



OFFICE OF THE GOVERNOR

January 30, 2009

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

Mr. Dale Morris
Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Re: Notice of (Gaming) Land Acquisition Application Filed by the Enterprise Rancheria of Maidu Indians for 40 Acres in Yuba County, California (Portion of APN 014-280-095)

Dear Mr. Morris:

The Governor's Office of Legal Affairs has reviewed the November 26, 2008 Notice of (Gaming) Land Acquisition Application issued by the Bureau of Indian Affairs (BIA), and the supporting August 13, 2002 application (Application) and September 23, 2008 supplement (Supplement) submitted by the Estom Yumeka Maidu Tribe of the Enterprise Rancheria (Tribe). Thank you for extending our time to comment.

The Tribe proposes the United States take 40 acres in trust for a planned off-reservation casino and destination resort hotel project located in Yuba County, California. The Tribe seeks separately a determination by the Secretary of the Department of the Interior (Secretary) that the newly acquired land would be eligible for gaming under a two-part determination pursuant to Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2719(b)(1)(A)). Because 25 U.S.C. § 2719(b)(1)(A) requires specific action by the Secretary and the Governor to allow the Tribe to conduct gaming on the site, the State believes that the Secretary should not move forward with this acquisition unless and until the Secretary determines that gaming on the newly acquired land would not be detrimental to the surrounding community¹, and requests gubernatorial concurrence.

¹ These comments do not constitute the State's official response to the BIA's January 16, 2009 request for input whether the proposed gaming facility on newly acquired land would not be detrimental to the surrounding community.

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I. Background

The United States owns in trust for the Tribe a 40-acre parcel located about 11 miles northeast of the City of Oroville in Butte County, California. (Application at pp. 2-4; Feb. 2008 Draft Environmental Impact Statement (DEIS) p. 1-2.) The Tribe's trust land in Butte County, known as "Enterprise 1,"² is located about 45 linear miles, or 52 driving miles one way (estimated at one hour ten minutes) north of the proposed acquisition in Yuba County. (Application at p. 2; BIA Request for Input Whether the Gaming Establishment on Newly Acquired Land Would Not Be Detrimental to the Surrounding Community (Jan. 16, 2009) 2.)

The Application claims that although Enterprise 1 "is considered Tribal land," it is "inaccessible and lacking in any utility to the Tribe," primarily because it is the private domain of descendants of the Walters family. (Application at p. 3.) According to the Application, the Walters family members claim descent from one of the original persons listed on the 1915 Tribal census, but for many years refused to participate in Tribal affairs or be enrolled as members, and opposed anyone that attempted to establish a homestead on Enterprise 1. (*Ibid.*) The Supplement, however, clarifies that Walters family members have since become Tribal members and some currently serve on the Tribal Council. (Supplement at p. 1.)

The Tribe claims the proposed acquisition is necessary to facilitate tribal self-determination and economic development. (Application at p. 2; see 25 C.F.R. § 151.3(a).) The Tribe hopes to accomplish these objectives by building and operating on the site a destination resort hotel, class III gaming facility, and ancillary facilities such as restaurants, parking and related businesses. (Application at p. 5; DEIS at pp. 1-2 through 1-9, 2-2 through 2-20.) The Yuba County site is undeveloped, unoccupied, relatively flat land that is currently used for hay farming. (Application at p. 11; DEIS at p. 1-2.) Although acquiring the Yuba County site for gaming appears to be the Tribe's primary objective, the Tribe has also considered the environmental impacts of developing a casino on its trust land (Enterprise 1) located in Butte County. (See, e.g., DEIS at pp. 1-2, 1-10 through 1-11, 2-38 through 2-46.)

In December 2002, the Tribe and Yuba County entered into a Memorandum of Understanding (Tribal-County MOU) that requires the County to provide a number of services to the Tribe, including law enforcement and possibly fire and emergency medical services, in exchange for specified payments from the Tribe in lieu of taxes. (See DEIS Appendix B, Tribal-County MOU at pp. 1-5.) Also, in August 2005, the Tribe entered into a Memorandum of Agreement with the City of Marysville (Tribal-City MOA)—located a few miles north of the

² The United States previously held in trust for the Tribe another 40-acre parcel in Butte County known as "Enterprise 2." In 1965, the United States sold Enterprise 2 to the State of California in a condemnation sale to accommodate construction of the Oroville Dam. (Pub.L. No. 88-453; Application at p. 3.)

