KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 445-1048
Facsimile: (916) 322-5609
E-Mail: Kathleen.gnekow@doj.ca.gov

November 23, 2011

Via Facsimile and U.S. Mail
(916) 978-6099

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

RE: Picayune Rancheria of Chuckchansi Indians
Notice of (Non-Gaming) Land Acquisition Application (12.48 acres)

Dear Ms. Dutschke:

This comment is submitted on behalf of the State of California at the behest of the Governor's Office in response to the Notice of (Non-Gaming) Land Acquisition Application ("Notice") issued by the Bureau of Indian Affairs ("BIA") on September 22, 2011, regarding the application of the Picayune Rancheria of Chuckchansi Indians of California ("Tribe") to have real property totaling 12.48 acres in Madera County ("Trust Acquisition") accepted into tribal trust. Thank you for granting the request to extend the time within to comment to November 25, 2011.

We object to the proposed acquisition because the Tribe has requested that the Trust Acquisition, which is contiguous to tribal trust property and not contiguous to the Tribe's Rancheria, be declared a part of its Rancheria without any justification for such extraordinary action. In addition, since the Trust Acquisition is contiguous only to trust property, it must be evaluated pursuant to the federal regulation for off-reservation acquisitions. Moreover, the Tribe has not expressed a legitimate need for the land to be taken into trust, nor has it adequately represented the purpose for which the land will ultimately be used, thus preventing an adequate environmental assessment by the BIA. The BIA must also consider the cumulative impacts of all the Tribe's pending trust applications.

BACKGROUND

The Picayune Rancheria was originally established by Executive Order of April 24, 1912, with 80 acres located three miles south of Coarsegold in Madera County. The Rancheria was terminated on February 14, 1966, and the 80 acres were distributed to the three individuals located on the Rancheria. Individuals in the name of the Rancheria became a plaintiff in the *Tillie Hardwick* matter and its original 80 acres were restored to Indian Country by the court's December 1983 stipulated judgment. (See *Hardwick v. United States* (N.D. Cal., Dec. 22, 1983, No. 79-1710 SW) 1994 WL 721578.) At the time of the stipulated judgment, there were seven parcels of land within the boundaries of the Picayune Rancheria. One was held in trust by an individual Indian, the other six parcels were owned in fee by non-Indian individuals. The Tribe later acquired the six parcels and in September of 2004 they were placed into trust status. Within the boundaries of the Tribe's original 80-acre Rancheria, 28.76 acres are held in individual trust and 48.53 acres are held in tribal trust. This tribal trust property is where the Tribe operates its casino. A second application (111.70 acres) for trust property was approved in November of 2004 and this is where the Tribe presently operates a hotel-resort complex. These trust properties are contiguous. The Tribe has acquired additional trust properties and currently has 171.84 acres in tribal trust which exceeds the size of the original 80 acre Rancheria by 91.84 acres.

The Tribe also owns approximately 12 fee parcels of land in and around its trust properties. The Tribe currently has approximately 194.52 acres in pending land acquisition applications, including this subject application. All or some of the 12 fee parcels may be included in the pending land acquisition applications.

COMMENTS

1. There Is No Basis for an Expansion of the Picayune Rancheria and the Proposed Trust Acquisition Must Be Evaluated as an Off-Reservation Acquisition

Section 465 of title 25 of the United States Code authorizes the federal government to acquire land in trust for an Indian tribe's benefit, and section 467 of title 25 allows the Secretary of the Interior ("Secretary") to declare a new reservation or expand the previously designated reservation. The Notice states that the Trust Acquisition parcels are contiguous to trust lands (i.e. off-reservation lands) but then cites the federal regulation applicable to on-reservation acquisitions as authority for the Notice. (25 C.F.R. § 151.10.). The Tribe in its Application to the BIA repeatedly states that the Trust Acquisition parcels are contiguous to the Tribe's Rancheria or to the Tribe's Reservation (Application, pp. 3, 4, and 6) and requests that "the Secretary proclaim the Proposed Trust Properties as a new addition to the Tribe's Rancheria." (Application, p. 1; see also pp. 2 and 6.)

