economic development, not merely healthcare, it is obvious that the 2001 EA is inadequate.

The EA statement of purpose and need is not adequate in light of the Ewiiaapaayp's shift in focus to economic development. BIA should have addressed this comment, but did not.

4. BIA relied on a deficient analysis of direct and cumulative effects in the Environmental Assessment.

Likewise, BIA does not address Viejas's comments regarding the cumulative effects analysis. In response to BIA's notice of the 2001 EA, Viejas provided comments regarding changes in circumstances that affect the cumulative effects analysis (and again noted that the cumulative effects analysis in the 2001 EA was inadequate). (AR 48). Since the 2001 EA, significant new development has occurred, impacting the "affected environment" and altering the cumulative effects analysis (which was ignored in the 2001 EA), a described above. Not only should the new development (*i.e.*, the grocery store, the sheriff's station, and the new high school) have been addressed in a new EA (or more likely EIS, when the Ewiiaapaayp's other

[66] *See, e.g.*, AR 106 at 9, 13, 14, and 23.
[67] *See* AR 62 at 1-5.

actions are considered), these developments require a reassessment of cumulative impacts. The cumulative impacts on traffic, for example, of the Ewiiaapaayp's various proposed acquisitions and development, when considered with the new development, are significant.

F. BIA Violated the Endangered Species Act by Failing to Comply with Section 7(a)(2)

The BIA's ND relies upon a 2002 biological opinion (BiOp) to satisfy BIA's obligation to consult with FWS over the proposed action and insure that acquiring the Walker Parcel in trust for development purposes will not cause jeopardy to, or adversely modify the crtical habitat of, any listed species.[68] In the case of the Walker Parcel, BIA had to satisfy this duty for the endangered arroyo toad,[69] and its critical habitat.

The record cited in the ND confirms that BIA has taken no action since the consultation in 2002, the resulting BiOp, and the 2002 MOA between BIA, FWS, and Ewiiaapaayp. Two subsequent events establish that the ESA compliance measures from nine years ago do not suffice.

First, a court decision in *Building Industry Legal Defense Foundation v. Norton*,[70] issued after the April 10, 2002, BiOp invalidated the entire critical habitat designation for the arroyo toad.[71] On April 13, 2005, FWS redesignated critical habitat,[72] but that action led to another lawsuit and a consent decree which required yet another designation.[73]

---

[68] 16 U.S.C. § 1536(a)(2).
[69] Final Rule Listing the Arroyo Toad as endangered under the Endangered Species Act. 59 Fed. Reg.64,589 (Jan. 17, 1995).
[70] *Building Industry Legal Defense Foundation v. Norton*, 231 F.Supp.2d 100 (D.D.C. 2002).
[71] *Id.*
[72] Final Rule Designating Critical Habitat for the Arroyo Toad. 70 Fed. Reg. 19562 (Apr. 13, 2005).
[73] *Center for Biological Diversity v. FWS*, Case No. 07-2380 (S.D.Cal. Dec. 19, 2007).

On February 9, 2011, FWS designated revised critical habitat for the arroyo toad for the second time since the 2002 BiOp.[74] The new designation applied different considerations for designation than were used in the 2001 designation upon which the 2002 BiOp was based. In fact, the 2011 designation expressly excluded lands on the Viejas Reservation and the nearby Capitan Grande Reservation shared jointly by Viejas and the Barona Band.[75] It did so based on the existence of Tribal species conservation strategies.[76] The 2011 designation continued to *include* the lands involved in the Walker Parcel request.[77] The existence of the 2002 MOA appears to have not been grounds to exclude the Walker Parcel from the designation. Thus, there must have been a reason for FWS to keep the Walker Parcel lands within the newly designated critical habitat.

Under the ESA regulations, the action agency, here, BIA, must reinitiate consultation when critical habitat is designated or redesignated after the issuance of a BiOp.[78] In the case of the arroyo toad, the initial court decision in *Building Industry* invalidated the critical habitat designation upon which FWS based the 2002 BiOp. Hence, the 2002 BiOp had no continued applicability to arroyo toad critical habitat. Two subsequent designations occurred, in 2005 and 2011, yet BIA did not reinitiate consultation or, it appears, even inquire of FWS whether the Walker Parcel acquisition would trigger new consultation under the "may affect" standard, as also required by the section 7(a)(2) regulations.[79]

---

[74] Final Rule Revising the Designation of Critical Habitat for the Arroyo Toad. 74 Fed. Reg. 7246 (Feb. 9, 2011).
[75] 76 Fed. Reg. at 7,251.
[76] *Id.*
[77] *Id.*
[78] 50 C.F.R. § 402.16.
[79] 50 C.F.R. § 402.16(b).

The second significant factor requiring reinitiation is the Ninth Circuit decision in 2004 in *Gifford Pinchot Task Force v. FWS.*[80] This decision invalidated the definition of adverse modification of critical habitat in the section 7(a)(2) regulations because it did not account for a recovery standard.[81] The result of this holding has been to indicate that impacts to critical habitat trigger a higher standard of review in the Ninth Circuit under section 7(a)(2) than the duty to avoid jeopardy. The 2002 BiOp relied on the pre-*Gifford Pinchot* definition of adverse modification. The Department of the Interior announced prior to the ND that it was undertaking an ESA rulemaking process to redefine adverse modification to account for the *Gifford Pinchot* ruling. *See*, FWS, *Improving ESA Implementation through Regulation Review.*[82] Thus, it was important for BIA to rely on a 2002 BiOp that was based upon an invalidated critical habitat designation subsequently redefined twice by FWS, and to be applied under a new standard defined by the Ninth Circuit. BIA's simple solution would have been to consult with FWS under the regulations at 50 C.F.R. Part 402, rather than fall back on the outdated 2002 BiOp without any further inquiry. Its failure to do so requires its decision be vacated and remanded.

---

[80] *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9th Cir. 2004)

[81] *Id.* at 1069 - 1070.

[82] FWS, *Improving ESA Implementation through Regulation Review*, http://www.fws.gov/endangered/improving_ESA/reg_reform.html. FWS states in its ESA reform proposal: "The 5th and 9th circuit courts of appeal have invalidated the regulatory definition, finding that the definition 'reads the 'recovery' goal out of the adverse modification inquiry' by requiring that a 'survival' threshold be met (Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service No. 23-35279 (9th Cir. 2004); Sierra Club v. U.S. Fish and Wildlife Service 245 F3d 434 (5th Cir. 2001)). Since 2004, both the Service and NOAA Fisheries have based determinations on policy guidance without the benefit of a regulatory definition. A new regulatory definition would provide a consistent basis to determine whether Federal actions have met their responsibilities under Section 7(a)(2) of the ESA. *Id.* Along with *Gifford Pinchot*, several courts have recognized that an agency must look at the prospects of recovery of species and not just avoid jeopardy. *See e.g., Southwest Center for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118, 1125 (S.D. CA 2006), *appeal dismissed and remanded by* 409 Fed. Appx. 143 (9th Cir. 2011) (recognizing principle and need for recovery in context of City of San Diego Conservation Plan); *Butte Environmental Council v. United States Army Corps of Engineers*, 620 F.3d 936, 947 (9th Cir. 2010) (recognizing the principle of recovery as discussed in *Gifford Pinchot*).

IV. CONCLUSION

For the reasons stated above, Viejas respectfully requests that the Board vacate and remand the proposed acquisition of the Walker Parcel for reconsideration.

Dated: November 4, 2011

Respectfully submitted,

Donald C. Baur
Jena A. MacLean

Counsel for Appellant
Viejas Band of Kumeyaay Indians
700 Thirteenth Street, NW Suite 600
Washington, DC 20005
(202) 654-6234

BEFORE THE
INTERIOR BOARD OF INDIAN APPEALS

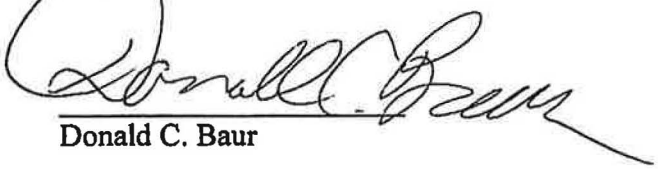
COUNTY OF SAN DIEGO, CALIFORNIA and VIEJAS BAND OF KUMEYAAY INDIANS, Appellants,	)	JOINT REQUEST FOR EXTENSION OF THE BOARD'S SCHEDULING ORDER
v.	)	Docket Nos. IBIA 11-136 11-137
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	)	November 4, 2011

MOTION TO SUPPLEMENT THE RECORD

Appellee Viejas Band of Kumeyaay Indians respectfully request that the Board exercise its authority under *Cecilia Plain Feather v. Acting Billings Area Director*, 18 IBIA 26 at 29 (1989), and *United Auburn Indian Community v. Sacramento Area Director*, 24 IBIA 33 at 48, fn. 19 (1993), to include the enclosed exhibits as part of the administrative record now before the Board in the current appeal. The documents included in this motion constitute substantial evidence in support of Appellant's arguments that the Bureau of Indian Affairs' decision to take the 16.69-acre Walker Parcel in Alpine, California, into trust should be overturned, and should be included in the administrative record for this appeal. All of the documents referenced herein have appeared before the Bureau of Indian Affairs. The Board has the power to order supplementation of the record. *See id.*

Dated: November 4, 2011

Respectfully submitted,



Donald C. Baur

Counsel for Appellant
Viejas Band of Kumeyaay Indians
700 Thirteenth Street, NW Suite 600
Washington, DC 20005
(202) 654-6234

INDEX

Walker Parcel Supplemented Administrative Record

Documents Included by Viejas' Motion to Supplement:

109. Ewiiaapaayp/SIHC Land into Trust Application for the Clinic Parcel (Jan. 9, 1985)

110. Cuyapaipe Reservation Community Development Block Grant – Health Center (Feb. 14, 1985)

111. Memorandum from R. Swimmer, Assistant Secretary – Indian Secretary, to BIA Regional Director, authorizing taking Clinic Parcel into trust (Dec. 16, 1985)

112. Letter from R. Swimmer, Assistant Secretary – Indian Affairs, to O. Tonemah, Executive Director, SIHC, giving notice of authorization to take Clinic Parcel into trust (Jan. 2, 1986)

113. Acceptance of Conveyance of Clinic Parcel from Ewiiaapaayp to United States (Apr. 1, 1986)

114. Lease No. MBL-71 (Jan 12, 1987)

115. BIA Approval of Lease No. MBL-71 (Feb. 24, 1987)

116. Meeting Minutes for SIHC Board of Directors Meeting with Native American Investments (April 25, 1994)

117. Letter from William Micklin, President & Chairman, Native American Investments, to SIHC and Ewiiaapaayp (May 6, 1994)

118. Letter from W. Micklin to SIHC and Ewiiaapaayp (May 22, 1994)

119. Ewiiaapaayp Tribal Resolution SCA-CY-10-96 approving offer of lease of additional Clinic Parcel to SIHC for 25 years with option (May 23, 1994)

120. Lease No. 5002519722 between SIHC and Ewiiaapaayp for 1.42 acres adjacent to Clinic Parcel (Aug. 26, 1996)

121. BIA Notice of Decision to take 1.42 acres into trust in the Ewiiaapaayp's name (Sept. 12, 1997)

122. Ewiiaapaayp request to BIA for a reservation proclamation for "Little Cuyapaipe Reservation" (Mar. 3, 1999)

123. Letter from BIA Area Director to T. Pinto, Ewiiaapaayp Chairman, requesting further information for reservation proclamation request (Mar. 25, 1999)

124. Letter from T. Pinto, Ewiiaaapaayp Chairman, to BIA Area Director, regarding reservation proclamation (Mar. 30, 1999)

125. Ewiiaapaayp Tribal Resolution No. 99-03 re: reservation proclamation (Apr. 29, 1999)

126. Letter from BIA Area Director, to T. Pinto, Ewiiaapaayp Chairman, acknowledging receipt of reservation request (May 14, 1999)

127. Letter from BIA Superintendent, to T. Pinto, Ewiiaapaayp Chairman, re: notice of review of reservation request (July 12, 1999)

128. Meeting Minutes for SIHC Board of Directors Meeting (Oct. 11, 1999)

129. Construction, Relocation and Lease Relinquishment Agreement between Ewiiaapaayp and SIHC (Dec. 21, 2000)

130. Ewiiaapaayp letter to BIA requesting action on reservation proclamation request (Jan. 30, 2001)

131. Ewiiaapaayp Tribal Resolution No. 01-17 (Feb. 20, 2001)

132. Ewiiaapaayp letter to BIA regarding reservation proclamation request (July 20, 2001)

133. Ewiiaapaayp letter to BIA regarding reservation proclamation request (July 26, 2001)

134. Ewiiaapaayp letter to BIA regarding reservation proclamation request (Aug. 7, 2001)

135. Ewiiaapaayp Tribal Resolution No. 01-23 re: Salerno Parcel trust request (including attached property title materials) (Aug. 8, 2001)

136. Ewiiaapaayp Land into Trust Application for the Salerno Parcel (Sept. 13, 2001)

137. Letter from H. Pinto, Ewiiaapaayp Chairman, to BIA Regional Director re: status of reservation proclamation request for Clinic Parcel (Oct. 25, 2001)

138. Ewiiaapaayp Tribal Resolution No. 02-01, re: Clinic Parcel Reservation Proclamation (Jan. 29, 2002)

139. Letter from H. Pinto, Ewiiaapaayp Chairman, to BIA Realty Office submitting revised Reservation Proclamation Notice for the Clinic Parcel (Feb. 6, 2002)

140. Letter from State Senator J. Brulte to BIA Regional Director in opposition to off-reservation gaming for Ewiiaapaayp (Feb. 11, 2002)

141. Letter from B. Bledsoe Downes, Dorsey & Whitney LLP for Ewiiaapaayp, to BIA Regional Director, requesting Walker Parcel contiguity determination (June 13, 2002)

142. Memorandum from BIA Regional Director to BIA Regional Solicitor re: Ewiiaapaayp request for Walker Parcel contiguous lands determination (June 17, 2002)

143. Letter from Assistant Secretary – Indian Affairs, to H. Pinto, Ewiiaapaayp Chairman re: May 24, 2002 letter responding to letter from U.S. Representatives and giving notice of withdrawal of Walker Parcel trust decision (Aug. 1, 2002)

144. Letter from State Assemblyman J. La Suer to Secretary of Interior in opposition to off-reservation gaming for Ewiiaapaayp (Aug. 9, 2002)

145. Letter from State Assemblyman M. Wyland to Secretary of Interior in opposition to off-reservation gaming for Ewiiapaayp (Aug. 9, 2002)

146. Letter from State Senator B. Morrow to Secretary of Interior in opposition to off-reservation gaming for Ewiiaapaayp (Aug. 15, 2002)

147. Viejas Paper on Opposition to Walker Parcel trust request (Aug. 23, 2002)

148. Memorandum from BIA Regional Director to Assistant Secretary-Indian Affairs transmitting administrative record for Walker Parcel trust decision (Aug. 27, 2002)

149. Letter from G. Martin, Viejas attorney, to Assistant Secretary – Indian Affairs, giving notices of Viejas lawsuit against SIHC re: lease termination, and additional information to consider in necessary EIS (Sept. 18, 2002)

150. Letter from Assistant Secretary – Indian Affairs, to U.S. Rep. D. Hunter, responding to letter of July 15, 2002, and giving notice of withdrawal of Walker Parcel trust decision (Sept. 26, 2002)

151. Letter from BIA Director, Office of Trust Responsibilities, to State Assemblyman J. La Suer, responding to letter of August 9, 2002, and giving notice of withdrawal of Walker Parcel trust decision (Oct. 9, 2002)

152. Letter from H. Pinto, Ewiiaapaayp Chairman, to San Diego Board of Supervisors re: Request for Consultation and Cooperative Agreements (Oct. 14, 2002)

153. Letter from Assistant Secretary – Indian Affairs, to State Senator B. Morrow, responding to letter of Aug. 15, 2002, and giving notice of withdrawal of Walker Parcel trust decision (Oct. 19, 2002)

154. Letter from Assistant Secretary – Indian Affairs, to U.S. Rep. D. Issa, responding to letter of July 12, 2002, and giving notice of withdrawal of Walker Parcel trust decision (Nov. 6, 2002)

155. Memorandum from Director, Office of Indian Gaming Management, to BIA Regional Director, re: Review of June 2002 Draft EA for the Ewiiaapaayp Reservation, SIHC Clinic Lease Relinquishment/Fee-to-Trust Acquisitions (Nov. 6, 2002)

156. Letter from U.S. Senators D. Feinstein and H. Reid to Secretary of the Interior, re: "clinic to casino" plan (Nov. 8, 2002)

157. Letter from Assistant Secretary – Indian Affairs, to L. Elliott, Manzanita Band Chairman, responding to letter of September 26, 2002 (Nov. 20, 2002)

158. Letter from Save our Forests and Ranchlands to BIA opposing Ewiiaapaayp EA and lease relinquishment (Jan. 9, 2003)

159. Letter from M. Dean (individual), to Secretary of the Interior re: Ewiiaapaayp proposed casino in Alpine (Jan. 15, 2003)

160. Letter from Assistant Secretary – Indian Affairs, to U.S. Senator D. Feinstein, responding to letter of November 8, 2002 (Jan. 27, 2003)

161. Letter from U.S. Senator B. Boxer, to Secretary of the Interior, re: numerous Ewiiaapaayp requests (Feb. 12, 2003)

162. Meeting Notes for File re: pending fee-to-trust land acquisitions for Jamul, Ewiiaapaayp, and La Posta (Feb. 14, 2003)

163. Letter from Assistant Secretary – Indian Affairs, to U.S. Senator B. Boxer, responding to letter of February 12, 2003 (Mar. 11, 2003)

164. Letter from Conference of the Western Attorneys General to Secretary of the Interior (Apr. 9, 2003)

165. NIGC Walker Parcel Environmental Assessment (May 2003)

166. Letter from B. Barrett, Viejas Vice Chairman, to NIGC, re: Ewiiaapaayp EA (June 13, 2003)

167. Letter from D. Jacob, San Diego Co. Board of Supervisors, to U.S. Senator B. Boxer, urging opposition to Ewiiaapaayp requests (June 23, 2003)

168. Letter from H. Pinto, Ewiiaapaayp Chairman, to Assistant Secretary – Indian Affairs, re: request for preparation of EIS (July 22, 2003)

169. Letter from H. Pinto, Ewiiaapaayp Chairman, to Secretary of Interior, re: joint venture with Viejas and requesting that DOI delay processing pending decisions directly related to Ewiiaapaayp gaming project to allow cooperative plan between tribes (Sept. 10, 2003)

170. Letter from U.S. Senator B. Boxer, to BIA Office of Congressional & Legislative Affairs, transmitting June 23, 2003, letter from D. Jacob (Oct. 17, 2003)

171. Letter from Assistant Secretary – Indian Affairs, to U.S. Senator B. Boxer, responding to letter of October 17, 2003 (Dec. 12, 2003)

172. [Proposed] Amendment to Tribal-State Compact between the State of California and Ewiiaapaayp (Aug. 18, 2004)

173. Report for the Ewiiaapaayp-Viejas Inter-Tribal Task Force: *History, Findings, and Recommendations for the Ewiiaapaayp-Viejas Joint Venture Project* (Supplemented Jan. 15, 2008)

174. Motion for Summary Judgment, *Luna Gaming – San Diego LLC, v. Dorsey & Whitney, LLP, et al.*, No. 06-cv-2804 (S.D. Cal. Feb. 8, 2008)

175. Letter from Deputy Assistant Secretary – Indian Affairs, to H. Pinto, Ewiiaapaayp Chairman, rejecting amendment to Tribal State Compact (Mar. 18, 2008)

176. Email from BIA Regional Director, to BIA Central, giving notice of Walker Parcel request reinitiation, history of request, and request for documents (Aug. 6, 2008)

177. Letter from R. Pinto, Ewiiaapaayp Chairman, to B. Barrett, Viejas Chairman, re: proposed joint venture project (Aug. 19, 2008)

178. Letter from R. Pinto, Ewiiaapaayp Chairman, to B. Barrett, Viejas Chairman, re: compact amendment (Aug. 20, 2008)

179. Letter from R. Pinto, Ewiiaapaayp Chairman, to B. Barrett, Viejas Chairman, re: proposed joint venture project (Sept. 8, 2008)

180. BIA Contact Report re: conference call with W. Micklin, Ewiiaapaayp (and attorneys) re: Walker Parcel request being given top priority (Sept. 10, 2008)

181. Letter to Reviewing Agencies from California Governor's Office of Planning and Research, State Clearinghouse and Planning Unit, re: Notice of Walker Parcel request (Oct. 24, 2008)

182. Letter from B. Barrett, Viejas Chairman, to R. Pinto, Ewiiaapaayp Chairman, re: proposed joint venture and Walker Parcel application renewal (Oct. 30, 2008)

183. Comment letter from Daniel & Gloria Harrington on Walker Parcel request (Jan. 7, 2009)

184. Letter from U.S. Representatives Hunter, Filner, Bilbray, Issa, and Davis to BIA (Mar. 26, 2009)

185. Comment letter from Viejas – Rebuttal to the Ewiiaapaayp Band's Response to Comments on the Proposed Acquisition in Trust of the Walker Parcel (Nov. 23, 2009)

186. Letter from B. Barrett, Viejas Chairman, to NIGC, re: Ewiiaapaayp economic development opportunity for wind energy (Jan. 20, 2010)

187. Letter from D. James, SIHC CEO, to BIA Superintendent and R. Pinto, Ewiiaapaayp Chairman, re: renewal of Clinic Parcel lease (Jan. 26, 2010)

188. Letter from R. Pinto, Ewiiaapaayp Chairman, to D. James, SIHC CEO, re: decision not to renew Clinic Parcel lease (Feb. 12, 2010)

189. Letter from R. Pinto, Ewiiaapaayp Chairman, to BIA Superintendent, providing notice of decision not to renew Clinic Parcel lease (Feb. 12, 2010)

190. Letter from B. Barrett, Viejas Chairman, to Assistant Secretary – Indian Affairs, re: renewal of Clinic Parcel lease (Apr. 14, 2010)

191. Letter from R. Pinto, Ewiiaapaayp Chairman, to BIA Superintendent, re: renewal of Clinic Parcel lease and Walker Parcel request (Apr. 14, 2010)

192. Memorandum from BIA Regional Solicitor, to BIA Superintendent, re: Clinic Parcel lease renewal, finding that Ewiiaapaayp may not decline to exercise renewal option (May 12, 2010)

193. Letter from Assistant Secretary – Indian Affairs, to R. Welch, Viejas Vice Chairman, re: status of reservation proclamation request for Walker Parcel (June 16, 2010)

194. Letter from R. Pinto, Ewiiaapaayp Chairman, to Assistant Secretary – Indian Affairs, re: reservation proclamation request for Clinic Parcel (Aug. 16, 2010)

195. Letter from B. Barrett, Viejas Chairman, to Assistant Secretary – Indian Affairs, re: additional off-reservation casino development plans of Ewiiaapaayp (Nov. 5, 2010)

196. Letter from R. Pinto, Ewiiaapaayp Chairman, to Assistant Secretary – Indian Affairs, re: meeting request to discuss Walker Parcel trust application, reservation proclamation request, and Clinic Parcel lease (Nov. 22, 2010)

197. Letter from BIA Regional Director to R. Pinto, Ewiiaapaayp Chairman, determining that Ewiiaapaayp does not have discretion to disapprove any extension of the Clinic Parcel lease (Dec. 22, 2010)

198. Materials prepared for Viejas meeting with Michael Smith, Deputy Bureau Director – Field Operations, BIA, and Michael Black, Director of BIA, asking BIA to: 1) deny Clinic Parcel reservation proclamation request; 2) confirm healthcare purpose of Clinic Parcel trust decision and necessity of 2-part determination prior to gaming; 3) determine Walker Parcel is not contiguous to Clinic Parcel; and 4) deny Walker Parcel trust request or, at a minimum, consider it as part of the comprehensive Ewiiaapaayp regional development plan and require an EIS (Jan. 21, 2011)

199. Ewiiaapaayp appeal of SIHC lease renewal, IBIA No. 11-062 (Feb. 1, 2011)

200. Letter from A. Pico, Viejas Chairman, to Assistant Secretary – Indian Affairs, re: Ewiiaapaayp off-reservation gaming proposals (Mar. 29, 2011)

201. Letter from U.S. Representatives B. Filner, D. Hunter, D. Issa, B. Bilbray, and S. Davis, to Secretary of Interior, in opposition to Walker Parcel decision (June 20, 2011)

202. Response Brief of the Jamul Indian Village, Manzanita Band of the Kumeyaay Nation, La Posta Band of Mission Indians, Campo Band of Mission Indians, and Viejas Band of Kumeyaay Indians, in SIHC lease renewal appeal, IBIA No. 11-062 (June 27, 2011)

203. Response Brief of the SIHC, in SIHC lease renewal appeal, IBIA No. 11-062 (June 27, 2011)

204. Letter from R. Pinto, Ewiiaapaayp Chairman, to Caltrans Native American Advisory Committee, re: proposed revisions to Caltrans MUTCD – signing for Indian Reservations and Rancherias (Aug. 9, 2011)

205. Iberdrola Renewables Press Release re: Availability of Final Environmental Documents for the Tule Wind Power Project (Oct. 14, 2011)

206. California Public Utilities Comm'n and U.S. Bureau of Land Management Notice of Availability of Joint Final Environmental Impact Report/Environmental Impact Statement for the East County Substation/Tule Wind/Energia Sierra Juarez Gen-Tie Projects (Oct. 14, 2011)

207. Letter from D. James, SIHC CEO, and L. Elliott, SIHC Vice Chairman, to BIA Acting Regional Director, re: renewal of SIHC lease (Mar. 17, 2010)

208. Letter from D. James, SIHC CEO, and L. Elliott, SIHC Vice Chairman, to R. Pinto, Ewiiaapaayp Chairman, BIA Acting Regional Director, and BIA Acting Superintendent, re: renewal of SIHC lease (June 14, 2010)

BEFORE THE
INTERIOR BOARD OF INDIAN APPEALS

COUNTY OF SAN DIEGO, CALIFORNIA and VIEJAS BAND OF KUMEYAAY INDIANS, Appellants,	)	APPELLANT VIEJAS BAND OF KUMEYAAY INDIANS' REPLY BRIEF
v.	)	Docket Nos. IBIA 11-136 11-137
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	February 22, 2012

I. INTRODUCTION

In its opening brief, appellant Viejas Band of Kumeyaay Indians describes both the longstanding efforts of the Ewiiaapaayp Band to develop a casino and the legal deficiencies of the Pacific Regional Director's decision to acquire the Walker Parcel in trust. For many years, Ewiiaapaayp has attempted to remove the Southern Indian Health Council (SIHC) Clinic from the current Clinic Parcel because it sits on pre-1988 trust land, available for gaming under the Indian Gaming Regulatory Act (IGRA). The Walker Parcel has been, and continues to be, the linchpin to the Ewiiaapaayp casino plan, because it would serve as the alternative site of the Clinic. The decision by the Pacific Regional Director to acquire the Walker Parcel in trust therefore would set in motion the domino effect of actions leading to the development of a casino on the Clinic Parcel. The Walker Parcel trust acquisition, by itself, will cause serious cultural, general welfare, environmental, and social harm to Viejas and the surrounding community. Combined with casino development, it would threaten governmental and economic self-sufficiency of Viejas as well.