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proposed acquisition—that requires the City to support the Tribe's project in exchange for specified monetary contributions from the Tribe. (See DEIS Appendix B, Tribal-City MOA at pp. 1-6.)

The Application further notes the subject parcel is located within an area zoned for sports and entertainment that was created when Yuba County voters enacted Measure R in January 1998. (Application at p. 6.) Measure R was a broad referendum that allowed for entertainment-related zoning of about 1,000 acres that is otherwise surrounded by agriculture. (*Ibid.*) It was enacted, in part, to bring "a quality motor vehicle racing facility" to the area. (*Ibid.*) As the Tribe notes, however, other than an amphitheater, the anticipated development of a racetrack and other retail and entertainment facilities that fostered Measure R has not happened. (Supplement at p. 1.) Although the Tribe asserts its hotel and casino project is consistent with current zoning approved by Measure R, in November 2005 Yuba County voters considered Measure G, a non-binding advisory measure that asked voters specifically, "Should a destination resort/hotel and American Indian gaming casino be located within the sports/entertainment zone on Forty Mile Road in the County of Yuba?" (Exh. A, Mem. and Resolution placing Measure G on Nov. 8, 2005 ballot.) Voters rejected Measure G by 52.1 percent to 47.9 percent. (See <http://www.co.yuba.ca.us/departments/clerk/elections/election%20results/CAselection2005/>, last viewed Jan. 26, 2009.)

Yuba County Supervisors placed Measure G on the ballot to comply with the Governor's May 18, 2005 Proclamation, which established State policy for the Governor to consider requests from the Secretary for gubernatorial concurrence under 25 U.S.C. § 2719(b)(1)(A). (See Exh. A.) The Proclamation states that the Governor shall consider such requests only when each of the following criteria is satisfied:

1. The proposed project site is not located in an urbanized area, as defined by state law;
2. The local jurisdiction in which the Tribe's proposed gaming project is located supports the project;
3. The tribe and local jurisdiction demonstrate that the affected local community supports the project, such as by a local advisory vote; and
4. The project substantially serves a clear, independent public policy, separate and apart from any increased economic benefit or financial contribution to the State, community, or the Indian tribe that may arise from gaming.

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(Gov. Schwarzenegger Proclamation (May 18, 2005).)

II. Applicable Standards

In deciding whether to take off-reservation land into trust for gaming purposes, the Secretary is guided by 25 C.F.R. § 151. Section 151.11(b) is particularly important here. It states that as the distance between a 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," and "greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." (25 C.F.R. § 151.11(b).)

In a "Guidance Memorandum" dated January 3, 2008, former Assistant Secretary Carl Artman explained that "greater scrutiny" applies

as long as the requested acquisition is off-reservation regardless of the mileage between the tribe's reservation and proposed acquisition. . . . A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located

off-reservation.

(Ass't Secretary Carl Artman Mem. to BIA Regional Directors (Jan. 3, 2008) (Guidance Memorandum) 3.) The Assistant Secretary further directed that

[w]hile the financial benefits of the proposed gaming facility might create revenues for the applicant tribe and may mitigate some potential negative impacts, no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility.

(*Id.* at p. 4.) Thus, the BIA considers a paradigm where the likelihood of accepting off-reservation land into trust decreases with the distance the subject parcel is from a tribe's established reservation.

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III. The Tribe Fails to Demonstrate That it Needs Additional Land