The Trust Acquisition is not property previously designated for use by the Tribe (and then lost), but is property outside the boundaries of the Rancheria. There is no justification for expanding the boundaries of the Tribe's Rancheria beyond its original designation. There are no extraordinary circumstances that would suggest it is appropriate for the Secretary to declare a new reservation or expand the previously designated reservation. Furthermore, since the Trust Acquisition parcels are not contiguous to the Tribe's Rancheria but only contiguous to later acquired trust property, a declaration of the property as reservation would establish non-contiguous parcels as part of the Rancheria without any justification for such extraordinary action.

The Notice cites the wrong federal regulation regarding the Trust Acquisition. Each parcel proposed to be conveyed in trust must be considered on the basis of whether it itself is contiguous to a tribe's reservation. If that contiguity does not exist, the application for that parcel must be considered an off-reservation acquisition. A contrary construction would allow tribes to circumvent the distance requirements of section 151.11(b) and the economic benefit requirements of section 151.11(c) by simply buying up land between its reservation and the parcels on which it desired to conduct a business and submit those parcels and the ones actually contiguous to the reservation for approval at the same time. Such a construction would also allow tribes to circumvent the provisions of section 2719 title 25 of the United States Code by enabling them to avoid the prohibition on off-reservation gaming absent the Secretary's two-part determination and gubernatorial concurrence through this simple expedient (e.g., once in trust, all contiguous parcels could be construed as a single parcel contiguous to a reservation and thus eligible for gaming). Thus, treating after acquired parcels contiguous to trust land itself contiguous to a reservation as if they were all contiguous to an existing reservation could create an impermissible conflict with the provisions of the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) ("IGRA") by allowing these regulations to be utilized as a means for evading the prohibitions on off-reservation gaming established by IGRA.

Since the Trust Acquisition parcels are contiguous to trust lands and not the Tribe's Rancheria, the acquisition is subject to the requirements of the federal regulation for off-reservation acquisitions which requires "greater scrutiny of the tribe's justification of anticipated benefits" (25 C.F.R. § 151.11).

II. The Application Fails to State a Sufficient Need for Additional Land to Be Taken into Trust

The Notice indicates that the Tribe does not propose any change in land use or any ground disturbing activity. (Notice, p. 2.) In its Application the Tribe indicates that the property is ancestral land and that the trust acquisition will "enhance tribal self-determination by preserving and protecting lands and resources which hold cultural and spiritual significance, as well as reestablishing tribal jurisdiction and sovereignty over an area of emotional, historical, and anthropological significance to the Tribe." (Application, pp. 6-7.)

The State of California respectfully requests that this Trust Acquisition be denied because it is not necessary to facilitate tribal self-determination. The Tribe's assertion that its application is consistent with the requirements of 25 Code of Federal Regulations part 151 confuses the mere desire to bank land with the actual need for the protections afforded tribes by trust status in order to actually facilitate some tribal purpose. Furthermore, the Notice presents no explanation of why trust status is necessary if these parcels will simply retain their existing uses. Trust status for these parcels is not necessary for "self-determination" since fee ownership allows the Tribe to control the land. If the acquisition is truly for existing use, then there is no justification for the property to be taken out of fee status. The Tribe has not demonstrated that fee ownership is inadequate to preserve and protect the Trust Acquisition parcels since nothing in the Application demonstrates that a trust acquisition is necessary to allow the Tribe to protect the property as it may desire. The Notice presents no explanation of why the property cannot be preserved if retained in fee status. (See 25 C.F.R. § 151.10(b).) While the Tribe may want the federal government to acquire the land in trust, it has not articulated a genuine need, or necessity arising from existing circumstances, nor has it articulated an economic benefit, to justify transferring into trust land that the Tribe already owns in fee.