While Ewiiaapaayp may pursue whatever gambit it desires, the Bureau of Indian Affairs (BIA) must follow the law in making a decision to acquire land in trust. As explained in the initial Viejas brief, BIA has failed to do so. The Pacific Regional Director: (1) failed to explain the Walker Parcel decision; (2) incorrectly assumed that the Walker Parcel was contiguous to reservation land and, as a result, applied an incorrect decision-making standard; (3) concluded without adequate support that the Walker Parcel qualifies for trust acquisition by Ewiiaapaayp; (4) relied on an out-dated environmental assessment (EA) that does not satisfy the requirements of the National Environmental Policy Act (NEPA); and (6) failed to comply with the Endangered Species Act (ESA) to evaluate impacts on the designated critical habitat for the arroyo toad.

BIA has made no attempt to explain or defend the Regional Director's decision in this appeal. Ewiiaapaayp's opposition brief (Opp.) fails to offer a valid defense of the Walker Parcel decision. Moreover, Ewiiaapaayp's argument that two governmental entities that have participated in the review process for Ewiiaapaayp's various actions for more than a decade (San Diego County, Viejas) lack standing ignores the record, the pleadings in this docket, and the controlling precedent for challenges trust land acquisition decisions. This brief sets forth the Viejas reply to the Ewiiaapaayp opposition brief. For the reasons set forth herein and in the Viejas initial brief, the Pacific Regional Director's decision must be vacated.

II. BACKGROUND

Two important developments have occurred since Viejas filed its opening brief. First, Ewiiaapaayp has adopted a new strategy for removing the SIHC from the Clinic Parcel. On December 8, 2011, Ewiiaapaayp Chairman Pinto wrote to the SIHC declaring default on the Clinic Parcel lease because of the alleged destruction of a Tribal backup well. Ex. 1. The SIHC responded by letter of December 21, which noted that the well is question is located on land

subject to a different lease than that governing the Clinic Parcel, and is thus irrelevant to the continued validity of the SIHC lease. Ex. 2 (enclosures omitted). The SIHC additionally noted that the well in question was sealed for public health reasons per an emergency order by the Environmental Protection Agency, with the constructive knowledge of Ewiiaapaayp. *Id.* While not required to do so, the SIHC, in an effort to show its good faith and ensure the continued operation of the Clinic, offered to fund the cost of a new well. To that end, the SIHC requested a meeting with BIA and Ewiiaapaayp to discuss the matter in person. The SIHC again requested a meeting by letter of January 12, 2012. Ex. 3. Ewiiaapaayp has not responded.

Ewiiaapaayp's effort to remove the SIHC from the Clinic Parcel, while at the same time using health care to justify the acquisition of the Walker Parcel, cannot be reconciled in the absence of an ulterior motive (i.e., casino development). The Walker Parcel acquisition is casually connected to Ewiiaapaayp's efforts to evict the SIHC. Ewiiaapaayp is being disingenuous, at best, when it states:

> SIHC is separately and actively contesting, with Viejas' active support, the Tribe's desire to end the lease with which SIHC *burdens the Tribe's 1986 Trust Parcel.* Viejas fears that if SIHC's lease with the Tribe ends, SIHC will be tempted to lease the Walker parcel from the Tribe. But any such relocation would be the voluntary choice of SIHC . . .

(Opp. at 14, n. 6) (emphasis added).

The question Ewiiaapaayp cannot answer is: why would it try to terminate one SIHC clinic, that allegedly "burdens" its trust land, so it can achieve the same "burden" on the Walker Parcel? The answer, of course, is that the pre-1988 trust status of the Clinic Parcel would make it possible to develop a casino on that land without the need to comply with the rigorous two-part determination of section 20 of IGRA. These actions are clearly connected now, as they were in

2002, when Assistant Secretary McCaleb recognized the interrelated nature of the Walker Parcel request and the casino plans for the Clinic Parcel, vacated the Walker Parcel trust acquisition, and directed the Pacific Regional Director to conduct a comprehensive review of all aspects of the Ewiiaapaayp development plan. (AR 6). Such a review is yet to occur.

Another significant factual development has occurred since the opening briefs. Ewiiaapaayp argues in its opposition brief that it needs trust status for the Walker Parcel because there is no economic development potential for its five members on the Band's 5,460-acre Reservation. (Opp. at 29). Viejas has demonstrated throughout the review of the Walker Parcel request (AR 14(g) at 15-20; AR 14(h) at 1-3; AR 80 at 1-2; AR 104 at 9-10; SAR 147 at 19; SAR 185 at 12-13, 27-28, 30; SAR 186; SAR 195) and in its opening brief (Viejas Br. at 54-57) that, in fact, there this no need for additional trust land for Ewiiaapaayp because of the development potential of the Reservation, especially for wind energy projects.

On December 27, 2011, the Bureau of Land Management (BLM) took an action that supports the Viejas position when it approved the 200 MW Tule Wind Project. 76 Fed. Reg. 80,962 (Dec. 27, 2011). A portion of this project will be located on the Ewiiaapaayp Reservation, subject to the approval of the tribal government. *BLM, Record of Decision: Tule Wind Project,* at 31 (Dec. 2011), available at http://www.blm.gov/ca/st/en/prog/energy/fasttrack/tule/fedstatus.html. In making the Walker Parcel decision, the Regional Director ignored the economic development potential of the Ewiiaapaayp Reservation, despite the evidence in the record on this point.

III. ARGUMENT

A. The Regional Director Did Not Provide the Required Analysis of Factors Set Out at 25 C.F.R. § 151.10 or Explain the Decision.

The Regional Director provided no analysis for her determinations on any of the factors in the Notice of Decision or the basis for considering the request under the on-reservation standards of 25 C.F.R. § 151.10 (as set forth below in section B). At no point does the Decision set forth any consideration of the arguments presented by Viejas, the County, or any other party. The best that can be said of the Decision is that it provides a cursory summary of the opposition's arguments. The Board has made it clear that a mere recitation of findings is not enough. "BIA's *analysis* of the criteria listed in 25 C.F.R. § 151.10 must appear in the decision and/or the administrative record." *Ziebach County, South Dakota v. Great Plains Regional Director, Bureau of Indian Affairs*, 36 IBIA 201, 204 (2001). The Regional Director's Decision falls far short of this requirement.

Ewiiaapaayp attempts to counter the Regional Director's failure by citing *McAlpine v. United States*, 112 F.3d 1429 (10th Cir.1997), which observes that the "regulation [for trust land acquisition] does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor. . . ." This argument misses the point. Viejas does not challenge the Regional Director's balancing in this claim; it challenges the Regional Director's failure to provide *any explanation or rationale for the action taken.* It is not possible to discern how the Regional Director balanced the factors because the Notice of Decision does not contain any analysis or discussion. Rather than supporting the Ewiiaapaayp argument, *McAlpine* supports the Viejas claim that the Regional Director is required to explain the Decision:

> Section 151.10 provides seven factors which the Secretary "shall" consider "[i]n evaluating requests for the acquisition of land in trust status." *** While the regulation does not provide guidance on how the Secretary is to "weigh" or "balance" the factors, it does provide a list of objective criteria that *the decisionmaker is required to consider* in evaluating trust land acquisition requests.

112 F.3d 1429 at 1434 (emphasis added)(citations omitted).

The test is whether BIA "articulate[d] a rational connection between the facts found and the choice made." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005). Here, the Regional Director's Decision is devoid of any analysis or explanation demonstrating consideration of the regulatory factors. The Regional Director merely catalogs the arguments made by each of the parties to this appeal, but provides no analysis of which arguments she adopts or why. (AR 33). Nor does the Regional Director discuss any of the Viejas arguments[1] or the comments from other parties. Her findings on the section 151.10 factors are nothing more than a conclusory laundry list.

The Board has consistently required BIA to explain its decisions. For example, in remanding a BIA decision analogous the Regional Director's action on the Walker Parcel, the Board explained:

---

[1] The fact that Viejas and other parties have made detailed and specific arguments concerning the regulatory criteria and other issues, both to the Regional Director and now to the Board, distinguishes this case from other appeals in which the appellant either failed to submit comments, allege error, or carry its burden of proof as a result of raising only generalized arguments. *See, e.g., Ziebach County*, 36 IBIA at 204 fn. 1 (2001), citing *City of Timber Lake, South Dakota v. Great Plains Regional Director*, 36 IBIA 188 (2001); *Dewey County, South Dakota v. Great Plains Regional Director*, 36 IBIA 107 (2001), and *Thurston County Board of Supervisors v. Aberdeen Area Director*, 34 IBIA 249 (2000). The dispute over the Walker Parcel has been pending for over ten years. The Ewiiaapaayp proposal is extremely controversial. Its flaws have been discussed extensively in the record. The Regional Director's decision provides no response to any of the issues or comments; it simply says "yes" to the application.

> The Superintendent's decision to acquire this land in trust contained mostly conclusory statements about the criteria listed in 25 C.F.R. § 151.10. . . . Although Appellant raised specific legal, factual, and abuse of discretion challenges to the Superintendent's decision, the Regional Director did not address any of those arguments in her decision. The administrative record does not contain any further analysis of either the criteria in 25 C.F.R. § 151.10 or the arguments which Appellant raised. Because the Regional Director did not participate in this appeal, she has also not provided any such analysis here.

Ziebach County, South Dakota v. Great Plains Regional Director, Bureau of Indian Affairs, 36 IBIA at 204. *See City of Eagle Butte, South Dakota v. Great Plains Regional Director, Bureau of Indian Affairs*, 38 IBIA 139 (2002) (remanding BIA decision to allow consideration of the regulatory factors). Here, Viejas has similarly raised specific legal and factual questions, challenges and issues that the Regional Director has not addressed.

In *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 31 IBIA 143 (1997), the Board held that the BIA administrative record in a trust acquisition case must show that the factors listed in 25 C.F.R. § 151.10 have been fully considered. The Board stated that "[i]n order to avoid any allegation of abuse of discretion, . . . BIA's final decision should be reasonable in view of its *overall analysis* of the factors listed in section 151.10. (Emphasis added). 31 IBIA 143 at 152 (footnotes and citations omitted). *See, also, Day County, South Dakota v. Aberdeen Area Director*, 17 IBIA 204 (1989) (stating that BIA's analysis of the criteria listed in 25 C.F.R. § 151.10 must appear in the decision and/or the administrative record); *Colby v. Acting Eastern Oklahoma Regional Director*, 35 IBIA 139 (2000) (Regional Director vacated Superintendent's decision and remanded the case when the administrative record did not support the Superintendent's trust acquisition decision); *Okanogan County, Washington v. Acting Portland Area Director*, 30 IBIA 42 (1996) (citing to *City of Eagle Butte, South Dakota v. Aberdeen Area Director*, 17 IBIA 198 (1989) (finding that proof of BIA's consideration of these factors should appear in the record)).

Here, the Regional Director's failure to support the Decision with any analysis of the section 151.10 factors, or with the reasons for reviewing the decision under section 151.10 rather than 151.11, or to address arguments made by the Viejas and others, compels the Board to vacate the decision and remand the matter for the required consideration. Had the Regional Director properly considered the factors, it would be evident that the Walker Parcel does not qualify for trust status for the reasons set forth in the voluminous record, as summarized in the Viejas' opening brief. (Viejas Br. at 44-62).

B. The Regional Director Used the Incorrect Standard in Evaluating the Proposed Acquisition of the Walker Parcel.

BIA erroneously reviewed the Ewiiaapaayp request under the standards in 25 C.F.R. § 151.10 – the authority for *on-reservation* trust requests – rather than 25 C.F.R. § 151.11 – the authority for *off-reservation* requests. Section 151.10 applies only to land that is within, or contiguous to, the Tribe's reservation. When applying section 151.11 for noncontiguous land, BIA is to give greater scrutiny to the Tribe's justification for the acquisition and greater weight to the objections of local governments. *Id.* § 151.11(b). In addition, under section 151.11, the BIA decision must consider a business plan submitted by the Tribe. *Id.* § 151.11(c). That business plan must specify the anticipated economic benefits as justification for proposed use of the acquisition under the section 151.11 criteria.

BIA failed to apply these criteria to the Walker Parcel request. BIA did not scrutinize Ewiiaapaayp's justification or address the question about the relationship between the Walker Parcel and the Clinic Parcel (as well as other Ewiiaapaayp fee lands in the same area). Likewise, BIA made no findings about the benefit to Ewiiaapaayp compared to the negative effects of the

acquisition, considering the 38-mile distance of the Walker Parcel from the Reservation. Finally, there is no reference in the Decision to a section 151.11 business plan.

1. The Walker Parcel and the Clinic Trust Parcel Are Not Contiguous.

Ewiiaapaayp argues that the clinic and Walker Parcel are contiguous based on an alleged, nearly one century-old physical connection that has long since been severed. The opposition brief asserts that Alpine Boulevard, Willows Road, the Walker Parcel, and the Clinic Parcel were "literally physically contiguous" prior to the construction of I-8. (Opp. at 22). Ewiiaapaayp also claims that subsequent acquisitions by the State of California, dating as far back as the 1920s, separated the tracts. *Id.*

By making this argument, Ewiiaapaayp concedes that whatever contiguity may have once existed has been broken, based on the test set by the Board in *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director, Bureau of Indian Affairs*, 47 IBIA 187, 204-205 (2008) (the parcels must "adjoin or abut;" in other words the parcels must "touch"). Moreover, the record demonstrates that, contrary to the Ewiiaapaayp assertion of prior contiguity, the parcels *never shared a common boundary*. (SAR 185 at 11).

Ewiiaapaayp also argues that BIA can look to California real estate law for guidance in interpreting federal law. (Opp. at 23, 24). This argument fails for three reasons. First, the Regional Director made no finding pertaining to contiguity, so this argument cannot be attributed to BIA or accorded any deference.

Second, the California Subdivision Map Act cited by Ewiiaapaayp states: "The definitions in this article *apply to the provisions of this division only and do not affect any other provisions of law*." Cal. Government Code 66414 (emphasis added). Thus, by its own terms, the

definition is inapplicable to federal law for trust land acquisition. Moreover, the term used in the California Code is not "contiguous" but "contiguous units" for the purpose of subdividing property, which is not at issue here.

Third, California real estate law cannot apply where there is direct contrary federal precedent. Under *Jefferson County,* the two parcels are not contiguous because they do not touch; California real estate practice is irrelevant.

Ewiiaapaayp also argues that, at the time of construction of Willows Road, the public only acquired a right-of-way and not fee simple title. Even if true, this argument does not address the separation also created by I-8 and Alpine Boulevard. Nor does it address the current status of Willows Road. San Diego County owns the land for Willows Road, and no argument regarding surface easements preserving pre-existing contiguity can apply. (SAR 185 at 11).

Ewiiaapaayp also cites *People v. Thompson*, 43 Cal. 2d 13, 19 (1954), a state law case, for the federal question of what "contiguous" means under the trust land regulations. (Opp. at 24). Even if California law was relevant, this case does not apply. *People v. Thompson* used a "unity of use" test to determine whether a landowner could claim severance damages as part of the compensation for condemnation of property:

> In determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, unity of use is the principal test and ... it is not considered a separate and independent parcel merely because it was ... separated by an imaginary line, or even if the two tracts are separated by a highway. ...

43 Cal. 2d at 23. This context is not analogous because the Walker Parcel, the Clinic Parcel, and the three intervening roadways never had "unity of use."

In any case, even if the foregoing arguments had merit, the Regional Director neither adopted them nor made any finding regarding contiguity of the parcels, an issue that goes to the validity of applying the section 151.10 factors without also applying section 151.11. The Board should conclude that the Walker Parcel and Clinic Parcel are not contiguous. At the very least, the question must be remanded to the Regional Director to make a determination on this question. *Jefferson County*, 47 IBIA at 207.

2. The Tribe's 1986 Trust Parcel is Not Reservation Land.

Section 151.10 also does not apply because the Clinic Parcel, *held in trust for health care purposes for the seven San Diego-area tribes,* is not a reservation for Ewiiaapaayp. The only reservation that applies for purposes of determining the applicability of section 151.11 is the formally designated, 5,460-acre Ewiiaapaayp Reservation, 38 miles east of the Walker Parcel.

As set forth in the Viejas opening brief, the Clinic Parcel cannot be treated as a reservation for purposes of section 151.11 applicability. (Viejas Br. at 44-49). Ewiiaapaayp does not address this claim, but rather relies on an argument that the Board should simply assume that the Regional Director had a valid basis for not applying the more rigorous standards of section 151.11. In support, Ewiiaapaayp cites to *Aitken County v. Acting Midwest Regional Director*, 47 IBIA 99 (2008), where the Board affirmed the Regional Director's treatment of the proposed acquisition as an on-reservation acquisition, even though no finding had been made that the parcel was an Indian reservation under 25 C.F.R. § 151.2. While Aitken County had argued that the Regional Director must make an express finding of the existence of a reservation, the Board declined to consider the argument because it was made for the first time on appeal and without any support. 47 IBIA at 106, n.5. Here, Viejas has repeatedly argued before the Regional Director that the Clinic Parcel is not a reservation, and it has provided ample support in

the record for this proposition. (AR 24, 85, 96, 162, and SAR 122, 125, 130-34, 137-39, 165, 194, 195).

In addition, the Board in *Aitken County* rejected the argument that evidence of a proclamation formally adding the trust parcel to the Tribe's reservation is required and that a Tribe can only have one reservation. 47 IBIA at 105-106. But a formal proclamation is only one way of demonstrating that the United States has recognized that a Tribe exercises governmental jurisdiction over an area of land, as required to be considered a reservation under 25 C.F.R. § 151.2(f).

While a presumption that a Tribe has exercised jurisdiction over land might apply, that assumption can be rebutted, 47 IBIA at 106-107 (footnote omitted). Viejas has contested Ewiiaapaayp's authority over the Clinic Parcel because the purpose of the 1986 trust acquisition was only for health care for seven separate Tribes. (Declaration of Anthony R. Pico, Chairman of the Viejas Band of Kumeyaay Indians ("Pico Declaration"), filed concurrently herewith, ¶¶ 23-24). The land was not acquired for any individual purpose of Ewiiaapaayp. The history of the Clinic Parcel is clearly set forth in the record (AR 28, SAR 110, SAR 109, SAR 208 Ex. 4, SAR 112, SAR 113, SAR 114, SAR 115, SAR 185) and the Viejas opening brief. (Viejas Br. at 9-12). BIA acquired the parcel in trust in Ewiiaapaayp's name for one reason only -- to expedite the acquisition of land in trust *for a tribal health clinic for seven Tribes*. (SAR 109, SAR 110, SAR 112, and SAR 185 at 21). As a matter of law, Ewiiaapaayp cannot exercise the governmental authority necessary to qualify as a reservation under section 151.2(f).

In addition, Ewiiaapaayp has not presented evidence that it exercises governmental jurisdiction over the Clinic Parcel, and no support for this position can be found in the record.

The documentation before the Board demonstrates nothing more than that Ewiiaapaayp acts as mere landowner, and the record can only support a finding that the federal government acquired the land for the limited purpose of tribal health care, not land over which Ewiiaapaayp could exercise jurisdiction. Finally, the Regional Director again failed to provide any analysis or discussion of this strongly contested issue. [2]

a. Trust Land and Reservation Land are Not Synonymous.

Ewiiaapaayp argues that there is no distinction between "trust land" and "reservation land."[3] (Opp. at 26) Ewiiaapaayp takes this position despite its longstanding efforts to have the Clinic Parcel formally designated as its reservation. (AR 24, AR 85, AR 96, SAR 122, SAR 125, SAR 130, SAR 131, SAR 132, SAR 133, SAR 134, SAR 137, SAR 138, SAR 139, SAR 165, SAR 194, SAR 195).

---

[2] Because the Tribe's actual reservation, where it has in fact exercised governmental jurisdiction, is 38 miles from the trust parcel, it is critical that the 25 C.F.R. §151.11 (b) and (c) criteria be applied. The Board has recognized: "It is clear from this regulatory structure that the comments of state and local governments with respect to acquisitions of noncontiguous lands . . . must be given increasing 'weight' and 'scrutiny' as the distance between a tribe's reservation and the subject land increases." *Jefferson County v. Northwest Regional Director*, 47 IBIA 187, 189-90 (2008).

[3] In *Aitken County*, 47 IBIA 99 (2008), the Board held that trust land equates to reservation land based on the specific facts in that case. There, the Board stated: "[w]e examine whether the law recognizes a distinction between 'trust land' and 'reservation land' and conclude that it does not." 47 IBIA at 106. It reached this conclusion by considering whether the United States had recognized the Tribe's governmental jurisdiction over the trust land at issue. In the absence of evidence to the contrary, the Board applied a presumption that tribes exercise governmental jurisdiction over trust land and affirmed the Regional Director's consideration of the trust land application under the on-reservation criteria. The Clinic Parcel cannot become reservation land unless and until a tribe exercises governmental jurisdiction that is recognized by the United States (which it cannot here because of the underlying purpose of the acquisition) or by other means such as a proclamation under 25 U.S.C. § 467.

Because Ewiiaapaayp has not attained a reservation proclamation, it argues that the term "reservation" is synonymous with the term "Indian country." Indian country is defined at 18 U.S.C. § 1151 as follows:

> [T]he term 'Indian country' ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government ..., (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although this definition relates to federal criminal jurisdiction, the Supreme Court has recognized that "it also generally applies to questions of civil jurisdiction. . . ." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998). The definition can be met in three ways; reservation status is only one possible constituent of Indian country. So while a reservation is Indian country, not all Indian country is a reservation. "Indian country," "trust land," and "reservation" are not interchangeable.