The Indian Reorganization Act, of which section 465 or Title 25 of the United States Code is a part, was enacted as a result of the loss of enormous amounts of tribal land because of the inability of tribes and tribal members to pay local and state land taxes. This is not the case with this Tribe which operates a successful destination casino and hotel-resort complex.

The Tribe's existing trust property (171.84 acres) already exceeds the size of the Rancheria at the time of termination (80 acres). There is no sufficiently articulated reason to support this additional trust acquisition. Thus, the stated desire for trust acquisition of the additional land is inadequate to justify the federal action of removing property from the jurisdiction of the State and the County.

In contrast to the absence of any immediate impact to the Tribe of a denial of its instant trust application, this Trust Acquisition, if approved, would have a significant individual and a cumulative adverse impact on the State and its political subdivisions within the meaning of 25 Code of Federal Regulations part 151.10(e). If future development occurs, this predominantly rural county loses significant and needed tax revenue, as well as losing the ability to control development in a way that protects the interests of the County as a whole and all of its citizens. And at the time of future development, the State would no longer have the ability to conduct environmental oversight or require compliance with its environmental regulations for the protection of State resources. We note that the Notice itself does not provide any justifications for removing the parcels from the county tax rolls and the jurisdiction of the State.

III. The Application Fails to Fully and Accurately Describe the Ultimate Purpose for Which the Land Will Be Used, and in Doing So Fails to Present the BIA with Sufficient Information to Comply with NEPA

The Notice indicates no change in use for the Trust Acquisition parcels, making it impossible to realistically assess the likelihood of future development and, considering their proximity to the Tribe's hotel-resort complex and Highway 41, the likelihood that these parcels will eventually serve a commercial purpose. Consequently, lacking sufficient information, the BIA cannot comply with the requirements of the National Environmental Policy Act (NEPA).

NEPA applies to discretionary actions of federal agencies, and requires the preparation of an Environmental Impact Statement (EIS) when a federal agency engages in a major federal action that significantly affects the quality of the human environment. (42 U.S.C. § 4332(2)(C); see *Sierra Club v. Babbitt* (9th Cir. 1995) 65 F.3d 1502, 1512.) NEPA establishes "action-forcing" procedures that require agencies to take a "hard look" at environmental consequences. (*Robertson v. Methow Valley Citizens Council* (1989) 490 U.S. 332, 348.) "As a preliminary step, the agency may prepare an [EA] to determine whether the environmental impact of the proposed action is significant enough to warrant an EIS." (*High Sierra Hiker's Assn. v. Blackwell* (9th Cir. 2004) 390 F.3d 630, 639 (*High Sierra*), citing *National Parks & Conservation Assn. v. Babbitt* (9th Cir. 2001) 241 F.3d 722, 730 (*National Parks*) and 40 C.F.R. § 1508.9.) "If the EA concludes that the action will not have a significant effect on the environment, the agency may issue a Finding of No Significant Impact and may then proceed with the action. 40 C.F.R. § 1508.13." (*Klamath-Siskiyou Wildlands Center v. Bureau of Land Management* (9th Cir. 2004) 387 F.3d 989, 993 (*Klamath-Siskiyou*).) "If the EA establishes that the agency's action 'may have a significant effect upon the environment' then an EIS must be prepared." (*High Sierra, supra,* 390 F.3d at p. 640, quoting *National Parks,* 241 F.3d at p. 730.)

In addition, since the Tribe has additional pending trust requests (194.52 acres), the BIA has insufficient data to assess the cumulative impacts of the Tribe's proposed trust acquisitions and the effect these acquisitions may have on the natural environment and surrounding communities. Specifically, the Tribe must furnish ample information for the BIA to perform an adequate and proper environmental impact evaluation of *all* land included in the Tribe's fee-to-trust applications, not just the 12.48 acres proposed in the present Notice.