The cases on which Ewiiaapaayp relies to argue that "Indian country" and "reservation land" are the same do not apply to this case. For example, in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the issue was whether the State of Oklahoma could sue the Tribe to force it to collect taxes on cigarettes sold on trust land. The Court held that sovereign immunity barred the suit because the property at issue constituted Indian country, even though the lands were not within a reservation. *Id.* at 511. The Court equated trust land and reservation land in *Oklahoma* for sovereign immunity purposes

only. *Id.* ("we find that this trust land is 'validly set apart' and thus qualifies as a reservation *for tribal immunity purposes*") (emphasis added).[4]

Ewiiaapaayp also cites several other cases that do not stand for the proposition that trust land is automatically an Indian reservation. In *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), the State of Minnesota sued the Secretary to enjoin the sale as Indian allotments of lands alleged to be state school sections under the Minnesota Statehood Act. By terms of the Act:

> That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold *or otherwise been disposed of,* other lands, equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools.

11 Stat. 166 (1857) (emphasis added). Minnesota did not challenge whether land held in Indian reservations could be disposed of under this law. The lands at issue were held by the Secretary as unceded Indian lands. The case therefore stands only for the proposition that Minnesota had no claim to unceded Indian land at the time of statehood because such lands were considered to have been already disposed of. 185 U.S. at 389.

In *Healing v. Jones*, 210 F. Supp. 125 (D. AZ 1962), *aff'd per curiam, Jones v. Healing*, 373 U.S. 758 (1963), the district court held that the terms of an Executive Order created an Indian reservation out of the public domain, even though the Order never mentioned the term "reservation." The Executive Order read, in part, as follows:

> It is hereby ordered that the tract of country, in the territory of Arizona, *** is hereby withdrawn from settlement and sale, and set apart for the use and

---

[4] Similarly, in *United States v. John*, 437 U.S. 634 (1978), the Court held that a reservation is Indian country for purposes of federal criminal prosecution. It does not address how trust land becomes a reservation. In *United States v. McGowan*, 302 U.S. 535 (1938), the Court held that an Indian colony constituted Indian country for purposes of liquor law enforcement. It says nothing about the status of trust land as a reservation. *United States v. Pelican*, 232 U.S. 442 (1914) involved prosecution of a murder alleged to have occurred on an Indian allotment which was held to be Indian country. It does not apply here because the Clinic Parcel is not an Indian allotment.

> occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.

Executive Order of December 16, 1882. Withdrawing from settlement and setting aside federal territory is essentially the definition of the term "reservation," so the result is entirely unsurprising. That case does not apply where, as here, the trust parcel was neither withdrawn nor set aside from the public domain and where Ewiiaapaayp seeks a proclamation that would formally grant reservation status. *Spalding v. Chandler*, 160 U.S. 394 (1896), addresses what government obligations arise from the creation of a reservation; it does not discuss the issue relevant to this appeal of whether a mere trust parcel is an Indian reservation. None of Appellee's cases demonstrates that trust land is synonymous with reservation land.[5]

In sum, the Regional Director made no express determination that the Clinic Parcel is an Indian reservation for purposes of 25 C.F.R. Part 151. Viejas has consistently raised this issue and established that the United States acquired the Clinic Parcel in trust for the benefit of seven area Tribes for health care purposes, not the Ewiiaapaayp for any individual tribal purpose. Consequently, Ewiiaapaayp has not exercised governmental jurisdiction over the trust parcel, and the federal government has not recognized Ewiiaapaayp as doing so. For these reasons, the Board should rule that the Clinic Parcel is not the Ewiiaapaayp Reservation. Like the contiguity issue, at the very least, the Board should remand the reservation question to the Regional Director for analysis and decision. *See Jefferson County*, 47 IBIA at 207.

C. The EA is Inadequate.

1. The EA is Stale and a New Review Must be Conducted.

The EA is now over ten years old. That fact alone necessitates a new NEPA review.

---

[5] Similarly, *Idaho v. United States*, 533 U.S. 262 (2001), involved title to submerged lands within an Indian reservation and is inapplicable to this case.

Ewiiaapaayp argues that the only concern about the timing of EAs is that NEPA review should be conducted early in the decision-making process, that an EA may be prepared "at any time" the agency deems appropriate, and that therefore a new EA is not "timely." (Opp. at 44-45).

Ewiiaapaayp confuses the mandate that NEPA be applied early in the decision-making process, 40 C.F.R. §§ 1501.2, 1502.5, with BIA's continued duty to evaluate new and significant environmental effects to ensure fully informed decision-making. *See*, *Marsh v. Oregon Natural Rsrc. Council*, 490 U.S. 360, 371 (1989) (Agencies must prepare supplements to NEPA documents if significant new information or circumstances arise bearing on the environmental concerns of a proposed action or its impacts. "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.").

Ewiiaapaayp also cites to NEPA regulations at 40 C.F.R. § 1501.3(b) to support the proposition that agencies may prepare an EA "at any time;" this reliance is misplaced. The regulations at 40 C.F.R. § 1501.3 discuss the *circumstances* under which an agency must prepare an EA. The section cited to by Ewiiaapaayp merely indicates that an agency has the discretion to prepare an EA for any action it feels is appropriate; it is not related to the temporal relationship between a NEPA review and final agency decision. *Id.* A NEPA analysis must continue to capture and incorporate new and significant information until such time as an agency actually makes a decision on the proposal in question.

BIA's guidance recognizes the potential for a NEPA document to become "stale." Section 5.4 of the BIA NEPA Handbook (May 10, 2005) states that an "EA that has not been acted upon must be reviewed to determine if it needs to be revised or supplemented when...*it is*

more than 3 years old." (Emphasis added). The EA is now more than a decade-old, and a new NEPA review is required.

2. The EA Has Never Been Adequate.

Ewiiaapaayp argues that the 2001 EA complies with NEPA because it discussed the need for the trust acquisition, alternatives to the project, environmental impacts, and listed the parties consulted. (Opp. at 43-44). This assertion is incorrect. The EA has been insufficient since its release in November 2001 because it relies on an inaccurate project description and fails to address adequately the environmental impacts associated with the proposed action.

Ewiiaapaayp cites numerous authorities for the proposition that the goal of an EA is to produce a concise public document with the purpose of providing adequate information and analysis for agency decision-makers to evaluate the proposal and determine whether any associated environmental impacts are significant enough to give rise to the development of an EIS. (Opp. at 42-43). The 2001 EA fails this test.

For example, the EA uses an inaccurate project description. The EA describes the project as a trust land acquisition for the "development and use of a health clinic and day care facility." (AR 58 at 1-6). This description fails to take into account all of the related actions taken by Ewiiaapaayp and its obvious intent to develop a casino on the Clinic Parcel. (AR 20 at 3, AR 24; SAR 135, SAR 136, SAR 165, SAR 168). As discussed in the Viejas opening brief, the Walker Parcel trust land request is part of a larger effort by Ewiiaapaayp to operate a class III casino on off-reservation lands. The EA reflects this plan in the description of purpose and need, noting that Ewiiaapaayp has agreed "to pay SIHC annual revenues through the year 2036, which will come from the Tribe's construction and operation of a gaming facility on the portion of the current leased premises that SIHC will vacate pursuant to the agreements." (AR 58 at 1-5). The

2008 NEPA Adequacy Determination (AR 100) does not correct Ewiiaapaayp's gaming assertions, belying the fact that gaming is still an anticipated result of trust acquisition of the Walker Parcel.

The EA also fails to address adequately the environmental impacts associated with the proposed action, including increased traffic and congestion (AR 39 at 2, AR 44 at 4, SAR 147 at 38, SAR 185 at 6), infrastructure capacity (AR 39 at 2), impacts to important and significant cultural resources (AR 48 at 3, SAR 185 at 6-7), impacts on groundwater supply and quality (SAR 147 at 39, SAR 185 at 7), visual, light, and aesthetic impacts (SAR 147 at 39), noise generation (SAR 147 at 39), air quality (SAR 147 at 39), biological and wetland impacts to Viejas Creek (SAR 147 at 39, SAR 185 at 6), and impacts to the availability of public services (SAR 147 at 39). (*See also* Pico Declaration, ¶¶ 4, 27-35).

3. Significant New Information and Changes to the Proposed Action Necessitate a New Review.

Ewiiaapaayp argues that a new NEPA review is only required if there is a seriously different picture than the situation originally evaluated. (Opp. at 45). Those circumstances exist.

In *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980), the Ninth Circuit adopted a set of factors to determine whether supplemental NEPA review is required: the significance of new information, the probability of its accuracy, the degree to which the agency considered and evaluated the impacts of the new information, and the degree to which the agency provided support for its decision not to supplement its NEPA documents.

An agency's NEPA responsibilities do not end once an initial review is complete; rather, there is a continuing duty to supplement that review to further NEPA's goal of focusing agency and public attention on the environmental consequences of the actions in question. *Price Road*

Neighborhood Ass'n. v. U.S. Dep't of Transp., 113 F.3d 1505, 1509 (9th Cir. 1997). The agency may not put on "blinders" to adverse environmental effects prior to the completion of their actions based on the completion of a prior review; this would be "incongruous with...[NEPA's] manifest concern with preventing uninformed action." *Marsh*, 490 U.S. at 371. Agencies must prepare supplemental NEPA reviews when substantial changes to the project related to environmental concerns are made after the initial review. 40 C.F.R. § 1502.9(c)(1)(i); *Sierra Club v. U.S. Dep't of Transp.*, 310 F.Supp.2d 1168, 1200 (D.Nev. 2004).

The project description in the EA, which is the basis for the purpose and need, is critical to defining the scope of the review and the alternatives that the agency must consider. The description in 2001 focuses on relocating and expanding the SIHC Clinic; the description contained in the Regional Director's Decision confirms that Ewiiaapaayp has purportedly moved away from a SIHC-operated facility to a health facility open to any healthcare entity. (AR 33 at 10; *See also* AR 8 (Ewiiaapaayp Tribal Resolution of May 8, 2008, opening tenant eligibility to "any healthcare entity")).

This project change requires new evaluation on the impacts on public health. The 2001 EA does not anticipate any adverse health or environmental impacts to low-income or minority populations, (AR 58 at 4-4), or available levels of emergency medical services. (*Id.* at 4-6). Depending on the health clinic tenant that Ewiiaapaayp ultimately enters into an agreement with, however, that conclusion might change. The SIHC Clinic is owned by and operated for the benefit of the seven Tribes. Should the land be taken into trust and a non-tribal party enter into an agreement to develop a health clinic on the Walker Parcel, there is no guarantee that the services currently available to the members of local Tribes would continue to be provided. (Pico Declaration at ¶ 28). These changes may well result in the loss of access to adequate health care

services, particularly if Ewiiaapaayp declines to extend the SIHC lease beyond its current renewal option. These impacts must be evaluated in a supplemental EA and evaluated under the terms of Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (1994).

In addition, the construction of a new, large-scale health clinic across the highway from the SIHC Clinic will result in significant environmental impacts, including impacts on water quality and supply, traffic congestion and impacts on social services that must be considered. (*See, e.g.*, AR 48 at 3, SAR 147 at 39, SAR 185 at 6-7). While BIA declined to consider the environmental impacts associated with the eventual development of a large-scale casino on the Clinic Parcel in the 2001 EA because it was too speculative, it cannot dismiss the cumulative impacts associated with the continued operation of the SIHC Clinic in addition to those of the proposed project.

Agencies must also prepare supplemental NEPA reviews when significant new circumstances or information alter the environmental impacts associated with the proposed action, including the cumulative effects. 40 C.F.R. § 1502.9(c)(1)(ii). Viejas has identified significant new circumstances and information since the 2001 EA that bear directly on the environmental impacts of the Ewiiaapaayp proposal.

A new 47,000 square foot grocery store has opened in Alpine, resulting in increased traffic. (AR 109 at 9, AR 65 at 2). In April 2007, the San Diego County Sheriff built its Alpine Substation. (SAR 185 at 6), and a new high school has been approved for Alpine students. (AR 104 at 2). None of these cumulative effects are considered in the EA.

Extensive mapping conducted since 2001 of the lands surrounding the Viejas Reservation and the portions of Viejas Creek running through the Walker Property show that it is highly

likely that important and significant cultural resources are present. (SAR 185 at 6-7). Impacts on these resources have not been addressed in the EA, nor has the Viejas Band been consulted about them.

Recent consecutive drought years have changed the groundwater tables in Alpine, (SAR 185 at 7), and the increased strain that a second clinic would place on groundwater supplies has not been evaluated.

Finally, construction of the Sunrise Powerlink, a large-scale energy transmission project, has begun, with undergrounding beginning at Starr Valley Road, which is in the very near vicinity of the Walker Parcel.[6] This project's significant environmental impacts must be considered cumulatively with the Walker Parcel development.

While Viejas has continuously submitted this information to BIA for consideration, it was not addressed in the 2008 NEPA adequacy determination, (AR 100), or the Regional Director's Decision. Under 40 C.F.R. § 1502.9(c)(1)(ii), a new NEPA analysis is required, and the Board should require the Regional Director to undertake such a review before making a decision on the Ewiiaapaayp request..

D. The Regional Director Failed to Comply with the Requirements of the ESA for New Designation of Critical Habitat.

As Viejas demonstrates in its opening brief, the Regional Director violated the ESA by failing to comply with section 7(a)(2), 16 U.S.C. § 1536 (a)(2) and its implementing regulations before making the Decision. Specifically, the ESA regulations and the 2002 biological opinion for the arroyo toad require reinitiation of consultation with the U.S. Fish and Wildlife Service (FWS) for any action that "may affect" new critical habitat. 50 C.F.R. § 402.16(d); (AR 91 at

[6] Construction updates are available through the California Public Utilities Commission website at: http://www.cpuc.ca.gov/Environment/info/aspen/sunrise/sunrise.htm.

18). To determine if reinitiation is needed, BIA must make a "may affect" finding under 50 C.F.R. § 402.14(a). The failure of the Regional Director to do so invalidates the Walker Parcel decision.

Critical habitat covering the Walker Parcel was in effect for the arroyo toad at the time of the Ewiiaapaayp application. Ewiiaapaayp developed a mitigation plan memorialized in a Memorandum of Agreement (MOA) in June 2002. (AR 99). The MOA served as the basis upon which FWS determined that the proposed action would comply with the ESA through the biological opinion issued on April 10, 2002, after formal consultation with BIA. (AR 91).

Much has changed since 2002. In July 2007, FWS withdrew the critical habitat designation for the arroyo toad pursuant to litigation. After extensive public comment, a new critical habitat designation came into effect on February 9, 2011. 76 Fed. Reg. 7,246 (Feb. 9, 2011). The revised designation encompasses the Walker Parcel. This new designation triggered the reinitiation of consultation requirements of the section 7(a)(2) regulations, which apply when "a new species is listed *or critical habitat designated that may be affected by the identified action.*" 40 C.F.R. § 402.16(d). (Emphasis added). The 2002 biological opinion includes the same requirement. (AR 91 at 18).

Ewiiaapaayp argues that there was no need to reopen consultation because "[t]here is no new species that has been listed or critical habitat designated that in any way may be affected by the trust acquisition." (Opp. at 52). Ewiiaapaayp offers no support of this conclusion, and its argument does not properly apply the requirement of 40 C.F.R. § 402.16(d).

The requirement to reinitiate consultation has two parts: 1) a new critical habitat designation; and 2) an action that "may affect" the critical habitat. *Id.* There has been a new

critical habitat designation. That designation is, as Ewiiaapaayp itself acknowledges, different than the designation in effect in 2002. (Opp. at 52). The new designation removes significant acreage around the Walker Parcel, but *retains* the designation of the Ewiiaapaayp land itself. In addition, the new designation *excludes* the nearby Viejas Reservation and the Capitan Grande Reservation due to the exercise of tribal government authority and Tribal plans to protect arroyo toad habitat. 75 Fed. Reg. at 7,251, 7,266, 7,274, 7,289-93. This exclusion was the result of affirmative conservation actions and comments by Viejas and the Barona Band. Ex. 4 (Viejas enclosures omitted). The important fact is that FWS chose to *retain the designation of the Walker Parcel when it excluded other surrounding lands, including those subject to Tribal conservation authorities and plans*. The existence of the Ewiiaapaayp MOA did not provide a basis for excluding the Walker Parcel from the revised designation.

The only remaining question is whether, under 40 C.F.R. § 402.16(d), the new critical habitat designation "may be affected by the" Walker Parcel trust acquisition and proposed development. The regulations and FWS guidance are clear on how this "may affect" determination must be made, and BIA failed to take the required steps.

Under the regulations, a federal action agency, here BIA, "shall review its actions at the earliest possible time to determine whether any action *may affect* listed species *or critical habitat*." 50 C.F.R. § 402.14(a) (emphasis added). The "may affect" threshold is very low. As clarified in the FWS Endangered Species Consultation Handbook (March 1998), "may affect" should be read to mean "the appropriate conclusion when a proposed action may pose *any* effects on listed species or designated critical habitat." *Id.* at xvi (emphasis in original).

As these authorities make clear, BIA had a duty to make the "may affect" determination requirements. The Pacific Regional Director did nothing to satisfy this procedural duty, and Ewiiaapaayp has provided no support for its argument that the impacts of the proposed action, under the 2002 MOA, would fall below the very low "may affect" threshold. In fact, as Ewiiaapaayp admitted in its comments to BIA, a "may affect" finding was made for the Walker Parcel trust acquisition, which lead to "formal section 7 consultation" and the issuance of the 2002 biological opinion. (AR 15 at 17-18). Clearly, if the proposed action met the "may affect" threshold in 2002, it also met that test in 2011 for the new critical habitat designation. Thus, formal consultation should have been reinitiated under section 402.16(d) and the 2002 biological opinion. BIA could have easily determined whether additional action, such as a revised MOA, was needed to protect the new critical habitat by consulting with FWS in 2011, as it did in 2002. The Regional Director It failed to do so, and remand is necessary to achieve compliance with the ESA.

E. Viejas Has Standing to Pursue This Appeal.

Ewiiaapaayp argues that the appeal should be dismissed because Viejas (and the County) did not allege standing, cannot do so now, and cannot meet Article III or prudential standing. (Opp. at 8 – 9). The Ewiiaapaayp argument is wrong on all counts. Viejas has alleged, and will suffer, an injury in fact that is directly traceable to BIA's decision and will be redressed if the decision is vacated. These harms are discussed in detail in the declaration of Anthony R. Pico, who has served for nearly three decades as the Viejas Tribal Chairman, filed concurrently herewith. (Pico Declaration). Chairman Pico provides detailed information regarding Viejas' history and the Tribal Council's role as a government entity to bring it into the future, (*id.* at ¶¶ 4 to 19), Viejas' longstanding commitment to ensuring local health care services for its members

(*id.* at ¶¶ 20-24), and Viejas' longstanding involvement in the Walker Parcel request and continued concern over the significant impacts that would follow Ewiiaapaayp's proposed developments. (*Id.* at ¶¶ 3-4, 25-37).

Further, under *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. 2011), *cert. accepted*, No. 11-247, Viejas clearly has standing because it is a party "who in practice can be expected to police the interests that the statute protects." The duty of the Viejas Tribal Council "is to provide for the health, safety, environmental integrity and economic opportunities" of its members. (Pico Declaration, ¶ 36).

1. Viejas Alleged Standing in The Notice of Appeal and May Prove Standing in This Reply.

Ewiiaapaayp argues that Viejas cannot allege standing in this reply brief because Viejas failed to do so in its opening brief. (Opp. at 9 n. 4). Obviously, Ewiiaapaayp failed to read the docket, and the Board should simply disregard this argument.

Viejas readily established standing in the Notice of Appeal (NOA). As Viejas asserted:

- Viejas is a federally recognized Indian tribe, with a reservation within 2 miles of the Walker Parcel;
- Viejas has devoted a tremendous amount of resources in developing a strong tribal government and diverse economic base, including an on-reservation casino, an outlet center, and RV park, and other development to support the Tribe and its members;
- The Walker Parcel request is part of an overall plan to develop an off-reservation casino on clinic land, as evidenced by Ewiiaapaayp's longstanding effort to develop a casino and the record surrounding the Walker Parcel trust acquisition;
- The Viejas' tribal sovereignty, economic ventures, environmental interests, jurisdictional interests, cultural values, and other interests would be irreparably harmed by BIA's decision to acquire land in trust on behalf of Ewiiaapaayp within Viejas' homeland; and

- The trust acquisition and development will generate environmental harms impacting Viejas, through increased traffic, land use conflicts, impacts on endangered species, other environmental impacts, and economic impacts.

(NOA at 2-4). A notice of appeal is the typical pleading where standing would be alleged, and nothing more is needed. Ewiiaapaayp either simply failed to consider the Notice of Appeal or cannot argue against the clear statement of standing set forth therein. *See Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987) (explaining that a motion to dismiss for lack of standing involves an examination of the face of the complaint), *Graham v. FEMA,* 149 F.3d 997, 1001 (9th Cir.1998) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.")

In any case, Ewiiaapaayp's argument that Viejas (and the County) cannot defend against a challenge to standing is plainly incorrect. Ewiiaapaayp cannot wait until its opposition to raise a challenge to standing, while at the same time denying Viejas an opportunity to respond. Challenges to standing typically occur in the context of a motion to dismiss. *See e.g., Western Watersheds Project v. BLM*, 182 IBLA 1 (2012) (stating that the Board "must resist BLM's invitation 'to create a 'gotcha' trap whereby parties who reasonably think their standing is self-evident nonetheless may have their cases summarily dismissed if they fail to document fully their standing at the earliest possible stage in the litigation.'" (citing *American Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005)). In fact, the Board will often raise an appellant's standing *sua sponte*, directing the appellant to show cause why an appeal should not be dismissed for lack of standing, when the Board believes that an appellant's standing is questionable. *See e.g., In re: Estate of Ralph Franklin Young, Sr.*, 53 IBIA 181 (2011). Further, the Boards allow appellants

to produce affidavits in a reply to demonstrate standing. *See e.g., Western Slope Environmental Resource Council, et al.*, 163 IBLA 262 (2004).[7]

2. Viejas Readily Meets Article III and Board Standing Requirements.

a. The Board Should Apply the "Any Interested Party" Standing Rule.

Board regulations allow "*[a]ny interested party* affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals." 25 C.F.R. § 4.331 (emphasis added). An "interested party" is "any person whose interests could be adversely affected by a decision in an appeal." 43 C.F.R. § 4.330 (adopting the definitions set out in 25 C.F.R. § 2.2); *see also Rosebud Indian Land and Grazing Ass'n and its Members v. Acting Great Plains Regional Director*, 50 IBIA 46, 53 (2009).

To be "adversely affected" within the meaning of the regulations, the adverse effect must be to the appellant's legally protected interest. *Anderson v. Great Plains Regional Director*, 52 IBIA 327, 331 (2010); 43 C.F.R. § 4.331; *see e.g. Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005). The Supreme Court defines "legally protected interest" very broadly. To be a "legally protected interest," the interest need only be

[7] There is no doubt that the County has standing. There should similarly be no doubt as to Viejas standing. Nonetheless, if one plaintiff has standing, the case can be heard as to all plaintiffs. *See Horne v. Flores*, 557 U.S. 433 (2009); *see also City of Jersey City v. Consolidated Rail Corp.*, --- F.3d ----, 2012 WL 335731 (D.C. Cir. 2012) ("For plaintiffs to establish Article III standing, at least one must demonstrate that it has suffered an injury that is 'concrete and particularized' as well as 'actual or imminent.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C.Cir.1996) ("[I]f constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim."). In cases where at least one appellant has clear standing, the Board has allowed appeals to proceed despite the arguable lack of standing of some appellants. *See Oklahoma Petroleum Marketers Ass'n v. Acting Muskogee Area Director*, 35 IBIA 285, 287 (2000). Thus, even if Viejas does not have standing, its appeal must be considered pursuant to the County's case and its standing.

more individualized than one which the plaintiff shares with the public at large. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (stating that the harm alleged must be more than a "generalized grievance" which the plaintiff shares "in substantially equal measure by all or a large class of citizens"). An alleged interest need not be "significant;" a "small" stake in the outcome will suffice if it is direct. *United States v. SCRAP*, 412 U.S. 669, 687–88 (1973). As discussed in the following section, Viejas clearly meets Article III standards.

While it is clear that Viejas has standing under the traditional test for federal court review, the standards for administrative appeals to Boards within the Office of Hearings and Appeals are even less rigorous. This Board has interpreted a "legally protected interest" as equivalent to Article III standing in that an appellant must demonstrate "'that (1) [appellant] has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision,'" *Emma Lu Reeves v. Great Plains Regional Director, Bureau of Indian Affairs*, 54 IBIA 207 (2012) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), but least one court has called into question this standard, and the Interior Board of Land Appeals (IBLA) applies a different test.

In *Preservation of Los Olivos v. U.S. Dept. of Interior*, 635 F.Supp.2d 1076 (C.D. Cal. 2008), the court held that IBIA acted arbitrarily and capriciously in invoking judicial standing principles to dismiss a citizen group appeal. The court did not set forth what an appropriate standard was, but declared that Article III requirements appear to be inconsistent with the Department of the Interior's and BIA's regulations. *Id.* at 1091. The court stated that the Board failed to explain why it had "adopted those Article III restrictions in the face of a markedly

looser standard in 43 C.F.R. § 4.331 and 25 C.F.R. § 2.2," *id.* at 1094, and directed BIA "to render a decision on Plaintiffs' standing that specifically accounts for its regulations."

IBLA recognizes that administrative standing differs from Article III standing. As IBLA has concluded:

> [W]e are mindful that judicial standing and administrative standing do not turn on the same considerations because an administrative adjudication is not an Article III proceeding to which either the "case or controversy" or prudential standing requirements apply. *See Koniag, Inc. v. Andrus*, 580 F.2d 601, 611-17 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 439 U.S. 1052 (1978). "[A]dministrative standing is more properly determined by an analysis embracing 'the nature of the asserted interest, the relationship of his interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions.'" *In re Pacific Coast Molybdenum*, 68 IBLA 325, 331-32 (1982) (*quoting Koniag*, 580 F.2d at 615 (Bazelon, J., concurring)).

Western Watersheds Project BLM, 182 IBLA at **5.

Particularly relevant to the D.C. Circuit's consideration of the issue in *Koniag*, as cited by IBLA, was the ability of administrative boards to formulate general policies, a consideration very important in this appeal. In contrast to the IBIA and IBLA authority, the power of "federal courts to formulate general policy is also severely limited by the method in which they reach decisions. Courts are confined to the resolution of particular disputes in an adversary setting. Administrative agencies, however, have unique resources for establishing broad, prospective policies." *Koniag*, 580 F.2d at 612-13. The D.C. Circuit also identified the resources available to boards and the range of actions that they might take:

> Unlike courts, administrative agencies can devote uninterrupted attention to relatively narrow problem areas, and can call upon technical staff assistance in formulating solutions. Unlike courts, they are not limited to the adjudicatory format, but have the flexibility to proceed by adjudication, legislative hearings, rulemaking, investigation or in other ways. And unlike courts, agencies do not have to wait for a plaintiff to file suit; they have the power to institute an investigation or an action on their own initiative.

Id. at 613.

IBLA's appeal regulations provide that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative law judge shall have a right to appeal to the Board." *See Theodore Roosevelt Conservation Partnership*, 178 IBLA 201, 206-07 (2009) (quoting 43 C.F.R. § 4.410(a)); *see also Center for Biological Diversity, et al.*, 181 IBLA 325 (2012).

The appeal regulations for IBIA are substantially similar to those for IBLA appeals, and the same approach should apply. Like 43 C.F.R. § 4.410(a), 25 C.F.R. § 4.331 provides that "*[a]ny interested party* affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals." *See* 25 C.F.R. § 4.331. The proper standard should be that which is set forth in the regulations, not Article III. That is, to appeal an agency decision, an appellant need only demonstrate that its legally protected interest (i.e., more than a "generalized grievance") is adversely affected by the agency's decision. Viejas clearly meets the standard of a party whose legally protected interests have been adversely affected by BIA's decision.

b. Viejas Will be Injured by BIA's Action.

Ewiiaapaayp does not argue Viejas is not injured. Instead, Ewiiaapaayp argues that Viejas has not suffered an injury to a legally protected interest. To make this argument, Ewiiaapaayp takes an absurdly narrow view of legally protected interest, suggesting that Viejas needs to have a specific interest in the Walker Parcel. (Opp. at 9-13). Of course, this is not the case. If such a rule applied, only a party with a competing claim to the land would have

standing. The scores of cases involving challenges to trust land acquisitions from numerous parties with no interest in the land confirm that such a constrained principle does not apply.

In fact, Viejas set forth the injury it will suffer as a consequence of BIA's decision in its Notice of Appeal, and that injury is quite clearly to a legally protected interest, as defined by the Supreme Court.[8] (NOA at 2-4). As a tribal government, Viejas is responsible for protecting and providing for the interests of its members, including taking action to protect the general health and welfare of its members, Viejas land, the economic interests of the Band, and tribal culture, custom and tradition. (Pico Declaration, ¶ 36). These duties apply to activities on the Viejas reservation and by other parties in any other location. As a sovereign government, Viejas also works extensively with San Diego County and the City of Alpine to address jurisdictional, land use, environmental, cultural, and other issues that affect tribal members. (*Id.* at ¶¶ 4, 15, 19, 35, 36). All of these relationships will be disrupted by a new tribal government acquiring trust land in Alpine, within the historic homeland of Viejas.

The proposed trust acquisition will jeopardize Viejas sovereignty, jurisdiction, access to health care, community concerns and environmental concerns. (*Id.* at ¶¶ 28, 29, 31, 33, 34). Ewiiaapaayp seeks to evict the existing Indian health clinic from the Clinic Parcel and to develop a health clinic across the highway and service roads. Access to Viejas' reservation will become more difficult, as will access to the Tribal clinic due to the increased traffic associated with the additional of another health clinic or other economic development in the immediate vicinity. (*Id.* at ¶¶ 29, 34). Further, Ewiiaapaayp has not committed to allowing the SIHC to relocate the

[8] In addition, the administrative record and the opening brief are replete with discussion regarding the impacts of the proposed trust acquisition on Viejas. Ewiiaapaayp simply ignores the abundant documentation of the harm its proposed actions will have to Viejas.

Clinic; nor has Ewiiaapaayp guaranteed that it will, in fact, develop a health clinic. This result constitutes a direct and substantial injury to Viejas.

Development on the Walker Parcel also conflicts with current land use designations. Any development of the Walker Parcel will result in increased traffic, which will affect both the immediate environment (including the reservation), access to the reservation by members and Viejas patrons, and access to the SIHC Clinic. (*Id.* at ¶¶ 29, 33-34). Such impacts are likely to diminish or reduce Viejas' economic ventures. Development of the Walker Parcel will result in the modification or loss of habitat, increased air and water pollution and noise, and more congestion. These impacts constitute a direct and substantial injury to Viejas, which as a tribal government, is responsible for protecting the interests and health of its people. (*Id.* at ¶ 36).

b. The Injuries are Traceable to BIA's Decision.

Ewiiaapaayp argues that there is no causal connection between any injury to Viejas and BIA's decision. (Opp. at 14-21). Ewiiaapaayp argues that it may construct facilities on the Walker Parcel whether or not the land is taken into trust, and that Viejas concerns about future casino development are too conjectural to constitute "harm," and further review would be required prior to any casino construction. *Id.*

But, as Ewiiaapaayp acknowledges, it cannot build a clinic or any other economic development without first obtaining a variance from the County. (Opp. at 14 (stating that constructing the proposed facilities "would be more difficult and would take longer, in part because it would likely require land use variances from the County"). There is no evidence that the County would grant such a variance, given that it too opposes trust acquisition of the Walker Parcel. Thus, the status quo would be no development. Further, Viejas would have the

opportunity to participate in the variance process, which would enable Viejas to protect its members and seek mitigation for the adverse effects of the development. Under the Regional Director's decision, however, this procedure would be removed and Ewiiaappaayp could proceed with the development that will harm Viejas.

The sovereign governmental, jurisdictional, environmental, cultural, economic and other injuries identified above are directly attributable to BIA's Decision to acquire land in trust for another tribe within the historic Viejas territory in a manner inconsistent with local land use. Without acquiring the Walker Parcel in trust, the existing relationships between the local governments would be maintained and access to tribal health care protected. Traffic, pollution and other impacts would not be generated, preventing the environmental and economic injuries to Viejas.[9] A decision that denies the Ewiiaapaayp request will fully address the Viejas concerns. Moreover, should BIA refuse to acquire land in trust on behalf of Ewiiaapaayp, tribal health care at the SIHC clinic would be maintained. Ewiiaapaayp would have less interest in trying to evict the SIHC from the Clinic Parcel because it could not offer a competing site from which it would derive economic benefit.

---

[9] With respect to the Viejas' environmental claims, the law is clear that parties asserting standing under NEPA face a lower bar. The Viejas need not meet "all the normal standards for redressability and immediacy." *Voices for Rural Living v. Pacific Regional Director*, 49 IBIA 222, 232 (2009) (internal citations omitted). *See also, Lujan*, 504 U.S. at 573 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Arizona State Land Dep't*, 43 IBIA at 169 n. 14. Viejas has alleged that, in addition to being harmed by acquisition of the Walker Parcel for health care purposes and/or casino purposes, BIA failed to conduct the proper analyses because it did not take into account concurrent activities and the effects of those activities. Its analysis addressed only the Walker Parcel acquisition, not the Ewiiaapaayp's efforts to block renewal of the lease or the other trust requests which are on file with the BIA. BIA improperly segmented the review of the Ewiiaapaayp's pending applications and requests. The question of harm is necessarily tied to the merits of the Viejas claims.

c. A Board Decision in Favor of Viejas Would Redress the Harms.

If BIA does not acquire the land in trust on behalf of the Ewiiaapaayp, no harm will occur to Viejas' jurisdictional, sovereign, environmental, economic, cultural and other interests. The Viejas relationships with the local governments will remain the same. Ewiiaapaayp will not develop the land so that Viejas' interests are harmed. The redressability standard would clearly be met by favorable action on the Viejas appeal.

3. Viejas Meets Prudential Standing Requirements.

Ewiiaapaayp incorrectly claims that Viejas does not meet the requirements of prudential standing. (Opp. at 38-42). Prudential standing exists when a claimed injury is one Congress expected might be addressed under the statute, and the party bringing the claim is arguably within the "zone of interests" protected by the statute. *Bennett v. Spear*, 520 U.S. 154, 175 (1997). The test is not "especially demanding." *Clarke v. Sec. Indus. Association*, 479 U.S. 388, 399 (1987). A party is outside the zone of interests only if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998).

In arguing against prudential standing, Ewiiaapaayp ignores *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. 2011); *cert. accepted*, No. 11-247. This case clearly supports Viejas standing. Patchak, an individual plaintiff, filed suit claiming that Interior's decision to take land into trust for the Match-e-be-nash-she-wish Band of Pottawatomie (Gun Lake Tribe) in Michigan was *ultra vires* and contrary to statute. After Patchak unsuccessfully sought to enjoin the acquisition pending resolution of his complaint, Interior took the land into trust, and the district court dismissed the suit for lack of standing. The Circuit Court reversed the district court and held that

Patchak has prudential standing. Under the D.C. Circuit decision, prudential standing "analysis focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects." *Id.* at 705 (citation omitted).

a. Viejas' Injuries are Addressed Under the Trust Regulations and NEPA.

Viejas easily satisfies the prudential standing requirement. First, with respect to the Viejas challenge to the trust acquisition itself, there can be no question that the Viejas appeal is one that Congress expected to be addressed under the statute. The Indian Reorganization Act of 1934 (IRA) provides for the acquisition of land in trust. 25 U.S.C. § 465. If a party feels aggrieved by a trust acquisition, the obvious expectation is that a challenge would result. Further, Viejas is a federally recognized tribe and, as such, is covered by the IRA . *See*, *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 75 Fed. Reg. 60,810 (Oct. 1, 2010).

"If the interests of a state or a municipality are within the zone of interests the IRA protects then so are" a private citizens. *Patchak v. Salazar*, 632 F.3d at 707 (explaining that "Patchak's injuries may be different, but they are just as cognizable. Among other things, [Patchak] alleged that the rural character of the area would be destroyed, that the value of his property would be diminished, and that he would lose the enjoyment of the agricultural land surrounding the casino site"). The Viejas interests as a tribal government, and injuries that it and its members would suffer, are at least as significant as a private citizen's and are within the zone of interests the IRA protects. Viejas has alleged that the Walker Parcel acquisition will increase traffic, harm economic ventures, undermine sovereignty, adversely affect tribal culture, and

jeopardize access to health care. These injuries may differ from Patchak's, but they are clearly cognizable under the IRA.

Likewise, the environmental, socioeconomic, and cultural injuries are precisely the kind of harm to be addressed under NEPA. Viejas has raised concerns regarding BIA's improper reliance on an outdated EA (AR 14(g) at 23-26 and 32-33, AR 104, SAR 147 at 45-46, SAR 185 at 6-7), the improper segmentation of the environmental review process (AR 14(g) at 26-32, AR 19, AR 48 at 2, AR 80 at 2, AR 104, SAR 147 at 27-35, SAR 185 at 3-5, SAR 195, SAR 200), the reliance on an improper purpose and need statement and range of alternatives (AR 80 at 1, AR 104 at 3, SAR 185 at 3-5, SAR 186, SAR 200), and the reliance on a deficient analysis of direct and cumulative effects (AR 48 at 3, AR 80 at 2, AR 104 at 8-10, SAR 147 at 35-44). *See also* (NOA at 2-4).

The specific environmental harms that result from these violations include increased traffic and congestion (SAR 147 at 38, SAR 185 at 6), impacts to important and significant cultural resources (AR 48 at 3, SAR 185 at 6-7), impacts on groundwater supply and quality (SAR 147 at 39, SAR 185 at 7), visual, light, and aesthetic impacts (SAR 147 at 39), noise generation (SAR 147 at 39), air quality (SAR 147 at 39), biological and wetland impacts to Viejas Creek (SAR 147 at 39, SAR 185 at 6), and impacts to the availability of public services (SAR 147 at 39). Viejas also asserts that BIA failed to issue an EA in the face of significant new developments that impact the environmental baseline associated with any trust land acquisition decision and that the cumulative effects of these developments will create traffic problems and inconsistent land use patterns. (Viejas Br. at 63). These concerns, which have been consistently raised by Viejas for more than a decade, more than fulfill the requirement that an appellant need only allege some minimal environmental claim to achieve standing.

Ewiiaapaayp also argues that Viejas has only identified economic harm and that such harms are not sufficient to support standing. (Opp. at 13). It is correct that Viejas has alleged that the Ewiiaapaayp's application seeks to promote a gaming enterprise. There is ample support in the record for this conclusion. (*See, e.g.*, AR 20, Summ. at 3 (Ewiiaapaayp FY 2009-2014 Comprehensive Economic Development Strategy, acknowledging that gaming on the SIHC Clinic Parcel remains a part of its plans); SAR 168 (Ewiiaapaayp July 2003 request for an EIS for a "health care and casino project"); (Viejas Br. at 57-59)). But as described above, Viejas also has alleged environmental, jurisdictional and sovereignty harms, associated both with development of the Walker Parcel only, and with casino development. Moreover, contrary to Ewiiaapaayp's arguments, "[a] plaintiff can...have standing under NEPA even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'" *Ranchers Cattlemen*, 415 F.3d at 1103, citing *Port of Astoria, Or. v. Hodel*, 595 F.3d 467, 476 (9th Cir. 1979.

"The purpose of the 'zone of interests' test is 'to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.'" *Nevada Land Action Ass'n. v. U.S. Forest Service*, 8 F.3d 713, 716 (1993), citing *Clarke*, 479 U.S. at 397 n. 12. Here, Viejas wants BIA to conduct the reasoned and thorough environmental review required by NEPA before issuing a decision. The aim of this appeal is directly tied to furthering the purpose of the statute.

b. Viejas is Protected Under Both the IRA and NEPA.

There is little doubt that NEPA and the IRA protect Indian tribes. Congress passed the IRA to benefit tribes. Congress did not limit those protections to only those tribes seeking to have land acquired in trust. The IRA also protects tribes wishing to protect their jurisdiction,

economic and sovereign interests.[10] Viejas need not prove that the IRA and NEPA were meant to benefit them in this situation; rather the proper question is "who in practice can be expected to police the interests that the statute protects.'" *Patchak*, 632 F.3d at 705, citing *Moval Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C.Cir. 1998); *see also Am. Chiropractic Ass'n v. Leavitt*, 431 F.3d 812, 815 (D.C.Cir. 2005). Tribes adversely affected by a trust decision made on behalf of another tribe can certainly be expected to police jurisdictional, governmental, economic, and environmental interests.

Moreover, there is no question that Viejas – as a governmental entity – can be expected to protect the environmental interests of its members. (Pico Declaration at ¶ 36). NEPA and the Department's implementing regulations and guidance recognize the important role that tribal governments play in the NEPA review process. Under the Department's NEPA regulations, federal agencies must consult with tribal governments during the completion of NEPA review, and coordinate with them as early as possible in the application of NEPA. 40 C.F.R. §§ 46.155 and 46.200. Lead agencies should, whenever possible, select the governments of affected tribes as cooperating agencies. *See id.* § 46.225(a)(3). The regulations also require that agencies seek comments from tribal governments whenever a proposed action may impact trust or restricted resources, or tribal health and safety. *See id.* § 46.435(c). Without question, the Viejas has prudential standing to raise claims under the IRA and NEPA.[11]

---

[10] Ewiiaapaayp characterizes Viejas an "economic enterprise" concerned only with developing economic opportunities for its members and the Band as a whole. (Opp. at 40-41). First and foremost, the Viejas is a tribal government that seeks to achieve self-determination and exercise its sovereignty. While economic development is critical to these goals, Viejas is not transformed into an "economic enterprise" only by engaging in economic activities. The record amply displays the many interests that Viejas seeks to protect.

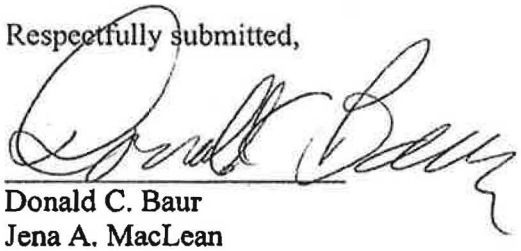
[11] Ewiiaapaayp argues that "Viejas lacks 'associational standing'" to bring claims asserting the interests of its members in environmental issues. (Opp. at 42). Viejas is a governmental entity. The very purpose

IV. CONCLUSION

For the foregoing reasons, Viejas respectfully requests that the Board vacate and remand the Pacific Regional Director's Decision to acquire the Walker Parcel in trust for the Ewiiaapaayp Band.

Dated: February 22, 2012

Respectfully submitted,



Donald C. Baur
Jena A. MacLean
Emily K. Merolli

Counsel for Appellant
Viejas Band of Kumeyaay Indians
700 Thirteenth Street, NW Suite 600
Washington, DC 20005
(202) 654-6234

---

of government is to protect the health and welfare of its people. A federally recognized tribe need not demonstrate organizational standing, just as a non-Indian government need not.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Reply Brief was served by United States first-class mail this 22nd day of February 2012 upon the following:

Pacific Regional Director
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Pacific Southwest Regional Solicitor
Office of the Solicitor
U.S. Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

Southern California Agency Superintendent
Bureau of Indian Affairs
1451 Research Park Drive, Suite 100
Riverside, CA 92507-2154

Office of the Governor
Attn: Jacob Appelsmith, Legal Affairs Secretary
State Capitol Building
Sacramento, CA 95814

Thomas D. Bunton
Thomas E. Montgomery
Counsel for Appellant County of San Diego
1600 Pacific Highway, Room 355
San Diego, CA 92101

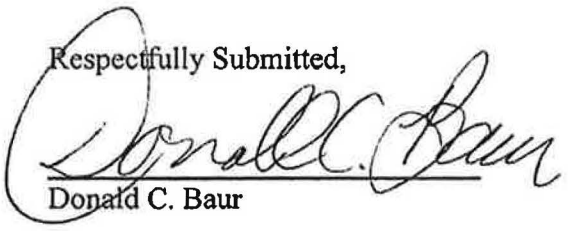
Philip Baker-Shenk
Counsel for Ewiiaapaayp Band of Kumeyaay Indians
Holland & Knight LLP
2099 Pennsylvania Ave., NW, Ste. 100
Washington, DC 20006

California State Clearinghouse
Office of Planning and Research
P.O. Box 3044
Sacramento, CA 95814

Daniel and Gloria Harrington
4137 Alpine Blvd.
Alpine, CA 91901

Sara Drake, Deputy Attorney General
State of California, Dept of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Respectfully Submitted,



Donald C. Baur

DATED: February 22, 2012

Exhibit 1

Ewiiaapaayp Tribal Office

Ewiiaapaayp Band of Kumeyaay Indians

4054 Willows Road
Alpine, CA 91901
TEL: (619) 445-6315
FAX: (619) 445-9126
E-mail: wmicklin@leaningrock.net

December 8, 2011

Leroy Elliott, Chairman of the Board of Directors
Chief Operating Officer
Southern Indian Health Council, Inc.
P.O. Box 2128
Alpine, CA 91903-2128

Re: Notice of Default

Dear SIHC Board Chairman Leroy Elliott and Chief Operating Officer:

As Tribal Chairman of the Ewiiaapaayp Band of Kumeyaay Indians (the "Tribe"), and by this letter, the Tribe issues a notice of events of default by Lessee pursuant to Article 25, Default, of the Lease Agreement between the Tribe as Lessor and the Southern Indian Health Council, Inc. ("SIHC") as Lessee in Lease No. MBL-71 ("Lease"), referred to as Contract No. J54C14205720 and Agreement Number 50052519722, dated February 13, 1987 and approved by the BIA February 24, 1987.

Lease Article 25 states "[i]n the event of default by Lessee in any of the terms and provisions of this lease, Lessee shall be given notice citing the defaults in the lease and allowing Lessee ten (10) days from receipt said notice to show cause why this lease should not be cancelled."

The Lease Article 10, Nonresponsibility Notices, states, "Prior to the commencement or construction of each improvement on the leased property, or any repair or alteration thereto, the Lessee shall give the Secretary ten (10) days advance notice in writing of intention to begin said activity..." [emphasis added]

Article 15, Construction, Maintenance, Repair, Alteration, states, "Subject to Article 10, NONRESPONSIBILITY NOTICES, and approval of the Cuyapaipe Band of Mission Indians, the Lessee shall have the right at any time during the term of this lease to make limited alterations, additions, or repairs to any improvement on the premises. Removal or demolition of any improvement shall not be made without the prior approval of the Cuyapaipe Band." [emphasis added]

The SIHC (Lessee) has not complied with the Lease provisions under Articles 10 and 15 requiring notice to and approval by the Secretary and Tribe for construction, maintenance, repair or alterations of improvements.

The SIHC (Lessee) on November 22, 2011 destroyed the Tribe's backup well on the leased premises immediately behind the Tribe's Tribal Office. This backup well is an improvement

owned and installed by the Tribe that served as the backup to the Tribe's water supply from the Tribe's main well that serves the leased property and Lessee. The SIHC (Lessee) failed to comply with the Lease Articles 10 and 15 by providing no notice of the intended destruction of the Tribe's property.

The Tribe hereby provides notice to the SIHC (Lessee) that it must comply with Article 12, Fire and Damage Insurance, for its damage to the Tribe's (Lessor's) property in the SIHC's (Lessee's) destruction of the Tribe's backup well. Article 12 states, "In the event of damage to any improvement on the leased premises, the Lessee shall reconstruct the improvements in compliance with applicable laws and building regulations... The Lessee shall also deposit in escrow as needed all additional funds required to reconstruct the damaged improvement...If a default has taken place, said money shall remain in escrow as security for performance by Lessee until said default is corrected, after which, funds remaining shall be paid to Lessee. If Lessee does not correct the default, said funds shall be paid to the Lessor." The Tribe (Lessor) requires the SIHC (Lessee) to comply with the requirements of Article 12.