The BIA must assess this proposed acquisition in light of the Tribe's remaining pending trust applications, otherwise the BIA will have failed to assess the cumulative impacts of the land acquisition. A cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . [and] . . . can result from individually minor but collectively significant actions taking place over a period of time." (40 C.F.R. § 1508.7.) The Ninth Circuit defines "reasonably foreseeable" in this context to include "proposed actions." (See *Oregon Natural Resources Council v. Marsh* (9th Cir. 1987) 932 F.2d 1489, 1498, *rev'd on other grounds,* 490

U.S. 360 (1989); see also *Lands Council v. Powell* (9th Cir. 2005) 395 F.3d 1019, 1023, as amended.)

> Cumulative impacts of multiple projects can be significant in different ways. The most obvious way is that the greater total magnitude of the environmental effects . . . may demonstrate by itself that the environmental impact will be significant. Sometimes the total impact will be significant. Sometimes the total impact from a set of actions may be greater than the sum of the parts.

(*Klamath-Siskiyou, supra,* 387 F.3d at p. 994.)

While federal acquisition of the Trust Acquisition parcels proposed in this Notice may have only a limited environmental impact, or perhaps no impact at all, future acquisitions now pending could add up to something with a much greater impact.

IV. The Proposed Acquisition Will Result in a Loss of Tax Revenue to a Rural County in Need of Funds

The Notice indicates that the combined property tax on these parcels for fiscal year 2009-2010 was $5,048. This tax assessment, taken in conjunction with lost tax from the Tribe's prior trust acquisitions is a significant loss of revenue to a rural county like Madera. Furthermore, the Tribe has not attempted to negotiate any "in lieu" payment to the County to compensate for the loss of property tax specific to these parcels. The Notice also fails to consider appreciating property values and corresponding tax revenue losses given the proximity to a major casino-hotel (destination resort) development. As the Tribe continues to develop its trust property, the tax value will increase exponentially and the County will suffer a substantial loss of tax revenue that is inversely proportionate to the increased property value. Additionally, the development and increased usage of all infrastructure and land within or near the Tribe's resort, without any incoming property taxes to prevent, mitigate or offset damages to the infrastructure and land, will negatively impact the State and County. The Tribe simply has not presented enough information regarding its future intended use of all parcels for which it has requested trust status to allow the BIA to fairly and accurately consider future negative impacts of removing the subject property from the tax rolls.

Though the current tax payment for this undeveloped property may be a relatively small amount, a policy of taking land into trust absent necessity governs more than a single tribe's contribution; it implicates contributions from every other tribe in California that no longer needs the protection of trust acquisitions, especially when one considers that this loss will continue in perpetuity.

CONCLUSION

The State requests that the BIA deny the Application because there is no basis for declaring that the Trust Acquisition is part of the Tribe's Rancheria. Furthermore, the BIA has used the wrong standard for trust consideration since the Trust Acquisition can only be evaluated pursuant to the federal regulation for off-reservation acquisitions. In addition the Tribe has not stated a genuine need for additional land to be taken into trust and, in order to comply with NEPA, the BIA must consider all of the Tribe's pending trust requests (194.52 acres) and not allow the pending trust acquisitions to be taken by piecemeal. As a result, this Notice contains insufficient information for the BIA to comply with NEPA. Additionally, removal of the land from the tax rolls and State and local jurisdiction will negatively impact the State and County. These factors, independently or collectively, present just cause to deny the application.

The State does not object to the principle that provision of housing on tribal trust land is integral to tribal sovereignty and self-determination, and we are reluctant to object to a trust application that seeks to provide housing for tribal citizens. That said, this application does not adequately show that the trust acquisition is necessary for this purpose. For the foregoing reasons, the State of California respectfully requests that the Tribe's Application be rejected.

Thank you for the opportunity to comment on this Application and Notice. If you have any questions concerning this comment please feel free to contact the undersigned.

Sincerely,

Sara J. Drake for

KATHLEEN E. GNEKOW
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

KG/pc

SA2007900405