The Lease Article 35, Environmental Protection Requirements, states, "It is agreed that it shall be the responsibility of the Lessee to satisfy all State and/or local environmental protection requirements. It is further agreed that Lessee shall furnish the Secretary a copy of all environmental assessments, environmental impact statements or reports, or negative declarations that are filed with State or local government authorities for consideration and that Lessee will furnish the Secretary a copy of the governmental ruling on such document." The SIHC (Lessee) recently terminated its contract with the Tribe whereby the Tribe provided water quality testing for the ground water from the Tribe's main well on the leased premises serving the SIHC (Lessee) clinic facility. The Chairman of the SIHC Board reason reported for termination of the testing agreement was this agreement described the leased property as a part of the Tribe's Reservation. The Lease Agreement Article 2, Land Description, Section A. states, "...the Lessor hereby leases to the Lessee the lands described in Addendum No. 1 ... Said lands are a part of the Cayuga/ss Indian Reservation..." [emphasis added] The SIHC (Lessee) Board of Directors is a party to and bound by the provisions of the Lease, and statements contravening the terms and conditions of the Lease are itself an event of default.

Further, the Tribe's (Lessor's) reason for providing the water quality testing services and agreement was due to non-performance by the prior contractor. The SIHC (Lessee) terminated the prior contractor. The Tribe (Lessor) believes the action of the SIHC (Lessee) is a breach of the requirements of Article 35, therefore, the Tribe by this letter re-assumes permitting, control and operation of its main well serving the leased property and SIHC (Lessee) clinic facility in order to assure compliance with applicable federal and local (tribal) water quality environmental requirements. Should the SIHC (Lessee) resist the Tribe's re-assumption of permitting, control and testing for its main well, the Tribe (Lessor) shall consider this an event of default by the SIHC (Lessee).

Pursuant to the Tribe's (Lessor's) re-assumption of permitting, operation and testing for its main well, and in accordance with Article 24, the Tribe shall permit the SIHC (Lessee) for use of the Tribe's well and water resources, and assess and collect fees and taxes upon the SIHC (Lessee) for the Tribe's costs for permitting, operating and testing. Article 24, Liens, Taxes, Assessments, Utility Charges, states, "Lessee shall discharge and pay all taxes, assessments, licenses, fees and

other like charges levied during the term of this lease when same become due and payable. Additionally, Lessee shall promptly pay all charges for utilities supplied to said premises."

Article 21, Agreements for Utility Facilities, states, "Upon entering into any such [public utility] agreement, the Lessee shall furnish the Lessor and the Secretary with executed copies thereof together with a plat or diagram showing the true location of the utility lines to be constructed." The SIHC (Lessee) failed to comply with the requirements of Article 21.

The Tribe (Lessor) requires the SIHC (Lessee) to answer the events of default specified above within ten (10) days of receipt of this letter. Failure to cure the events of default to the satisfaction of the Tribe will be cause for the Tribe to request the Secretary to cancel the Lease.

Should the Lease be cancelled by the Secretary, the Tribe will work with the SIHC to negotiate a permit for occupancy of the Tribe's property by the SIHC in order to preserve the continuity of SIHC clinic operations and uninterrupted services for the tribal citizens of its neighbor and sister tribes and its own tribe as provided through the state chartered SIHC corporation.

The Tribe appreciates your understanding and cooperation in this matter. Thank you.

Sincerely,

Robert Pinto, Sr., Chairman
Ewiiaapaayp Band of Kumeyaay Indians

cc: Amy Dutschke, Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Larry Echo Hawk, Assistant Secretary
Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Mike Black, BIA Director
Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Michael Smith, BIA Deputy Director
Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Exhibit 2

SOUTHERN INDIAN HEALTH COUNCIL, INC.
4058 Willows Road • Alpine, CA 91901-1620
Mailing: P.O. Box 2128 • Alpine, CA 91903-2128
(619) 445-1188 • FAX (619) 445-4131

December 21, 2011

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Robert Pinto, Chairman
Ewiiaapaayp Band of Kumeyaay Indians
4054 Willows Road
Alpine, CA 91903-2250

Re: Response to December 8, 2011 letter from Ewiiaapaayp Band regarding alleged Notice of Default under Lease No. 5002519722 and Lease No. MBL-71, Contract No. J54C14205720

Dear Chairman Pinto:

We write to respond to the above-referenced letter alleging defaults under Lease No. MBL-71, Contract No. J54C14205720 of 1987 underlying all of Southern Indian Health Council ("SIHC") health care facilities. However, the Tribe's principal complaint involves a well on land subject to Lease No. 5002519722 dated October 29, 1997, an entirely separate lease. Your letter describes Lease No. 5002519722 as "Agreement Number 5002519722" and suggests that it is a part of Lease No. MBL-71, but this is inaccurate. Your effort to conflate the two leases is an obvious and disingenuous attempt to attack Lease No. MBL-71 involving SIHC's principal health care facilities.

As discussed below, we request an additional 30 days in order to provide a complete response to your letter. Furthermore, we request a personal meeting with representatives of the Tribe and the BIA to discuss and resolve this matter. The Tribe's request to cancel the Lease No. MBL-71 under SIHC health facilities is a very serious matter that, if granted, would have a devastating impact on the quality of health care provided to Indians in southern San Diego County. These issues should be fully explored in order to minimize the risk of such terrible consequences. SIHC stands ready to work cooperatively with the Tribe and BIA to avoid such an outcome.

We provide a preliminary response to the allegations of default below.

1. The Removal of the Well Was Reasonable Means for Complying With EPA Directives.

The Tribe alleges that SIHC removed a water well on the leased premises without securing tribal approval pursuant to Article 15 of Lease No. 5002519722 or providing notice to the Secretary pursuant to Article 10. The Tribe requests that SIHC reconstruct the well and deposit funds to pay the cost of such reconstruction in an escrow account pursuant to Article 12. The Tribe further alleges that the well was owned and installed by the Tribe and that it served as backup to the water supply from the main well that serves the leased property.[1]

SIHC removed the well pursuant to requirements imposed by the Environmental Protection Agency ("EPA") under the Safe Drinking Water Act[2] in order to avoid contamination of the water supply serving the health care facilities and the Tribal Office on the leasehold.[3] The requirements are documented in an August 13, 2008 Sanitary Survey Report prepared for EPA.[4] The report identified six deficiencies, including Deficiency 6 which stated that the well by the tribal office was inactive and not properly sealed or destroyed. Further, the Report stated that if there is potential for future use, the well casing needed to be sealed to prevent contamination of the aquifer, but if the well is not to be used in the future, it needed to be properly destroyed. In a telephone conference with SIHC's Chief Executive Officer and staff on or around October 20, 2011, EPA directed that these deficiencies be corrected as soon as possible.[5] The EPA threatened to issue an order shutting down the water system at SIHC if the deficiencies and other

---

[1] SIHC disputes that the Tribe installed the well as it was in existence when SIHC purchased the property in 1993. According to the contractor which removed the pump from the well, the pump was installed in 1985 or 1986 well before SIHC purchased the property. Declaration of Michael Cadena ¶ 3. Furthermore, the well was not functioning, and additional drilling would have been required in order to make the well productive. *Id.*; *see also* Letter from Franks Well Drilling at 2. Since the well was not functioning, SIHC disputes the Tribe's assertion that it served as a backup well. SIHC disputes any tribal claim of full ownership of the water system as it is a part of the leasehold which SIHC possesses pursuant to the terms of the Lease. Any ownership interest by the Tribe in the water system is limited and circumscribed by SIHC's leasehold interest.

[2] The water system is classified as a public water system subject to regulation under the Act. *See* 42 U.S.C. § 300f(4); 40 C.F.R. § 141.2 (definition of "public water system" for the purposes of the Safe Drinking Water Act).

[3] The Tribe occupies the building on the premises subject to Lease No. 5002519722 without SIHC permission. In 1997 the Tribe and SIHC entered into a sublease of the land where the Tribal Office is located under which the Tribe began use of the building for its Tribal Office. The sublease agreement had a term of one year with the possibility of up to four one-year renewals. The Tribe stopped paying rentals, and the sublease expired and has not been renewed. SIHC has contacted the Tribe in an effort to negotiate regarding the sublease, but the Tribe has refused. Declaration of Robert McBane ¶ 4. While SIHC now requires the space in the building now housing the Tribal Office for health care operations (specifically mental health services), in order to preserve good relations, SIHC has so far not pressed this issue.

[4] A copy of the Report is enclosed.

[5] Declaration of Carolina Manzano ¶ 3.

issues were not promptly addressed. In compliance with EPA's directives, SIHC removed the well. The contractor found upon opening the well that the equipment was not in working order, specifically that the pipes had holes in them and broke when the contractor tried to unscrew them due to rot.[6] Since the well was not functional, SIHC's contractor determined – reasonably – that removal was the appropriate remedy.[7]

In these circumstances, it is the view of SIHC that its action, taken pursuant to the direction of the federal agency with jurisdiction over this matter to protect the environment, does not fall within the cited provisions of Articles 10 and 15 of Lease No. 5002519722.

2. The Tribe Received Notice of EPA Report and Recommendations.

Through representation on the Board, the Tribe has always been fully informed, constructively if not actually, of SIHC's activities on the leasehold, including the matter in question. The Tribe was specifically on notice of Deficiency 6 and the recommendations for correction in the Sanitary Survey Report. The tribal environmental technician was present during the survey and received a copy of the Sanitary Survey Report.[8] Michael Garcia, the Vice-Chairman of Ewiiaapaayp and Director of SIHC was Vice-Chairman of the Board when EPA issued the Sanitary Survey Report in 2008, and he was elected Chairman of the Board a few months later. Furthermore, on September 29, 2011, the Acting CEO notified the Board of SIHC's plan to take certain actions to correct certain deficiencies identified in the Sanitary Survey Report, including Deficiency 6 involving the inactive well.[9] At that meeting the Board approved the plan. Vice-Chairman Michael Garcia was notified of the meeting on September 29, 2011 but neither he nor you, the Alternate Director, attended.[10] SIHC Bylaws provide that "[e]ach Director shall regularly attend Board meetings and keep his/her tribe advised of the

---

[6] Letter from Franks Well Drilling at 2.

[7] SIHC showed the contractor the description of Deficiency 6 and recommendations in the Sanitary Survey Report and relied on the contractor's professional judgment to determine whether to remove or seal the well. Declaration of Michael Cadena ¶ 3.

[8] Sanitary Survey Report at 1 (stating that "Contract Field Technical from the Ewiiaapaayp Band of Kumeyaay Indians" was present during survey); Declaration of Michael Cadena ¶ 4.

[9] Declaration of Carolina Manzano ¶ 2. Under SIHC Bylaws each of the Member Tribes, including Ewiiaapaayp, appoints a Director and Alternate Director to the Board of Directors of SIHC. *See* SIHC Bylaws, art. VI(C). Ewiiaapaayp has actively participated in the management of SIHC through the Board of Directors for many years. Ewiiaapaayp Vice-Chairman Michael Garcia served as Vice-Chairman of the Board of Directors from 2006 to 2008 and as Chairman of the Board from 2008 to 2011.

[10] Declaration of Carolina Manzano ¶ 2. Vice-Chairman Garcia said that he would ask you, Chairman Pinto, to attend in his place, but you did not.

activities of the Corporation and the services being offered to the tribe's members by the Corporation."[11]

3. While Not Required, SIHC Will Pay To Drill a New Well.

The Tribe argues that SIHC must place in escrow funds needed to drill a new well pursuant to Article 12 of the Lease. For the reasons discussed above, the removal of the well was not an event of default, and SIHC is not obligated to drill a new well. However, in order to show its good faith and ensure its ability to continue to provide critical health care to Indians in southern San Diego County from this facility, SIHC is prepared to fund the cost of a new well if the Tribe and BIA believe that a new well is necessary and appropriate to benefit the leasehold. Accordingly, as requested, SIHC has deposited $60,000 in a special purpose account pending completion of the work. A copy of the account information is enclosed. SIHC hopes to discuss the details with the Tribe regarding the construction of a new well, including the purpose of such a well and its location. Plans for construction of a new well must take account of the fact that the contractor that removed the prior well opined that it was a low producer, and any new well will deteriorate over the remaining more than 35-year term of Lease No. 5002519722 (including the 25-year renewal period), if it is used only as a backup source of supply, and, at the end of that time period, such new well may be in a condition resembling that of the well that was removed, notwithstanding SIHC's reasonable efforts to maintain it.

4. SIHC's Refusal to Renew Its Contract With the Tribe for Water Quality Testing Was Not A Default Under Either Lease No. 5002519722 or Lease No. MBL-71.

The Tribe alleges that SIHC's decision not to renew its water quality testing contract with the Tribe was a default under the Lease. The Tribe alleges that SIHC took such action because the proposed contract contained a statement that the leased premises is part of the Ewiiaapaayp Reservation to which SIHC objected. Citing a provision of the Lease referring to the leased premises as part of the Cuyapaipe Reservation, the Tribe argues that "statements contravening the terms and conditions of the Lease are itself an event of default."[12] The Tribe also alleges that the Tribe provided water quality testing services "due to non-performance by the prior contractor." The Tribe cites Article 35 of Lease No. MBL-71 regarding compliance with state and local environmental requirements but does not explain its connection to its allegation of default.

---

[11] SIHC Bylaws, art. VI(L).

[12] The factual premise of the Tribe's allegation and of the provision of the Lease upon which the Tribe relies – that the leased premises is a part of the Ewiiaapaayp Reservation – is incorrect. The Assistant Secretary has recently confirmed that it is not. *See* letter dated 6/16/10 from Larry Echo Hawk, Department of the Interior, Assistant Secretary-Indian Affairs, to Robert Cita Welch, Vice-Chairman, Viejas Band of Kumeyaay Indians.

The Tribe's allegations of default have no merit. The terms of a commercial agreement for water quality testing, or the identity of SIHC's contractor retained to perform water quality testing services, have no connection to lease compliance. The water system is required to comply with federal water quality standards. As noted above, the clinic has recently taken steps to ensure compliance with those standards. The contractor which SIHC retained has conducted sampling in accordance with federal requirements. SIHC has no obligation under either Lease to continue to retain the Tribe to perform water quality testing services.

The Tribe states that it "re-assumes permitting, control and operation of its main well serving the leased property. . ."[13] The Tribe provides no information about prior control, operation[14] or permitting of the water system or the legal basis for same. Indeed, SIHC disputes this assertion as SIHC has operated the water system since the beginning of the Lease.[15] If the Tribe's assertion of prior control, operation and permitting is based on its four one-year contracts with SIHC for water quality standards, it lacks merit. Enclosed is a copy of the 2007 contract, the first such agreement, between Ewiiaapaayp and SIHC under which Ewiiaapaayp provided water quality testing services to SIHC. It states in the Recitals that "SIHC is in need of collections of water quality samples; and . . . the Tribe possesses the expertise needed to provide such assistance; Now therefore, in consideration of the mutual interests of the parties set hereto by them, . . . the Parties hereby agree as follows. . . ." SIHC paid the Tribe a fee in exchange for professional services. These terms demonstrate that it was a commercial agreement between contracting parties and not the exercise by the Tribe of governmental authority. SIHC also disputes that the prior contractor was terminated for non-performance as the prior contractor, not SIHC (or the Tribe), terminated the contract.[16]

5. The Tribe Provides No Evidence of Breach of Article 21 of Lease No. 5002519722 or Lease No. MBL-71 Regarding Agreements for Utility Service.

The Tribe alleges breach of Article 21 – presumably of Lease No. MBL-71, though it is not clear – which provides "Lessee shall have the right to enter into agreements with public utility companies and the State of California or any of its political subdivisions to provide utility services necessary for the full development and enjoyment of the leased premises in accordance with this lease. Upon entering into any such agreement, the Lessee shall furnish the Lessor and the Secretary with executed copies thereof together with a plat or diagram showing the true location of the utility lines to be constructed."

---

[13] The Tribe refers to Article 24 related to fees and taxes but does not allege a breach of this provision.

[14] As noted in note 1 above, SIHC disputes the Tribe's implicit claim of complete ownership of the water system.

[15] Declaration of Michael Cadena ¶ 2.

[16] Declaration of Robert McBane ¶ 3.

The Tribe does not explain which agreement with a public utility company, the State of California or state subdivision involving utility lines that it believes that should be provided to it pursuant to Article 21. Prior to the discussion of Article 21 the Tribe's letter references SIHC's decision not to renew its contract with the Tribe to provide water quality testing services and its retention of another company. Since this agreement is not with a public utility company, the State or a state subdivision and does not involve utility lines, it does not come within Article 21 of either Lease No. 5002519722 or Lease No. MBL-71. However, in the event the Tribe is referring to this agreement, it is enclosed.

6. SIHC Requests Additional Time to Respond and a Meeting of the Parties.

SIHC requests additional time to more fully respond to your letter. Specifically, we request an additional 30 days, e.g. until January 23, or until a reasonable time after the parties can meet to discuss these issues, whichever is later.[17] SIHC also requests a meeting with tribal and BIA representatives to discuss these issues. We will follow up with your offices to schedule such a meeting as soon as practical.

Sincerely,

Leroy Elliott
Chairman, Board of Directors

Carolina Manzano
Acting Chief Executive Officer

cc: Superintendent
Southern California Agency
Bureau of Indian Affairs
1451 Research Park Drive, Suite 100
Riverside, CA 92507
(w/encl.)

Amy Dutschke, Regional Director
Pacific Regional Office
Bureau of Indian Affairs

[17] SIHC received the Tribe's letter on December 13.

2800 Cottage Way
Sacramento, CA 95825
(w/encl.)

Larry EchoHawk, Assistant Secretary
MS 4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240
(w/o encl.)

(w/o encl.) Mike Black, BIA Director
MS 4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240
(w/o encl.)

(w/o encl.) Michael Smith, BIA Deputy Director
MS 4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240
(w/o encl.)

Response to December 8, 2011 letter from Ewiiaapaayp Band Regarding Alleged Notice of Default under Lease No. 5002519722 and Lease No. MBL-71, Contract No. J54C14205720

List of Enclosures

Declaration of Michael Cadena
Declaration of Carolina Manzano
Sanitary Survey Report
Declaration of Robert McBane
Documents Related to Bank Account
Letter dated November 16, 2011 from RCAC to Michael Cadena regarding Service Agreement No. SIHC /Task Order No. 1
Service Agreement Between Southern Indian Health Council, Inc. and Ewiiaapaayp Band of Kumeyaay Indians dated Sept. 17, 2007
Letter dated June 16, 2010 from United States Department of Interior to Robert Cita Welch
Letter from Franks Well Drilling to Michael Cadena
Southern Indian Health Council ByLaws (revised 11/2000)

Exhibit 3

SOUTHERN INDIAN HEALTH COUNCIL, INC.
4058 Willows Road • Alpine, CA 91901-1620
Mailing: P.O. Box 2128 • Alpine, CA 91903-2128
Phone (619) 445-1188

January 12, 2012

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Robert Pinto, Chairman
Ewiiaapaayp Band of Kumeyaay Indians
4054 Willows Road
Alpine, CA 91903-2250

Re: Alleged Notice of Default under Lease No. 5002519722 and Lease No. MBL-71, Contract No. J54C14205720

Dear Chairman Pinto:

We write in response to your letter dated December 21, 2011 regarding your December 8, 2011 letter alleging defaults under Lease No. MBL-71, Contract No. J54C14205720 of 1987 underlying all of Southern Indian Health Council ("SIHC") health care facilities. While we requested (and the Tribe agreed to) more time to make a complete response to your December 8, 2011 letter, our letter dated December 21, 2011 is an initial response.

We also wish to reiterate our request for a personal meeting with representatives of the Tribe and the BIA to discuss and resolve this matter. As we have explained, the Tribe's effort to cancel the Lease No. MBL-71 under SIHC health care facilities prematurely (many years before the 99 years that the SIHC Member Tribes, including Ewiiaapaayp, initially proposed and before the 50 years agreed on in the Lease) would have grave consequences for health care provided to Indians in southern San Diego County. SIHC wishes work cooperatively with the Tribe and BIA to avoid such an outcome. Good faith discussions of the issues are critical for working toward a resolution, and we believe that we should begin now and continue beyond January 23. Chairman Elliott has contacted Vice-Chairman Garcia to discuss the details of replacing the well, which we are prepared to do, as discussed in our December 21, 2011 letter. We hope these discussions will assist in determining the purpose and location of such a well as well as the steps to begin work.

We further hope the parties can sit down and discuss these issues in good faith and for the sake of health care for our people.

Sincerely,

Leroy Elliott
Chairman, Board of Directors

Carolina Manzano
Acting Chief Executive Officer

cc: Superintendent
Southern California Agency
Bureau of Indian Affairs
1451 Research Park Drive, Suite 100
Riverside, CA 92507

Amy Dutschke, Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Kevin Bearquiver, Deputy Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Larry EchoHawk, Assistant Secretary
MS 4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Mike Black, BIA Director
MS 4141-MIB
1849 C Street, N.W.

Washington, D.C. 20240

Michael Smith, BIA Deputy Director
MS 4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Ken Salazar, Secretary of Interior
Department of Interior
1849 C Street, NW
Washington, DC 20240

Exhibit 4

VIEJAS
TRIBAL GOVERNMENT

P.O Box 908
Alpine, CA 91903
#1 Viejas Grade Road
Alpine, CA 91901

Phone: 6194453810
Fax: 6194455337
viejas.com

Bobby L. Barrett, Chairman
Robert Cita Welch, Vice Chairman
Diana L. Aguilar, Tribal Secretary
John A. Christman, Tribal Treasurer
Greybuck S. Espinoza, Councilman
Virginia M. Christman, Councilwoman
Timothy Bactad, Councilman

December 14, 2009

Rick Sayers, Ph.D.
Branch Chief, Endangered Species Program
Public Comments Processing
Attn: FWS-R8-ES-2009-0069
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Re: Comments on the Proposed Rule for Revised Critical Habitat for the Arroyo Toad (Anaxyrus californicus)

Dear Dr. Sayers:

These comments are submitted by the Viejas Band of Kumeyaay Indians regarding the inappropriate inclusion of Capitan Grande Reservation lands in the Proposed Rule for Revised Critical Habitat for the Arroyo Toad under the Endangered Species Act (ESA). *See Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Arroyo Toad* (Anaxyrus californicus), 74 Fed. Reg. 52,612 (Oct. 13, 2009). The proposed designation is in response to a consent decree in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, which required publication of a new proposed designation by October 1, 2009.

Viejas is strongly opposed to the inclusion of Capitan Grande Reservation[1] lands as critical habitat for the arroyo toad for three reasons.[2] First, according to a biological study prepared for

[1] As the Proposed Rule notes, the Capitan Grande Reservation was formed pursuant to an 1875 Presidential Executive Order. It was from this Reservation that the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, and the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, emerged. Both Bands share jurisdiction over the Capitan Grande Reservation.

[2] The critical habitat designation for the arroyo toad has a long and complicated history, beginning with an environmental group lawsuit and settlement agreement (1999), an initial proposed designation (65 Fed. Reg. 36,512, June 8, 2000), final designation (66 Fed. Reg. 9414, Feb. 7, 2001), a lawsuit by development groups and a court-ordered remand (2002), a second proposal (69 Fed. Reg. 23,254, Apr. 28, 2004), a second final designation (70 Fed. Reg. 19,562, Apr. 13, 2005), another environmental group lawsuit (2007) and consent decree (2008), followed by

the Viejas and Barona Bands, a substantial portion of the proposed 92 acres does not contain the primary constituent elements necessary to qualify as critical habitat. In addition, no toads have been confirmed on or near the Reservation. Thus, there is no basis upon which to determine that the Reservation lands are "essential to the conservation" of the species, as required by the definition of critical habitat. 16 U.S.C. § 1532(5)(A)(i)(I). Second, the proposed designation would cause Viejas significant hardship, interfering with Viejas's planned management of Reservation lands and undermining tribal sovereign governmental authority. Third, as the U.S. Fish and Wildlife Service (FWS) is aware from working with Viejas and Barona, the Bands have a long history of protecting the Reservation lands from development and activities that would adversely modify the identified habitat area. FWS should defer to the Bands' governmental expertise in managing tribal lands. On these grounds, FWS should follow its practice from other critical habitat designations (discussed below) and exclude *all* Capitan Grande lands from the final designation.

Government-to-Government Consultation Duties

As an initial matter, Viejas is concerned that FWS and the Bureau of Indian Affairs (BIA) did not make a greater effort to comply with the directives obligating federal agencies to consult with Indian tribes when taking actions that impact tribes, particularly those involving tribal lands and the management of biological resources.

Secretarial Order 3206, which specifically addresses ESA implementation that affects tribes, directs FWS to "consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable." This includes "providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes." In fact, the Order specifically addresses critical habitat designation proposals in Principle 3(B) of the Appendix, which provides that FWS is to consult with affected tribes "when considering the designation of critical habitat in an area that may impact tribal resources . . . ." This track record fails to meet the obligations described above and, specifically, Principle 3(C) of Secretarial Order 3206 to "*promptly* notify" tribes "[a]t the *earliest indication* of the need for federal conservation restrictions" and "consult with affected tribes and provide written notice to them of the intended (conservation) restrictions *as far in advance as practicable*." (Emphasis added.) Despite these obligations, Viejas was not consulted early on and was not accorded an opportunity to participate in the data collection process.

the current, third proposal (74 Fed. Reg. 56,612, Oct. 13, 2009). Throughout this process, Viejas has been required to respond to multiple information requests and a wide range of proposed designation actions affecting Capitan Grande, ranging from 900 acres to zero acres. Throughout this entire period, the constant factors have been that the Capitan Grande Reservation contains, at most, an extremely small fraction of the potential critical habitat for the arroyo toad and that it has been carefully managed by the two Bands to ensure conservation of all of its resources, including the arroyo toad habitat. As discussed in this comment letter, these factors are ample grounds for excluding *all* proposed critical habitat on the Reservation.

In addition, Executive Order 13175 acknowledges "the unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions" that "establish and define a trust relationship with Indian tribes." Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (Nov. 9, 2000). Federal agencies are directed "to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The importance of government-to-government consultation was reaffirmed by President Obama on November 5, 2009, when he stated this Administration's commitment to meaningful collaboration with Indian tribes, including as an initial step, "complete and consistent implementation of Executive Order 13175."

Viejas had very little advance notice of the proposed designation. Had such notification and consultation occurred, FWS would have obtained sufficient information to exclude the Reservation lands from the proposed designation. The consent decree that led to the proposed designation was entered into on June 5 and approved by the Court on June 17, 2008, but no action was taken to inform Viejas of the intent to cover Reservation lands in the proposed designation until shortly before publication of the proposed designation.

Such a failure to consult fully is especially disappointing considering the long history of the critical habitat designation for this species described in footnote 2. By letter of July 14, 2004, Viejas specifically requested assistance from FWS regarding the development of a Tribal Management Plan that would provide for the conservation of the arroyo toad and other species on tribal lands should such a plan be needed. *See* Attachment 1. This remains the Viejas Band's intent, and we again request future consultation and assistance from FWS *and* BIA in this regard.

Viejas requests full consultation going forward so that the final rule will exclude Capitan Grande lands. We appreciate the agencies' recent efforts in this regard and look forward to continuing intergovernmental discussions.

Habitat Not Essential to Arroyo Toad Conservation

The proposed rule for revised critical habitat, with its contemplated expansion of arroyo toad critical habitat, is over-inclusive, at least with respect to Capitan Grande Reservation lands. The previous final rule, issued on April 13, 2005, 70 Fed. Reg. 19,562, designated 11,695 acres of critical habitat, which correctly did *not* include Capitan Grande based on an exclusion under section 4(b)(2) because the detrimental effects on the Bands outweigh the benefits to the species and because of sufficient conservation actions undertaken by Viejas and Barona on the Reservation. 70 Fed. Reg. 19,606.

FWS now proposes to designate approximately 109,110 acres of lands located in Santa Barbara, Ventura, Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties, California,

an almost tenfold increase in designated critical habitat. The proposed rule includes 92 acres of Capitan Grande Reservation lands as critical habitat. The proposed rule states that the "Capitan Grande Reservation lands fall within the Capitan Grande Canyon where the San Diego River once ran, which is approximately 35 miles (56 km) east of San Diego, San Diego County. The Reservation encompasses approximately 15,619 ac (6,306 ha) of land in Unit 17, which includes approximately 92 ac (37 ha) of arroyo toad habitat proposed as critical habitat." 74 Fed. Reg. at 52,560.

As proposed, the Capitan Grande lands amount to no more than .08% of the total proposed designation. Moreover, as discussed below, only about one-half of the proposed critical habitat on the Reservation actually contains the required primary constituent elements. Thus, an infinitesimal (0.4%) segment of the proposed designation is found on the Reservation. Clearly, this small area is not essential as required by the definition of critical habitat in the ESA, 16 U.S.C. § 1532, and recognized by FWS precedent, 64 Fed. Reg. 5957, 5960 (Feb. 8, 1999).

The FWS proposal to include this area also was made not on the basis of field surveys or studies of the Reservation lands, but instead on a general understanding of the habitat characteristics of the area. To address this data gap, the Bands commissioned a site-specific study of the affected Reservation lands. This study constitutes the best scientific and commercial data available, as required by section 4(b)(2) of the ESA. 16 U.S.C. § 1533(b)(2). As the biological study submitted by the Barona Band indicates, however, only about half of Reservation lands proposed for designation contain suitable habitat for arroyo toad population expansion that would increase the probability of the long-term persistence of these populations. Thus, there are at most about 45 acres of land containing the characteristics that would qualify as arroyo toad habitat.

In addition, as discussed in the comments submitted by the Barona Band, there have been no sightings of arroyo toads on or near the Reservation. If toads were present on the Reservation, their presence almost certainly would have been detected. While the absence of a species generally is not an adequate reason for non-designation, when combined with the non-existence of the requisite habitat elements, the facts that the habitat is unoccupied and serves no apparent connectivity purpose are grounds for deleting the area.

Finally, the need for protection of the toad habitat may be less acute than previously understood. The Department of the Interior issued a news release on October 20, 2009, stating that FWS has recommended downlisting the arroyo toad from endangered to threatened. The Service's recommendation is based on the result of a five-year review of the status and recovery of this species, in which it concluded that "based on the improvements in the status of the arroyo toad and conservation management to control threats that have occurred since it was listed, we recommend the species be downlisted to threatened." See *Arroyo Toad (Bufo californicus (=microscaphus)): 5-Year Review: Summary and Evaluation*, 19 (Ventura, California,

U.S.F.&W.S., August 2009). For these reasons, there is no biological justification for designating critical habitat on the Capitan Grande Reservation.

Exclusion of Reservation Lands as a Result of Negative Impacts on Viejas

Not only does the proposed rule overestimate the acreage of Capitan Grande Reservation lands supporting arroyo toad critical habitat, *all* Capitan Grande Reservation lands should be excluded from the proposed revised designation, pursuant to section 4(b)(2) of the ESA. Viejas appreciates that FWS and BIA are seeking comment regarding the grounds to exclude the Capitan Grande Reservation lands from critical habitat, even if it qualifies on biological grounds.

With respect to Capitan Grande Reservation lands, Viejas strongly believes that exclusion is appropriate because the negative impact of such a designation on tribal activities. Section 4(b)(2) gives the Secretary the authority to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Here, the benefits of exclusion significantly outweigh the benefits of specifying Capitan Grande Reservation lands as critical habitat, and there clearly is no risk of extinction.

Including Capitan Grande Reservation lands will cause Viejas significant hardship. As noted above, Viejas shares management authority over the Capitan Grande Reservation with Barona. Both Bands are currently coordinating their efforts to conserve arroyo toad habitat on the Reservation. While both Bands work very cooperatively, there are significant administrative costs associated with such joint management that would be substantially increased by the imposition of additional federal oversight over tribal lands. The hardship is simply not warranted where the acreage of arroyo toad habitat is so small (45 acres). In fact, Viejas has had to invest significant resources simply commenting on the proposed arroyo toad designations over the years. The record is clear that Capitan Grande lands should *not* be included in any *proposed or final* designation, and Viejas seeks a binding determination to that effect.

Moreover, such designation constitutes an unwarranted federal intrusion into tribal affairs. FWS has repeatedly recognized that excluding tribal lands from critical habitat designation is consistent with the government-to-government trust relationship between the United States and tribes. Such an approach: 1) furthers established national policies, federal trust obligations, and appropriate deference to tribes in the management of natural resources; 2) helps to maintain effective working relationship that promote the conservation of species; 3) allows for meaningful collaboration and cooperation in scientific work to learn more about the needs of a species; and 4) respects tribal sovereignty regarding the management of resources occurring on tribal lands. *See, e.g.*, 74 Fed. Reg. 17,337-38 (final rule excluding tribal lands from critical habitat for the

bighorn sheep); 71 Fed. Reg. 66.015 (Canada lynx); 70 Fed. Reg. 56,243 (final rule excluding tribal lands from critical habitat for the bull trout). BIA has correctly taken this position before for a proposed critical habitat designation affecting the Capitan Grande Reservation, and Viejas requests that BIA reaffirm that position with regard to the current proposal *and* that FWS accept such a recommendation in the final rule. *See* Attachment 2.

As FWS has correctly determined in previous determinations to exclude tribal lands, "fish, wildlife and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable." Federal interference through critical habitat designation constitutes an "unwanted intrusion . . . compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend." 71 Fed. Reg. 66,015. This principle has been consistently applied to exclude tribal lands, and it should be adopted for the arroyo toad designation to exclude the Capitan Grande Reservation.

Exclusion of Reservation Lands as a Result of Tribal Management and Planning

The proposed rule states:

> [W]e are requesting public comment on whether the conservation needs of the arroyo toad can be achieved or not by limiting the designation of final revised critical habitat to non-Tribal lands, and are otherwise considering these Tribal lands for exclusion from the final critical habitat under section 4(b)(2) of the Act based on partnerships and habitat management plans and practices. We will evaluate any submitted plans in consideration of Secretarial Order 3206, "American Indian Tribal Rights, Federal Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2) in relation to the conservation benefits to the arroyo toad, the features essential to the conservation of the species, and the appropriateness of excluding Tribal lands under section 4(b)(2) of the Act.

As stated above, and indeed, as noted in the proposed rule, the Viejas and Barona Bands have a long history of protecting this habitat. In fact, the original 2005 designation of critical habitat for the arroyo toad excluded Capitan Grande lands from arroyo toad critical habitat because, in part:

> Additionally, in regards to portions of 17a, the Barona Band of Mission Indians and the Viejas Band of Kumeyaay Indians have both agreed to establish a

> cooperative approach with us concerning arroyo toad conservation on certain lands in Capitan Grande Reservation, which is jointly administered by both Tribes. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

70 Fed. Reg. 19,606.

As has been the case since the arroyo toad was first considered for critical habitat designation, the Bands continue to work closely with the FWS to deal with wildlife issues. In fact, Viejas has worked closely with BIA on a fuel reduction project on Capitan Grande Reservation lands near the Viejas Reservation for fire safety purposes, which has required consultation under the National Historic Preservation Act and the ESA. Viejas's efforts with respect to the Capitan Grande Reservation have not been development-oriented, but rather conservation focused. Similarly, the Barona Band enacted a moratorium on all deer hunting by Tribal members on the Capitan Grande Reservation as part of its efforts to manage the Reservation's natural resources. These examples of responsible resource management support exclusion of tribal lands, just as FWS determined in the case of critical habitat for peninsular bighorn sheep on the Agua Caliente Indian Reservation. *See* 74 Fed. Reg. 17,288, 17,334 (stating that the "Tribe regularly coordinates and works with the Service to ensure maximum protection of tribal trust resources by managing activities in such a way as to ensure compliance with the [ESA]. . . This cooperative relationship provides the Tribe an opportunity to acknowledge the Service's duty and authority while preserving tribal sovereignty and honoring traditional tribal land management practices." Finally, as noted by the Viejas July 14, 2004, letter to FWS (Attachment 1), the Bands intend to develop a comprehensive management plan for the Reservation, including the toad and other wildlife species, should that be needed.

The Capitan Grande Reservation is not used for residential or development purposes. The Tribes prevent use by outside parties, and only Tribal members can use the Reservation lands for hunting and cultural purposes. There is no plan to change these practices for controlling access to the Reservation and protecting its resources. If the Bands do, in the future, decide to undertake some development on these lands, such action would only be taken under a plan that ensures protection of this habitat and that is developed in consultation with BIA and FWS. Similar commitments to future planning have been sufficient grounds to exclude tribal lands from critical habitat for other species. *See, e.g.*, Final Rules designating critical habitat for: Quino checkerspot butterfly, 74 Fed. Reg. 28,776; Peninsular and Desert bighorn sheep, 74 Fed. Reg. 17,288; Canada lynx, 71 Fed. Reg. 66,008; and bull trout, 70 Fed. Reg. 56,212. Viejas is committed to working with Barona, FWS, and BIA to continue and revise the Capitan Grande conservation and management strategies and plans that have protected this habitat for decades, and this intent is an adequate basis for excluding the proposed Capitan Grande lands designation under section 4(b)(2) of the ESA. In addition, they establish that the Capitan Grande lands do

not meet the definition of critical habitat due to the absence of the need for "special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i)(II).

Viejas believes that there are ample grounds for excluding Capitan Grande Reservation lands from arroyo toad critical habitat. Viejas looks forward to working with FWS and BIA to achieve this appropriate resolution. If FWS requires more information, and for purposes of future consultation, please contact Land Use Manager Lisa Haws at (619) 733-7697. Thank you for considering these comments.

Very truly yours,

Robert Cita Welch, Vice Chairman
Viejas Tribal Council

Cc: Viejas Tribal Council
Barona Tribal Council

VIEJAS
TRIBAL GOVERNMENT

P.O Box 908
Alpine, CA 91903
#1 Viejas Grade Road
Alpine, CA 91901

Phone: 6194453810
Fax: 6194455337
viejas.com

Bobby L. Barrett, Chairman
Robert Cita Welch, Vice Chairman
Diana L. Aguilar, Tribal Secretary
John A. Christman, Tribal Treasurer
Greybuck S. Espinoza, Councilman
Virginia M. Christman, Councilwoman
Timothy Bactad, Councilman

July 29, 2010

Public Comments Processing
Division of Policy & Directives Management
U.S. Fish & Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

Re: FWS-R8-ES-2009-0069; Comments of Viejas Band of Mission Indians on Draft Economic Analysis of Proposed Redesignation of Critical Habitat for Arroyo Toad

Dear Public Comments Processing:

The Viejas Band of Mission Indians (Viejas) submits the following comments regarding the Proposed Redesignation of Critical Habitat for the Arroyo Toad, in response to *Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Arroyo Toad*, 75 Fed. Reg. 37,358 (June 29, 2010). As the record indicates, Viejas previously submitted comments on December 14, 2009, in response to the Proposed Rule for Revised Critical Habitat for the Arroyo Toad under the Endangered Species Act (ESA). *See Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Arroyo Toad* (Anaxyrus californicus), 74 Fed. Reg. 52,612 (Oct. 13, 2009). The comments in this letter are in response to the June 29 notice seeking information on the Service's Draft Economic Analysis (DEA) for the proposed rule. The purpose of the DEA is to determine whether areas that qualify for designation should be excluded under section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), because the benefits of doing so outweigh the benefits of adding critical habitat protection.

For the reasons discussed in this letter, Viejas asserts its position as the sovereign nation responsible for the lands subject to potential designation on the Capitan Grande Band of Mission Indians Reservation that such exclusion is necessary. Exclusion of Reservation lands, currently identified as part of subunit 17a, from critical habitat is imperative to protect tribal sovereign interests. Exclusion of our tribal lands also will have no adverse impacts on the conservation and recovery of the arroyo toad, but will substantially protect the historic, cultural, governmental,

land use, and economic interests of the Band. Further, although Viejas believes that exclusion is warranted on the basis of tribal sovereignty, to the extent that federal law provides for the consideration of the potential economic impacts of designation, it is quite clear that the benefits of exclusion of these lands very substantially outweigh the benefits of specifying Capitan Grande Indian Reservation lands as part of the arroyo toad critical habitat. Had the U.S. Fish and Wildlife Service (FWS) consulted with Viejas in advance, as it is required to under federal law and policy, the interests and authority of Viejas and the Barona Bands would have been clear and no proposal for these lands would have been included. Viejas objects in the strongest possible terms to the complete failure to consult with the affected Tribes in conjunction with this proposed designation and the DEA. There is no excuse for such a clear dereliction of longstanding legal requirements and policy, especially in consideration of the President's vigorous commitment to full and open government-to-government consultation.

Capitan Grande Band of Mission Indians

As discussed in prior comments, Viejas and the Barona Band of Mission Indians are joint successors to Capitan Grande Indian Reservation lands. Together, from time immemorial, the Bands' members have lived on and enjoyed the area surrounding and including what ultimately became the Capitan Grande Indian Reservation. By Act of May 4, 1932 (47 Stat. 146), Congress authorized the City of San Diego to condemn the bottomland of the Capitan Grande Indian Reservation so that it could build a dam on the San Diego River for the dual purposes of protecting the City of San Diego from flooding and providing water storage for City use.

The project, however, forced members of the Band to leave the Reservation. Congress authorized the condemnation of all land that would be inundated by the waters of the reservoir, as well as part of any parcel which, at maximum pool elevation, would be at all inundated. As a consequence, the Capitan Grande Band of Mission Indians lost practically all access to the San Diego River, on which it had always relied. The members were forced by BIA to relocate to new lands. Proceeds from the condemnation were used to establish two nearby parcels which today support the Barona and Viejas Bands.

Although the Capitan Grande Indian Reservation has been uninhabited since condemnation, Viejas and Barona members continue to use the land for hunting, cultural, and ceremonial purposes. The land has remained undeveloped for the last eight decades and, under tribal plans, continues to be preserved. It is therefore vital to the sovereign, cultural, historic, and religious interests of the two Bands. The area of the Capitan Grande Reservation proposed for potential exclusion is the last point of physical access to the San Diego River. The land thus has significant economic value that requires its exclusion.

Viejas's Comments on the October 13, 2009 Notice

On December 14, 2009, Viejas detailed its objections to the inclusion of Capitan Grande Indian Reservation lands as critical habitat for the arroyo toad. In those comments, we explained that the land should not be designated for three reasons. First, according to a biological study prepared for the Viejas and Barona Bands, a substantial portion of the proposed 92 acres does not contain the primary constituent elements necessary to qualify as critical habitat. No arroyo toads have been confirmed on or near the Reservation and most of the identified area does not include suitable habitat. As a consequence, there are no grounds for determining that the Reservation lands are "essential to the conservation" of the species, as required by the Act. *See* 16 U.S.C. § 1532(5)(A)(i)(I). Second, Viejas described the significant hardship it and the Barona Band would experience as a result of an unwarranted intrusion into the Bands' planned management of Reservation lands and our tribal sovereign governmental authority. Such intrusion is clearly unwarranted when no risk is posed to the protected species. The lands should be excluded under section 4(b)(2) on that basis. Third, we explained that FWS is well aware from working with Viejas and Barona that the Bands have a long history of protecting the Reservation lands from development and activities that would negatively affect wildlife or wildlife habitat. Consequently, there are no special management considerations that call for designation as required by the definition of critical habitat. *Id.* § 1532(5)(A). For these reasons, Viejas strongly objected to inclusion of Capitan Grande Indian Reservation lands as critical habitat.

In an effort to work with FWS and the Bureau of Indian Affairs (BIA), a cooperating agency in this process, and despite their failure to consult with us before issuing the first Federal Register notice, Viejas invited both agencies to contact us to discuss the grounds for not designating Capitan Grande Indian Reservation lands. Viejas pointed out that both agencies had failed to comply with the directives obligating federal agencies to consult with Indian tribes when taking actions that impact tribes, particularly those involving tribal lands and the management of biological resources, including: 1) Secretarial Order 3206 (which addresses ESA implementation that affects tribes and directs FWS to "consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable"); 2) Executive Order 13175 (which acknowledges "the unique legal relationship with Indian tribal governments" and directs agencies "to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications"); and 3) President Obama's November 5, 2009 memorandum (which restates this Administration's commitment to meaningful collaboration with Indian tribes, including as an initial step "complete and consistent implementation of Executive Order 13175").

Viejas is deeply concerned over, and strongly objects to, the failure of FWS and BIA to reach out to Viejas throughout the entire designation process, and in particular since our December 14 comment letter. The Obama Administration has devoted months to developing a robust tribal consultation policy, yet FWS and BIA have failed to take any steps to involve Viejas in the decision-making process beyond the Federal Register notices. We therefore once again call for full and prompt consultation before any additional action is taken.

The Draft Economic Analysis in the Current Notice

The latest notice includes a DEA that was not available when FWS published the October 13, 2009 notice. The DEA is highly problematic. One of the omissions of the DEA is its failure to estimate economic costs for any of the tribal lands within the study area. Although the 92 acres of the Capitan Grande Indian Reservation are listed in the Federal Register as an area considered for exclusion under 4(b)(2), the DEA offers no assessment of economic impacts, and instead asks for input from affected parties. Remarkably, the DEA makes no effort to quantify these costs, despite quantifying the economic impacts of designation of all non-Indian lands. It is not clear why FWS allowed the DEA to ignore the economic impacts associated with the potential designation of Indian lands. In any case, the DEA provides only that:

> Approximately 4,000 acres of the AT CHD covers land owned by Indian tribes. Review of the consultation history suggests that tribal activities include development and infrastructure projects. This draft of the AT DEA does not include economic impacts borne by the Tribes if development of their land is affected by the designation. However, it is anticipated that the Final Economic Analysis will incorporate comments and additional information from Indian Tribes, and other knowledgeable parties, to estimate economic impacts related to private real estate development on tribal owned lands.

As an initial matter, this approach is not consistent with Administrative Procedure Act requirements. Under 5 U.S.C. § 553(c), an action agency is to provide studies and other evidence supporting its proposed action, and circulate such information for meaningful public comment. 5 U.S.C. § 553(c). *See, e.g., Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir.1991) (per curiam). Although an agency may use supplementary material not available during the comment period, *see Community Nutrition Institute v. Block*, 749 F.2d 50, 57-58 (D.C. Cir. 1984), assessing the economic impacts of inclusion is a relatively straightforward task and could easily have been achieved so that such information would have been available for public comment. In addition, it is worth noting again that the FWS would not be in this position now had it consulted with Tribes, as so directed under various authorities.

Further, as mentioned above, there are significant reasons relating to cultural importance and sovereign rights with respect to this land that warrant excluding Capitan Grande Indian Reservation lands from designation as critical habitat. Tribal sovereignty concerns and decades of responsible management strongly argue for exclusion of Capitan Grande Indian Reservation lands. These reasons, described in detail in our December 14 comments, are sufficient grounds for exclusion. Nonetheless, as noted above, it is also easy to develop an economic value of the land from the DEA's estimates which might serve as a lower bound on the land's value. Indeed, FWS's consultant could readily have calculated economic costs on the basis of development of non-tribal land, without interfering with, intruding on, or quantifying the concerns unique to

tribal entities. On that basis as well, exclusion should have been already called for. The following provides general estimates for FWS's consideration.

a. Forgone Land Development Value.

One example of forgone economic value would be for development purposes. If the Bands ever sought to develop the 92 acres, an expected 55.28 acres would be required as set-aside for arroyo toad conservation measures, based on the ratio of set-aside to developable acres for San Diego County in Table 2-6 on p. 44 of the DEA. Using the Residual Land Values calculated in Table 2-9 on p. 49 of the DEA for San Diego County, the average residual value per acre is $279,123. This yields $15,429,615 in forgone land value on Capitan Grande Indian Reservation lands. Adding the typical project modification costs of $375,166 (Table 2-12, p. 54) that would be required to develop the remaining acres gives a total forgone land development cost of $15,804,781.

b. Winters Doctrine Water Rights.

Assuming that the Bands asserted their right to irrigate the 92 acres of their land under the Winters Doctrine of federally-reserved water rights, the land would carry with it a valuable water right. A rough valuation of this water right can be gained using numbers in the DEA. Assuming a very conservative water right estimate of three acre-feet of consumptive use per acre, the Bands would be entitled to 276 acre-feet annually from the flow of the San Diego River. The DEA values replacement water released from San Vincente Reservoir on the San Diego River at $540 per acre-foot. Capitalizing the water right using the seven percent discount rate used in the DEA yields a water right value of $7,714 per acre-foot, or $2,129,143.

Therefore, a minimum threshold for the economic cost of critical habitat designation to the Bands is $17,933,924 based simply on the information already contained in the Services own DEA. This would be a significant loss of value irrespective of whether the Bands ever decide to develop their property. In fact, critical habitat designation could have an even greater negative effect by limiting the Bands' ability to use the reserved water rights for the entire Reservation by restricting the only remaining point of contact with the River. Moreover, this economic value is a minimum threshold because it does not consider the social and cultural value of the land to the Bands, nor the value of exercising tribal sovereign rights. Finally, under the section 4(b)(2) balancing test, these negative impacts to the Bands *demand* exclusion of Capitan Grande Indian Reservation lands because, as shown in our December 14 comments, there is no benefit to the species from designation while there are major and significant negative impacts to both Bands.

Conclusion

FWS has not yet ranked the biological values of different segments of habitat to the conservation of the arroyo toad species. However, the 92 acres of Capitan Grande Indian Reservation land are

of lower conservation value than other riparian lands and have no benefit to the species. Viejas feels that its sovereign concerns are sufficient to outweigh any benefits that designation of the land would provide. Nonetheless, it is also obvious that the economic costs of declaring the land to be critical habitat far exceed the potential benefits to the conservation of the arroyo toad. This land parcel should not be included in the least cost combination of habitat necessary to preserve the arroyo toad species.

There are thus ample grounds for excluding Capitan Grande Indian Reservation lands from arroyo toad critical habitat. Viejas therefore respectfully requests that its land be excluded from critical habitat in the final section 4(b)(2) report. Viejas hopes that, in contrast to past actions, FWS and BIA contact the Band to work directly to reach an appropriate resolution. If FWS requires more information, and for purposes of future consultation, please contact Land Use Manager Lisa Haws at (619) 733-7697. Thank you for considering these comments.

Very truly yours,

Robert Cita Welch, Vice Chairman
Viejas Band of Kumeyaay Indians

LAW OFFICES OF ART BUNCE

ART BUNCE
KATHRYN CLENNEY
ATTORNEYS AT LAW

December 10, 2009

Public Comments Processing
Attn: FWS-R8-ES-2009-0069
Division of Policies and Directives Management
U.S. Fish & Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

Re: Comments of the Barona Band of Mission Indians on Proposed Revised Designation of Critical Habitat for Arroyo Toad (Anaxyrus Californicus)

Dear Public Comments Processing,

As stated in the notice published in the *Federal Register* of October 13, 2009, 74 F.R. 52612, enclosed please find the original of the comments prepared by the Barona Band of Mission Indians on the proposed revised designation of critical habitat for the arroyo toad, especially regarding the proposed inclusion of 92 acres of the Capitan Grande Indian Reservation in subunit 17a. Thus, the focus of the comments are on question no. 18 of the 25 questions posed in the notice.

Please consider these comments in determining the final rule. If there are any questions, please contact me at the address or number on the letterhead.

Sincerely yours,

Art Bunce
Tribal Attorney

101 STATE PLACE, SUITE C, ESCONDIDO, CA 92029
MAILING ADDRESS: P.O. BOX 1416, ESCONDIDO, CA 92033-1416
TELEPHONE: 760-489-0329 FAX: 760-489-1671

December 10, 2009

Public Comments Processing
Attn: FWS-R8-ES-2009-0069
Division of Policies and Directives Management
U.S. Fish & Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

COMMENTS OF THE
BARONA BAND OF MISSION INDIANS
ON PROPOSED REVISED DESIGNATION OF CRITICAL HABITAT
FOR ARROYO TOAD (ANAXYRUS CALIFORNICUS)

Summary

In response to the notice published by the U.S. Fish & Wildlife Service in the *Federal Register* of October 13, 2009, the Barona Band of Mission Indians (the "Tribe")[1] submits the following comments on the proposed redesignation of 92 acres of the Capitan Grande Indian Reservation as critical habitat, within Subunit 17a. The Service proposes to include these 92 acres in the final designation, but also states:

> We are considering the exclusion of approximately 92 ac (37 ha) of Capitan Grande Band of Diegueno Mission Indians Tribal lands in Subunit 17a from the final revised critical habitat designation under section 4(b)(2) of the Act. We are seeking public comment on the appropriateness of the inclusion or exclusion of these lands from final designation of critical habitat and whether the conservation needs of the arroyo toad can be achieved by limiting the designation to non-tribal lands. [74 F.R. 52634]

The Tribe believes that the incremental benefits of including these 92 acres of Reservation land are greatly outweighed by the detriment to the service and conservation efforts of including these 92 acres. This is largely because, as a sovereign with stewardship over these 92 acres since before the creation of the Capitan Grande Indian Reservation in 1875, the Tribe is quite capable of managing the use and development of

[1] Although the Barona Band will refer to the Viejas Band in these comments, the Barona Band does not speak for the Viejas Band. The Viejas Band speaks for itself.

1095 Barona Road, Lakeside, California 92040-1599 • Phone 619.443.6612 • Fax 619.443.0681

these acres in a way that affords full protection to the species and its habitat while also maintaining the Tribe's authority over the use and disposition of reservation land. Any outside interference from another sovereign, by way of designation, interferes with the cooperative government-to-government relationship between the Tribe and the Untied States that is of value to both the Service and the Tribe. Furthermore, the need for such designation in questionable areas such a federal Indian reservation declines as the species and its habitat are benefiting from earlier conservation efforts, as evidenced by the proposal of the Service to downgrade the arroyo toad from endangered to threatened. Furthermore, the science supporting redesignation of these 92 acres is not compelling and, in any event, the spatial extent of the redesignation of the 92 acres is overly broad.

Status and interest of the Tribe

The Capitan Grande Band of Mission Indians is a federally-recognized Indian tribe with which the United States maintains a government-to-government relationship. By his Executive Order of December 27, 1875, President U.S. Grant first established the Capitan Grande Indian Reservation to include approximately 12,000 acres of land astride the San Diego River. This reservation included the ancestral land of the Capitan Grande people, whom archaeological and other evidence indicates had lived there along the river for centuries before the arrival of Europeans. President Arthur expanded this reservation to over 16,000 acres by his Executive order of June 19, 1883, including all of Section 11, T. 14 S., R. 2 E., S.B.M., in the northeast quarter of which section the subject 92 acres proposed for redesignation are found. Under the authority of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, the Secretary of the Interior in 1894 issued a patent, declaring that the United States would hold the lands of the Capitan Grande Indian Reservation, including all of this Section 11, in trust for the Capitan Grande Band.

By 1919 the City of San Diego wanted to build a dam on the San Diego River for flood control and water storage purposes. Therefore, it obtained the consent of Congress in the Act of February 28, 1919, 40 Stat. 1206, for the City to condemn the bottomland of the Capitan Grande Indian Reservation for these purposes. The City did not do so immediately, but went back to Congress in 1932, asking for further authority to condemn an additional 960 acres so that it could build a higher dam and inundate even more Indian land. Congress authorized this further condemnation by its Act of May 4, 1932, 47 Stat. 146, which also authorized the federal government to use the proceeds of the condemnation to purchase one or more substitute reservations to which the Capitan Grande people could relocate themselves as the rising waters flooded their ancestral river valley and villages.

With the proceeds of the condemnation, the Secretary of the Interior purchased what is now the Barona Indian Reservation to the west of the Capitan Grande Indian Reservation, and what is now the Viejas Indian Reservation to the south and east. The Capitan Grande people who settled on these two new substitute reservations became known as the Barona and Viejas Groups of the Capitan Grande Band of Mission Indians, or the Barona and Viejas Bands of Mission Indians. The United States treats each group as the successor to the Capitan Grande Band and as an autonomous tribe. By mutual

consent, and as provided in the 1932 statute, the Barona and Viejas Bands jointly administer the remaining lands of the Capitan Grande Indian Reservation, including the subject Section 11. The only part of the original Capitan Grande Indian Reservation that contains the San Diego River and that was not included in the condemnation is the north half of the subject Section 11, because it is higher than the highest pool elevation of the reservoir behind the dam. This half-mile stretch of the San Diego River is important to the Barona and Viejas peoples because it is the only part of their original reservation that contains the river and was not condemned. It also contains important archaeological and cultural resources.

Since the removal of the Capitan Grande people to the Barona and Viejas Indian Reservations in 1932, the remaining uncondemned portions of the Capitan Grande Indian Reservation, including the north half of the subject Section 11, have remained uninhabited. The only use to which the remaining original reservation has been put is occasional hunting for small game by members of the Barona and Viejas Bands. There has been no construction or development of any kind. Considering its remoteness, it is not likely that there will be any construction or development of any kind at any time in the near future. However, the Barona Band wishes to maintain the unlikely option to make some kind of use or development, in conjunction with the Viejas Band, of these remaining original reservation lands. Doing so is an important aspect of tribal sovereignty, particularly the ability to control the timing, content, and nature of the use or development of reservation land. No such use or development has occurred, and no human habitation, since 1932, and it is possible none ever will. But the choice must remain with the Barona and Viejas Bands, as the successors to the Capitan Grande Band.

Basis and rationale for exclusion

Section 4(b)(2) of the Endangered species Act, 16 U.S.C. §1533(b)(2), states that, in designating critical habitat

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat, unless the determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

The Secretary has often used this authority, after balancing the relative benefits of inclusion and exclusion, to choose to defer to tribal authorities in the management of tribal lands. The most recent local example was with regard to the peninsular bighorn sheep, for which the Secretary designed a new critical habitat in his notice of April 14, 2009, *Federal Register*, vol. 74, no. 70, p. 17288. The area originally considered for such designation included much of the Agua Caliente Indian Reservation in adjacent Riverside County including 4,790 acres of tribal land with all the required primary constituent elements for that species. And yet the Secretary excluded all of the tribal lands of that

reservation from that designation, largely on the following rationale, which deserves repetition here in pertinent part:

> The Tribe regularly coordinates and works with the service to ensure maximum protection of tribal trust resources by managing activities in such a way as to ensure compliance with the [Endangered Species] Act. . . . This cooperative relationship provides the Tribe an opportunity to acknowledge the Service's duty and authority while preserving tribal sovereignty and honoring traditional tribal land management practices. [74 F.R. 17334]
>
> The Agua Caliente band of Cahuilla Indians highly values its wildlife and natural resources, and is charged to preserve and protect these resources under the Tribal Constitution. Consequently, the Tribe historically has been committed to managing the habitat of wildlife on its lands, including the habitat of endangered and threatened species. In light of the demonstrated commitment by the Tribe to manage Peninsular bighorn sheep habitat to provide for the conservation of the DPS, the preferable regional scale of conservation utilized in the development of the 2001 Tribal Conservation Strategy and the 2007 draft Tribal HCP, and the conservation that has been achieved through implementation of the 2001 Tribal Conservation Strategy and will occur through implementation of the 2007 draft Tribal HCP, we conclude that the potential regulatory benefit of designating these areas in Units 1 and 2A as critical habitat is minimal. [74 F.R. 17336]
>
> In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered species Act" (June 5, 1997); the President's Memorandum of April 22, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and the other natural resources on tribal lands are better managed under tribal authorities, policies, and programs, than through Federal Regulation wherever possible and practicable. Based on this philosophy, we believe that, in most cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as unwarranted and an

> unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend. 74 F.R. 17336-7
>
> . . . we recognize the importance of tribal self-governance and fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. Because of the unique government-to-government relationship between Indian tribes and the United States, it is important for us to establish and maintain an effective working relationship and mutual partnership with the Agua Caliente Band of Cahuilla Indians to promote the conservation of the Peninsular bighorn sheep and other sensitive species. As stated above, we believe that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies and programs than through Federal regulation wherever possible and practicable. Because of this philosophy, we believe that, in most cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. 74 F.R. 17337

For the reasons noted below, the Secretary should act to exclude the 92 acres in question of the Capitan Grande Indian Reservation on the same basis and rationale.

Grounds for exclusion

As with the 4,790 acres of the Agua Caliente Indian Reservation that the Secretary chose to exclude from the redesignation of critical habitat for the peninsular bighorn sheep earlier this year, the Secretary should similarly exclude the 92 acres in question within Section 11, T. 14 S., R. 2 E., S.B.M. from the current proposed redesignation of critical habitat for the arroyo toad. The rationale for doing so is exactly as stated above regarding the exclusion of the lands of that other local reservation. The grounds for doing so are remarkably parallel, although certainly not identical. Those grounds are as follows.

1. ***The Barona Band has not permitted any development of the subject lands in the 77 years since 1932, and is unlikely to do so in the future.***

Because of its unique history, as set forth above, the Capitan Grande Indian Reservation has remained entirely uninhabited since 1932. The only improvements there are those few one-lane dirt roads and remains of structures, homes, orchards, etc. that date from before 1932. Land access is possible only through the Barona and Viejas

Indian Reservations, and each successor tribe jealously restricts access to members, largely for hunting and cultural purposes. These tribal restrictions have been more effective in preserving the suitable habitat of the arroyo toad than any measures that could ever have been taken under the Endangered Species Act. As with the Agua Caliente Band, tribal restrictions have preserved the resources and other primary constituent elements for each species on the respective reservations since long before any federal regulatory efforts even existed. There is no reason now to expect that this historic highly effective and voluntary tribal stewardship will be any less effective in the future.

While the Barona and Veijas Bands both wish to retain their sovereign choice to make some further use or development of the 92 reservation acres in question, they have not made that choice in 77 years. Nor is it likely that they will. The area is of great cultural significance, not only as the ancestral homeland of the Capitan Grande people, but there are significant archaeological and cultural resources present on the 92 acres that are not suitable to describe in any detail here.

But, if the Barona and Viejas Bands do choose to make some use or development of any of the subject 92 acres, they will still be constrained by the explicit provisions of the Endangered Species Act regarding "take", "harm", etc. That should provide at least as much protection as the measures taken by the Agua Caliente Band that the Service found sufficient to justify, together with other factors, the exclusion of their tribal lands from a similar redesignation for another species earlier this year.

2. ***The Barona Band has worked cooperatively with the Forest Service to achieve conservation goals.***

In the original 2005 designation of critical habitat for the arroyo toad, the Service based exclusion of Unit 17, in part, on the willingness of the Barona and Viejas Bands to work cooperatively with the Service regarding conservation of the species on tribal lands:

> Additionally, in regards to portions of 17a, the Barona Band of Mission Indians and the Viejas Band of Kumeyaay Indians have both agreed to establish a cooperative approach with us concerning arroyo toad conservation on certain lands in Capitan Grande Reservation, which is jointly administered by both Tribes. There is accordingly no reason to believe that these exclusions would result in extinction of the species. [70 F.R. 19606, April 13, 2005]

Since then, nothing has changed in this regard. The Barona Band (and presumably the Viejas Band) still wish to work cooperatively with the Service. Although neither tribe has enacted a formal Tribal Habitat Conservation Plan, none is needed concerning an area that is uninhabited, is very remote, and has not been developed or used for anything but hunting by Tribal Members in 77 years. The informal policy of both tribes to leave the area in question in a nearly-pristine state since 1932 has probably done more for preservation of the habitat than any more formal measure would have done.

In addition, the Barona Band has learned that the Viejas Band, in conjunction with the U.S. Bureau of Indian Affairs, has embarked on a fuel reduction project on about 200 acres of the Capitan Grande Indian Reservation near the Viejas Indian Reservation for purposes of fire safety. In doing so, the participants have already started the necessary consultations with other agencies under the National Historic Preservation Act, the Endangered Species Act, etc. This is an example of how the occasional activity on the Capitan Grande Indian Reservation is done in full compliance with federal law, and for conservation purposes, not development.

As a further example of the Tribe exercising control over the natural resources on the Capitan Grande Indian Reservation, the Barona Band, at the meeting of its General Council on November 24, 2009, voted to establish a moratorium on all hunting of deer by Tribal Members on the Capitan Grande Indian Reservation for a period of 20 years. In doing so, the Tribe exercises its sovereign right to manage its own natural resources in the interest of conservation entirely outside federal law.

3. ***The viability of the species is increasing, not decreasing.***

As stated in the Department of the Interior's News Release of October 20, 2009, the Service has recommended downlisting the arroyo toad from endangered to threatened. The Service is making this recommendation as a result of its 5-year review of the status and recovery of this species. See *Arroyo Toad (Bufo californicus (=microscaphus)): 5-Year Review: Summary and Evaluation* (Ventura, California, U.S.F.&W.S., August 2009): "Therefore, based on the improvements in the status of the arroyo toad and conservation management to control threats that have occurred since it was listed, we recommend the species be downlisted to threatened." [p. 19]

4. ***The data on which the Secretary relied in proposing the re designation of the 92 acres in question is weak.***

Under Section 4(b)(2) of the Endangered Species Act, the Secretary has broad discretion in making designations of critical habitat. One of the major factors that he must consider is "the best scientific and commercial data available." The following table summarizes the sightings of this species known to the Barona Band in the vicinity of the 92 acres in question in the NE¼ Section 11, T. 14 S., R. 2 E., S.B.M.

Sighting	*Year*	*Location* (Section-Township S.-Range E.)	*Source and Location*
1	1993	11-14-2	CNDDB, on San Diego River
2	1991	?-12-2	CNDDB, on Witch Creek, tributary to Santa Ysabel Creek, not San Diego River

3	2003 1993	1&2-14-2	USF&WS map, based on USGS data; on Cedar Creek, near junction with San Diego River
4	2003 1993	36-13-2	USF&WS map, based on USGS data from 2000-2001 and 1993, several locations along San Diego River, above junction of Cedar Creek
5	2007	25-13-2	Helix Environmental Planning, Inc., on San Diego River, 2 miles above junction with Cedar Creek
6	2007	30-13-2	Helix Environmental Planning, Inc., on Ritchie Creek, tributary to San Diego River (presence assumed, not observed)
7	2008-9	36, 25, 19, 18, 17, 8	USF&WS map, based on 2008-9 survey by USGS, 17 "occurrences" scattered along 3-4 miles of San Diego River

Sighting 1. This sighting is 16 years old and is at an unspecified location somewhere within the polygon shown on the CNDDB map. Depending on location, it is up to 1½ miles south of the subject 92 acres.

Sighting 2. This sighting is over 5 miles away and on a tributary of Santa Ysabel Creek, not the San Diego River, and is thus in a different watershed.

Sighting 3. These sightings are immediately north of the subject 92-acre parcel, but are at least 6 and 16 years old.

Sighting 4. These sightings are more than 1 mile north of the subject parcel, and are at least 6 and 16 years old.

Sighting 5. This sighting is at least 2 years old, and is 3 miles north of the subject parcel.

Sighting 6. This is not an actual sighting, but an unspecified location where the presence of the species was assumed. Depending on the location, the area is 3-4 miles from the subject parcel.

Sighting 7. The U.S.F.&W.S. informed the Barona Band of the existence of this cluster of 17 sightings only on December 8, 2009, although it had earlier stated that a 2008-9 survey by the USGS had been performed, without providing a copy. On December 8, 2009 the Tribe received a map with no supporting data other than a legend identifying the sites as from an unspecified "2008-9 USGS survey". Without the supporting data, the Tribe cannot tell what the supporting data are or mean, especially since the sites are described only as "occurrences, without any explanation of exactly what an "occurrence" is. If these are actual sightings of live examples of the species at

the locations shown, the nearest is at least 2 miles north of the subject parcel, and the farthest between 5 and 6 miles distant.

These data do not include a single sighting of even one arroyo toad on the 92 acres in question. While the presence of a species on a parcel is not necessary for designation as critical habitat, if the primary constituent elements for that species are present, the absence of any sightings certainly cuts against the need for such designation as to that parcel. In the original 2005 designation for this species within the very same unit, the Service stated:

> The unit [17] was divided into four subunits in the proposed rule (subunits 17a, 17b, 17c, 17d), of which two (subunits 17b and 17c) are no longer essential because they are not known to be occupied. [70 F.R. 19589, April 13, 2005]

What the data do show is that 6 and 16 years ago the species was found up to 1½ miles south of the subject parcel [1], and immediately north and more than a mile north of the parcel [3, 4]. They also show that it was present more than 3 miles north over 2 years ago [5]. If the most recent USGS data are actual sightings of live individuals, then a cluster of individuals were present within the last year at locations at least 2 miles, and up to 5 or 6 miles, north of the subject parcel [7]. In other words, *no live individual has been seen any closer than 2 miles from the subject parcel in the last 6 or more years.* This does not necessarily mean that no live individuals are now on the parcel or that the parcel could not support the species. It only means that there is no affirmative data to support their presence on the parcel or within 2 miles of it upstream or downstream within the last 6 or more years.

While connectivity is a factor that may justify designation of unoccupied parcels if adjacent to occupied parcels in some circumstances, the evidence that adjacent parcels are now occupied by arroyo toads is relatively weak. The most recent local sightings were 4 miles away in 2007 [6], but all at least 2 miles away, perhaps in 2008-9, and some as far as 6 miles away [7]. Another cluster of sightings was reported by the USGS in 2003, but they occurred in 2000 and 2001 [3, 4]. There is no evidence that such individuals are present at those locations today, 7 and 8 years after their incidence and all but one of which years were very dry. The same can be said for the 1999 sightings 1-2 miles downstream on the San Diego River at the north end of the El Capitan Reservoir [1]. Due to many years of drought, the individuals observed in 1999 may no longer exist. Furthermore, if the one sighting to the south of the subject parcel is discounted for being 16 years old [1], then there are no sightings at all to the south of the subject parcel. If so, there is no need to include the subject parcel for purposes of connectivity, because there are no two areas with sightings for the parcel to connect.

5. ***The proposal overdesignates within the subject 92 acres.***

The boundaries of the proposed redesignation on the Capitan Grande Indian Reservation apparently include the aliquot parts of the section that are traversed by the thread of the San Diego River. Presumably the lines were drawn based only on aerial photographs of the subject parcel, and the features of upstream and downstream parcels, rather than any direct, on-the-ground observations. The proposed redesignation includes not only the relatively broad, shallow, sandy lands adjacent to a watercourse described in the primary constituent elements for this species, but large areas of adjacent relatively steep rocky hillsides in which even dispersal would be difficult.

On November 18, 2009, the Barona and Viejas Bands engaged the services of a qualified biologist from Helix Environmental Planning, Inc. (the very same biologist who made the 2007 sighting of an arroyo toad noted above [6], although distant from the subject parcel) to make a limited biological survey of the 92-acre parcel in question. Because thiswas not the breeding season, it is no surprise that he saw and heard no arroyo toads on the parcel. One would not expect any at this time of year. But he did verify that the primary constituent elements are present within the 92 acres, although not on the entire 92 acres. A copy of his report of December 4, 2009 is attached as Attachment A. Its Attachment B is an aerial map showing both the relatively arbitrary boundaries of the proposed 92-acre parcel and his designation of the contoured boundaries of the areas closest to the thread of the San Diego River most likely to display all the primary constituent elements. That much more contoured area is, by eye, approximately half the spatial extent of the original proposed redesignation.

Because this survey by a qualified professional is not only the most recent, but also the *only*, on-the-ground direct scientific data as to this parcel, it is the best scientific data available. Therefore, the Secretary should accord more weight to it than to the relatively arbitrary boundaries drawn from less reliable and indirect, older sources. While the Barona Band believes that the entire 92-acre parcel should be excluded from the redesignation, if any lands of the Capitan Grande Indian Reservation must be included, those included lands should be limited to the approximately half of the 92 acres identified by the qualified on-the-ground biologist just two weeks ago as "Arroyo Toad Suitable Breeding Habitat."

6. ***Excluding the subject 92-acre parcel is consistent with federal law.***

Federal law beyond section 4(b)(2) of the Endangered Species Act itself also supports the Secretary acting in his discretion to exclude the subject 92 acres on the Capitan Grande Indian Reservation from the redesignation of critical habitat for this species.

Executive Order 13175 (November 6, 2000, 65 F.R. 67249) states:

> When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes. [§3(b), 65 F.R. 67250]

On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty or other rights, each agency shall explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. [§5(d), 65 F.R. 67251]

Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribe level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate. [§6(b), 65 F.R. 67251]

The President repeated and reinforced this directive to the Secretary in his *Memorandum for the Heads of Executive Departments and Agencies*, of November 5, 2009, 74 F.R. 57881.

In addition, **Secretarial Order 3206**, June 5, 1997 addresses these very concerns in the context of the Endangered Species Act itself.

The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goals of promoting and protecting the health of ecosystems. [Principle 1, p. 4]

> The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (. . .) depend. [Principle 3(A), p. 5]
>
> The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. [Principle 3(B), p. 5]
>
> In cases involving an activity that could raise the potential issue of an incidental take under the [Endangered Species] Act, such notice [from the Department to a tribe] shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose. [Principle 3(C), p. 6]

Conclusion

In view of these policy directives, this is an ideal opportunity for the Secretary to exercise his discretion by determining that the benefits of excluding the subject 92-acre parcel from the proposed redesignation outweigh the benefits of including it. The species is achieving increased viability on its own. The Tribe is taking responsible conservation measures as a matter of tribal law, and has effectively adopted a moratorium on all development of the subject parcel that has been in place for 77 years. While the Tribe wishes to retain the sovereign choice to conduct some development in the future, the

other existing protections of the Endangered Species Act regarding "take", "harm", etc. are more than adequate to limit that development to activities that do not endanger the arroyo toad. The best scientific data available show that this parcel is not needed for connectivity, has no examples of the species, and is at least 2 miles distant from the nearest sighting of the species over 6 years ago. It is prudent tribal management of this parcel for the last 77 years that has preserved it in nearly pristine and undeveloped condition, not any measures taken under the Endangered Species Act. Redesignation of any of this parcel as critical habitat is simply unnecessary to the protection of the arroyo toad. As required by the above Executive and Secretarial Orders, the Department should defer to tribal management of tribal trust lands, especially when that management has been successful for 77 years, and not trample on tribal sovereignty by straining to impose a measure of federal law whose added protection for the species is negligible and whose intrusion on tribal sovereignty is prohibited by those Orders. The conservation needs of this species can be fully met by limiting the proposed redesignation to non-tribal lands.

For these reasons, the Barona Band of Mission Indians urges the Secretary to exclude all lands of the Capitan Grande Indian Reservation from the proposed redesignation of 92 acres of that Reservation as critical habitat for the arroyo toad.

HELIX
environmental planning, inc.

7578 El Cajon Boulevard, Suite 200
La Mesa, CA 91941
fax (619) 462-0552
phone (619) 462-1515

Inland Empire Office
phone (951) 328-1700

December 04, 2009 TES-03

Mr. Mike Baksh
Tierra Environmental Services
9915 Business Park Ave., Ste. C
San Diego, CA 92131

Subject: Arroyo Toad (*Anaxyrus californicus*) Habitat Assessment on the Capitan Grande Reservation

Dear Mr. Baksh:

The U.S. Fish and Wildlife Service (Service) has released the Revised Critical Habitat for the Arroyo Toad (*Anaxyrus californicus*); Proposed Rule (Proposed Rule; Service 2009). Subunit 17a of the Proposed Rule would include 92-acres along an approximately half-mile long section of the San Diego River on the Capitan Grande Reservation. Critical habitat is defined in the Proposed Rule as:

> (1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features; (a) Essential to the conservation of the species; and (b) That may require special management considerations or protection; and (2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

While arroyo toads have been observed up- and down- stream from Capitan Grande, it is the understanding of HELIX Environmental Planning, Inc. (HELIX) that no arroyo toad surveys have been conducted on the Reservation. HELIX biologist Dale Ritenour conducted an arroyo toad habitat assessment on November 18, 2009 to determine the extent of areas on site suitable to support arroyo toad. This assessment focuses on evaluating the Primary Constituent Elements (PCE) from the Proposed Rule associated with critical habitat.

The San Diego River through Capitan Grande consisted of a 150 to 400 foot wide, gently sloped drainage. Habitat within the river valley was observed to be southern cottonwood-willow riparian forest (Attachment A). The habitat was dominated by western cottonwood (*Populus fremontii*), arroyo willow (*Salix lasiolepis*), mule-fat (*Baccharis salicifolia*), western sycamore (*Platanus racemosa*), with coast live oak (*Quercus agrifolia*) along the river banks. The openings between trees contained wetland herbaceous species

(western ragwort [*Ambrosia psilostachya*] and mugwort [*Artemisia douglasiana*]), stands of field mustard (*Hirschfeldia incana*), and loose, open benches of sediments.

The riverbed within Capitan Grande is suitable habitat for arroyo toad (the limits of appropriate breeding habitat are shown on Attachment B), as is a narrow section of the tributary entering from the east. The habitat on site is considered suitable for arroyo toad because it contains the four PCE's for the species. Discussion of the onsite condition of the four PCE's follows:

1) Hydrology. The riverbed within the proposed Critical Habitat has appropriate hydrology to support breeding arroyo toad. The San Diego River on Capitan Grande has a watershed sufficiently large to supply water for breeding pools for arroyo toad. Surface water flow occurs upstream well into the summer, suggesting that ponding of breeding pools on site would persist long enough to allow for the development of arroyo toad larvae. Shallow, braided channels exist in the onsite riverbed suggesting that areas of slow moving water occur in the spring.

2) Substrate. The riverbed within Capitan Grande is low gradient (less than 6 percent) with exposed sandy and silty alluvium in sections. Small terraces exist within the riverbed and a larger terrace exists to the east of the channel. This substrate is loose enough to allow arroyo toads to burrow.

3) Flooding Regime. The San Diego River is free flowing above of the Capitan Grande Reservation. The river has a natural flooding regime which would allow for the changing of stream courses, the scouring of vegetation, and the deposition of sediments. This is expected to keep the stream open for breeding locations.

4) Connectivity. This section of the San Diego River is connected to undeveloped Cleveland National Forest to the north and a riparian area above El Capitan Reservoir to the south, which would allow for the movement of arroyo toads up- and down-stream. The hills on either side of the stream are undeveloped, but steep. An approximately 15-foot tall concrete diversion dam exists immediately downstream from the reservation. While this dam might prevent movement of arroyo toads in the river bed, uplands with low gradients exist adjacent to the east of the river, which would allow for dispersal of adults.

While the river bed is good quality arroyo toad breeding habitat, the Service designation of critical habitat may overestimate the quantity of upland dispersal habitat outside of the river bed. Slopes to the west of the river bed have slopes from a 4:1 grade up to 2:1. The river bed is good habitat, with a gentle slope and plenty of open areas for dispersal, reducing the likelihood that arroyo toads would utilize the slopes.

Please feel free to contact me with any questions or comments.

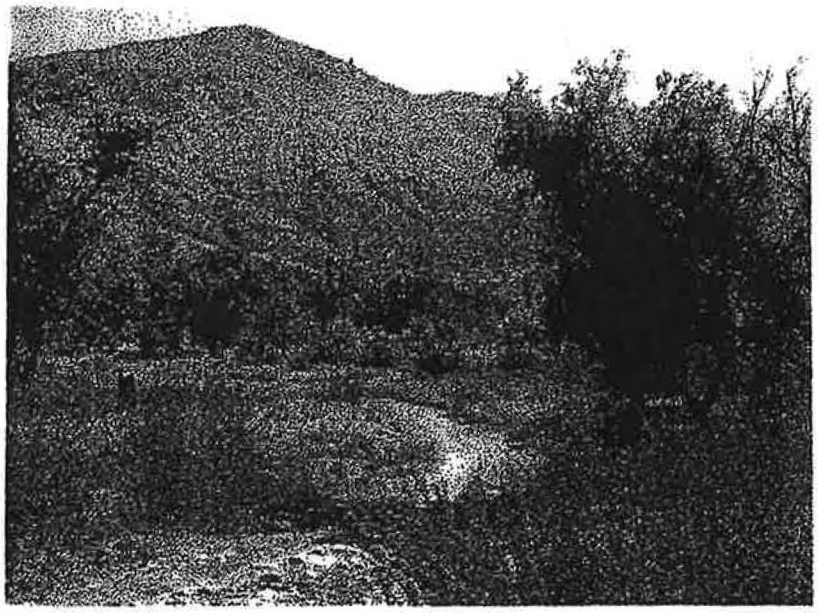
Sincerely,

Dale Ritenour
Biologist

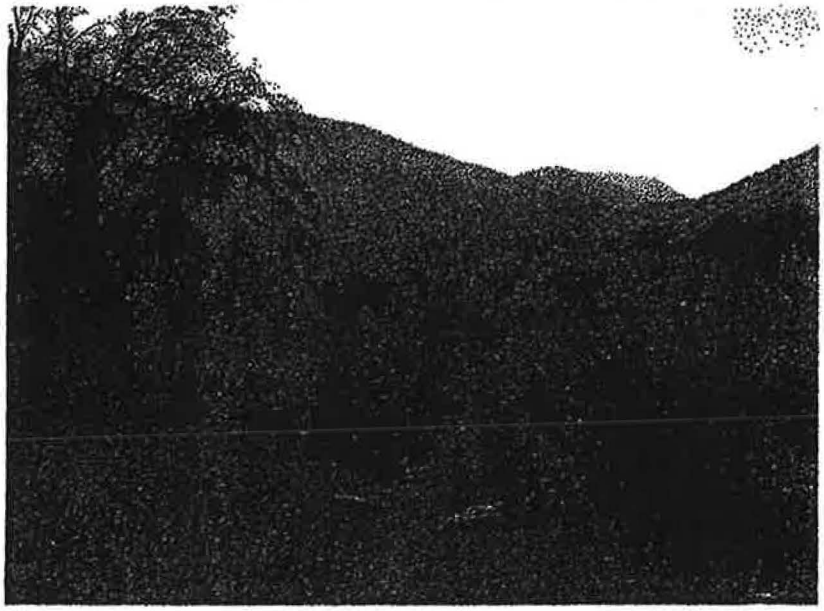
Attachment A: Representative Site Photos
Attachment B: Suitable Breeding Habitat Figure

Reference:

U.S. Fish and Wildlife Service. 2009. Revised Critical Habitat for the Arroyo Toad (*Anaxyrus californicus*). Federal Register Volume 74 No. 196. October 13.



Potential arroyo toad upland habitat in forground
with steep hills in the background (view looking south).



Southern cottonwood-willow riparian forest (view looking south).

Representative Site Photos

CAPITAN GRANDE ARROYO TOAD HABITAT ASSESSMENT

Attachment A



Open riparian forest (foreground) with steep hills in background (view looking northwest).

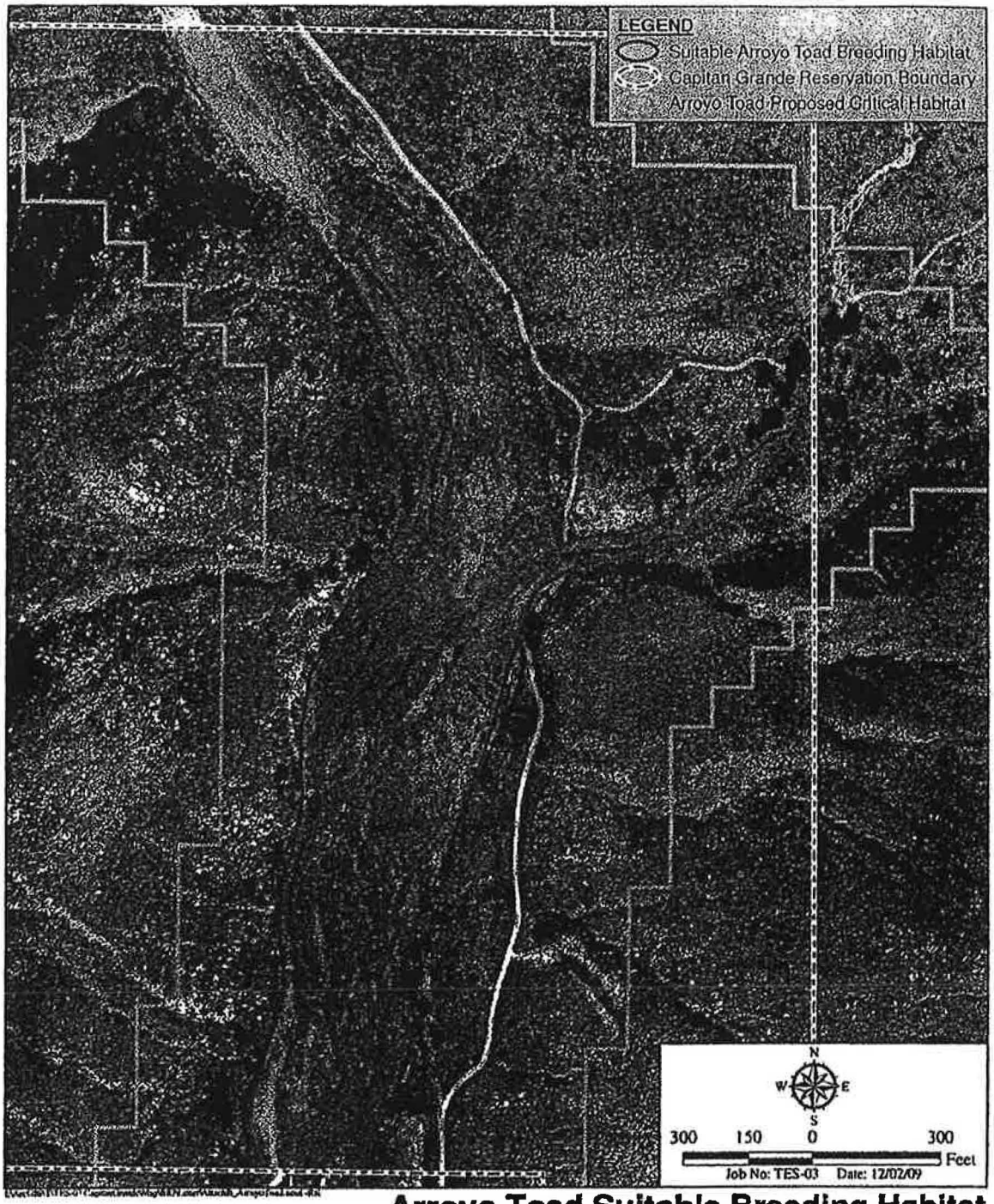


Scattered riparian vegetation (foreground) in the riverbed with steep slopes to the east of the river (view looking north).

Representative Site Photos

CAPITAN GRANDE ARROYO TOAD HABITAT ASSESSMENT

Attachment A



Arroyo Toad Suitable Breeding Habitat

CAPITAN GRANDE

Attachment B

RELIX

HELIX
environmental planning, inc.

7578 El Cajon Boulevard, Suite 200
La Mesa, CA 91941
fax (619) 462-0552
phone (619) 462-1515

Inland Empire Office
phone (951) 328-1700

December 04, 2009 TES-03

Mr. Mike Baksh
Tierra Environmental Services
9915 Business Park Ave., Ste. C
San Diego, CA 92131

Subject: Arroyo Toad (*Anaxyrus californicus*) Habitat Assessment on the Capitan Grande Reservation

Dear Mr. Baksh:

The U.S. Fish and Wildlife Service (Service) has released the Revised Critical Habitat for the Arroyo Toad (*Anaxyrus californicus*); Proposed Rule (Proposed Rule; Service 2009). Subunit 17a of the Proposed Rule would include 92-acres along an approximately half-mile long section of the San Diego River on the Capitan Grande Reservation. Critical habitat is defined in the Proposed Rule as:

> (1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features; (a) Essential to the conservation of the species; and (b) That may require special management considerations or protection; and (2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

While arroyo toads have been observed up- and down- stream from Capitan Grande, it is the understanding of HELIX Environmental Planning, Inc. (HELIX) that no arroyo toad surveys have been conducted on the Reservation. HELIX biologist Dale Ritenour conducted an arroyo toad habitat assessment on November 18, 2009 to determine the extent of areas on site suitable to support arroyo toad. This assessment focuses on evaluating the Primary Constituent Elements (PCE) from the Proposed Rule associated with critical habitat.

The San Diego River through Capitan Grande consisted of a 150 to 400 foot wide, gently sloped drainage. Habitat within the river valley was observed to be southern cottonwood-willow riparian forest (Attachment A). The habitat was dominated by western cottonwood (*Populus fremontii*), arroyo willow (*Salix lasiolepis*), mule-fat (*Baccharis salicifolia*), western sycamore (*Platanus racemosa*), with coast live oak (*Quercus agrifolia*) along the river banks. The openings between trees contained wetland herbaceous species

(western ragwort [*Ambrosia psilostachya*] and mugwort [*Artemisia douglasiana*]), stands of field mustard (*Hirschfeldia incana*), and loose, open benches of sediments.

The riverbed within Capitan Grande is suitable habitat for arroyo toad (the limits of appropriate breeding habitat are shown on Attachment B), as is a narrow section of the tributary entering from the east. The habitat on site is considered suitable for arroyo toad because it contains the four PCE's for the species. Discussion of the onsite condition of the four PCE's follows:

1) Hydrology. The riverbed within the proposed Critical Habitat has appropriate hydrology to support breeding arroyo toad. The San Diego River on Capitan Grande has a watershed sufficiently large to supply water for breeding pools for arroyo toad. Surface water flow occurs upstream well into the summer, suggesting that ponding of breeding pools on site would persist long enough to allow for the development of arroyo toad larvae. Shallow, braided channels exist in the onsite riverbed suggesting that areas of slow moving water occur in the spring.

2) Substrate. The riverbed within Capitan Grande is low gradient (less than 6 percent) with exposed sandy and silty alluvium in sections. Small terraces exist within the riverbed and a larger terrace exists to the east of the channel. This substrate is loose enough to allow arroyo toads to burrow.

3) Flooding Regime. The San Diego River is free flowing above of the Capitan Grande Reservation. The river has a natural flooding regime which would allow for the changing of stream courses, the scouring of vegetation, and the deposition of sediments. This is expected to keep the stream open for breeding locations.

4) Connectivity. This section of the San Diego River is connected to undeveloped Cleveland National Forest to the north and a riparian area above El Capitan Reservoir to the south, which would allow for the movement of arroyo toads up- and down-stream. The hills on either side of the stream are undeveloped, but steep. An approximately 15-foot tall concrete diversion dam exists immediately downstream from the reservation. While this dam might prevent movement of arroyo toads in the river bed, uplands with low gradients exist adjacent to the east of the river, which would allow for dispersal of adults.

While the river bed is good quality arroyo toad breeding habitat, the Service designation of critical habitat may overestimate the quantity of upland dispersal habitat outside of the river bed. Slopes to the west of the river bed have slopes from a 4:1 grade up to 2:1. The river bed is good habitat, with a gentle slope and plenty of open areas for dispersal, reducing the likelihood that arroyo toads would utilize the slopes.

Please feel free to contact me with any questions or comments.

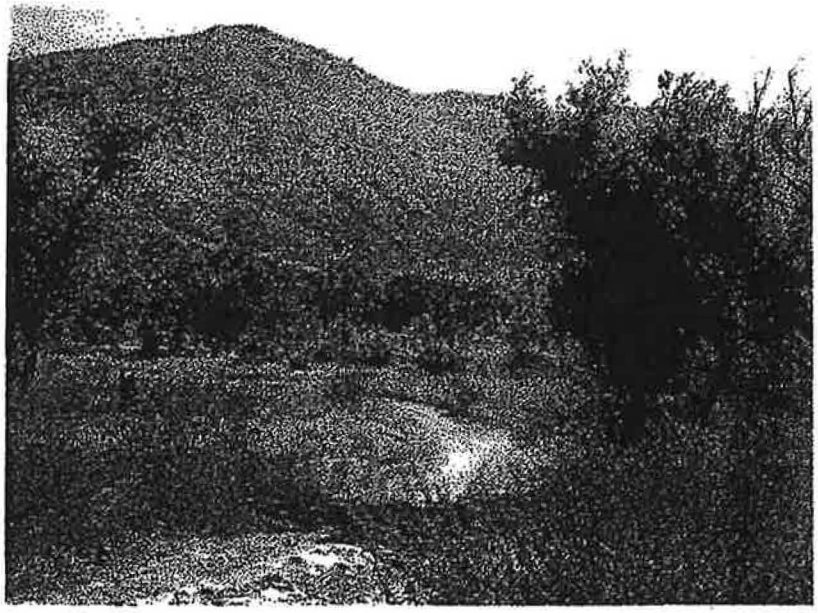
Sincerely,

Dale Ritenour
Biologist

Attachment A: Representative Site Photos
Attachment B: Suitable Breeding Habitat Figure

Reference:

U.S. Fish and Wildlife Service. 2009. Revised Critical Habitat for the Arroyo Toad (*Anaxyrus californicus*). Federal Register Volume 74 No. 196. October 13.



Potential arroyo toad upland habitat in forground
with steep hills in the background (view looking south).



Southern cottonwood-willow riparian forest (view looking south).

Representative Site Photos

CAPITAN GRANDE ARROYO TOAD HABITAT ASSESSMENT

Attachment A



Open riparian forest (foreground) with steep hills in background (view looking northwest).



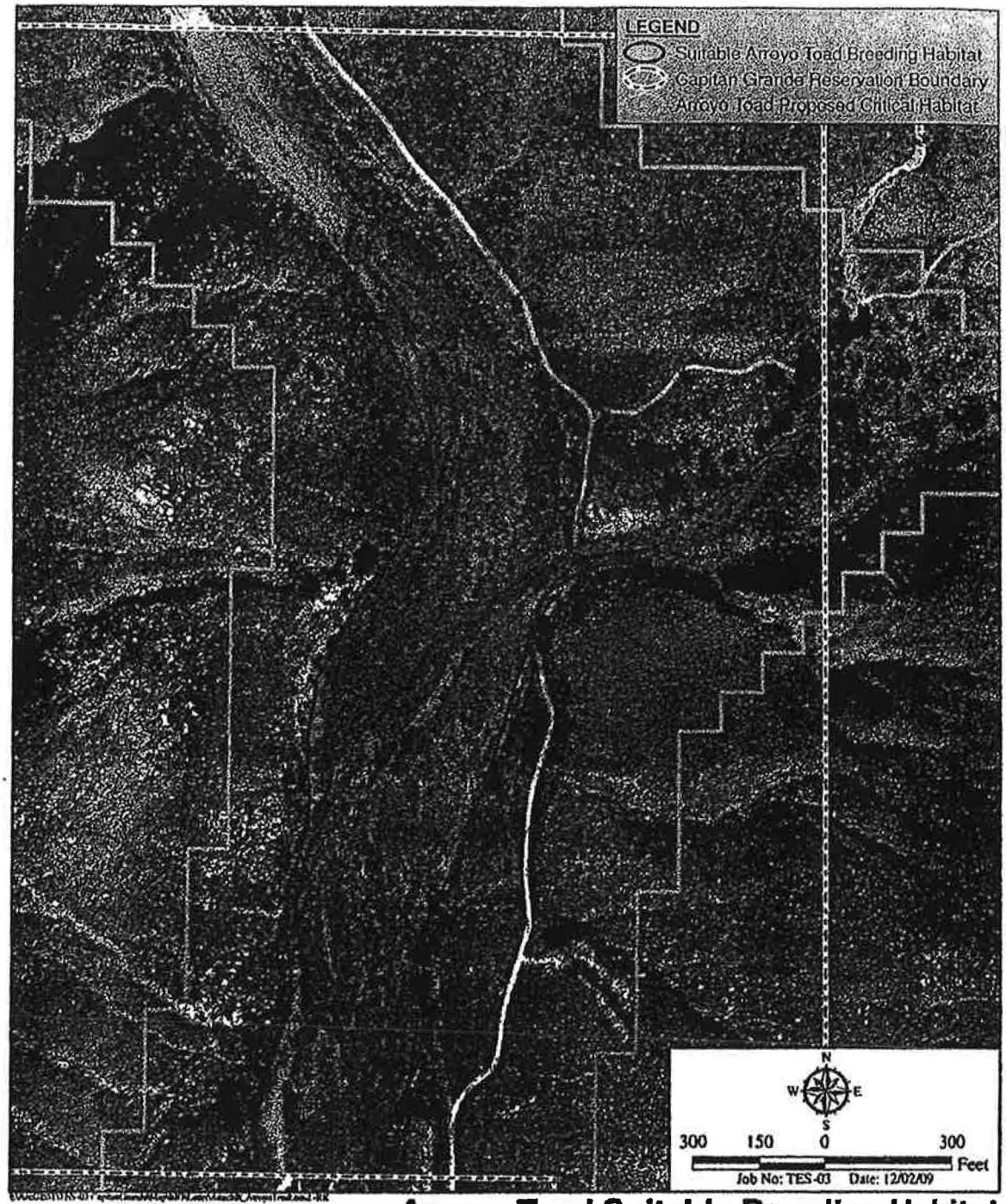
Scattered riparian vegetation (foreground) in the riverbed with steep slopes to the east of the river (view looking north).

Representative Site Photos

CAPITAN GRANDE ARROYO TOAD HABITAT ASSESSMENT

Attachment A

HELIX



Arroyo Toad Suitable Breeding Habitat

CAPITAN GRANDE

HELIX

Attachment B