In determining whether to acquire off-reservation land in trust for a tribe, the Secretary considers whether the tribe needs additional land. (25 C.F.R. §§ 151.10(b), 151.11(a).) Here, the Application expressly states that no housing will be built on the Yuba County site but, instead, the land is needed to build a destination resort hotel, class III gaming facility and related businesses to foster Tribal self-determination and economic development. (Application at pp. 2, 6.) The United States, however, currently holds in trust for the Tribe the 40-acre Enterprise 1 parcel located in Butte County. Although the Tribe's 2002 Application confirms Enterprise 1 is "tribal land," it claims Enterprise 1 is "not in the Tribe's possession" because it is occupied by the Walters family. (*Id.* at p. 3.) The 2008 Supplement, however, states that the Walters family has since enrolled in the Tribe and some serve on the Tribal Council. (Supplement at p. 1.) There is no indication that the Walters family currently makes Enterprise 1 unavailable to other Tribal members. Even if true, it would not necessarily be determinative of whether the Tribe needs additional land because since at least 1983 the BIA has recognized that all Tribal members "are eligible to utilize the land known as Enterprise Rancheria (No. 1)." (See *Edwards v. Pacific Regional Director* (2007) 45 IBIA 42, 53.)

Moreover, to the extent the Application suggests that "not all" of Enterprise 1 is appropriate for housing or other buildings because "some of the land contains steep slopes" (Application at p. 3), the Tribe recognized in the DEIS that at least a sufficient portion of Enterprise 1 is available and could accommodate construction and operation of a class III gaming facility (see DEIS at pp. 1-2, 1-10 through 1-11 [evaluating Enterprise 1 as an alternative project site]). Therefore, it does not appear that the Tribe needs additional land in trust for gaming.

IV. Because the Application's Stated Primary Purpose for Acquiring the Yuba County Parcel is to Build and Operate a Project That Includes a Class III Gaming Facility, It is Premature to Proceed with this Application Until the Section 20 Concurrence Process is Complete

The Secretary must consider the purpose for which the land will be used. (25 C.F.R. §§ 151.10(c), 151.11(a).) In this instance, the Application states the purpose of the acquisition is to build and operate a destination resort hotel and class III gaming facility. (Application at p. 5.) The Tribe has further requested that the land be determined eligible for gaming pursuant to 25 U.S.C. § 2719(b)(1)(A). Section 2719(b)(1)(A) allows a tribe to conduct class II or class III gaming on trust land acquired for the tribe by the Secretary after October 17, 1988, only if

the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be

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detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination[.]

(25 U.S.C. § 2719(b)(1)(A).)

The Governor has not received a formal request from the Tribe or Secretary seeking his concurrence. Therefore, it is premature to proceed with this fee-to-trust application unless and until the Secretary determines that gaming on the newly acquired land would not be detrimental to the surrounding community, and requests gubernatorial concurrence.

V. The Secretary Should Reject the Tribe's Fee-to-trust Application Unless and Until Outstanding Issues Regarding the DEIS Are Resolved

Before the Secretary can exercise his discretion to acquire trust land, he must consider the extent to which the applicant has provided information sufficient to allow the Secretary to comply with NEPA. (25 C.F.R. §§ 151.10(h), 151.11(a).) On May 5, 2008, we submitted to the BIA written comments identifying several aspects of the DEIS that failed to comply with NEPA, or failed to provide sufficient information to evaluate the project's environmental impacts and proposed mitigation measures. Several other comment letters were submitted that questioned the DEIS's adequacy. Until the issues raised by the comment letters are resolved, the Secretary should not move forward with the acquisition.

VI. Additional Information is Needed to Evaluate Other Guidance Memorandum Criteria

The Guidance Memorandum emphasizes that if a proposed off-reservation acquisition exceeds a daily commutable distance from the reservation, the reviewer must, at minimum, consider the following questions to help determine the benefits to the tribe:

What is the unemployment rate on the reservation? How will it be affected by the operation of the gaming facility?

How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility?
How will their departure affect the quality of reservation life?

How will the relocation of reservation residents affect their long term identification with the tribe and the eligibility of their children and descendants for tribal membership?

What are the specifically identified on-reservation benefits from the proposed gaming facility? Will any of the revenue be used to create on-reservation job opportunities?

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(Guidance Memorandum at pp. 3-4.)

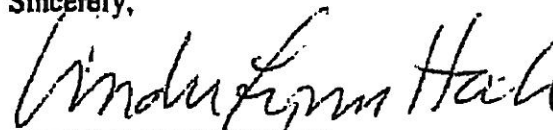
In this case, the Yuba County site is located about 52 driving miles one way, or about an hour-and-ten-minute commute, from the Tribe's Rancheria in Butte County. If this distance exceeds a reasonable daily commutable distance, then the above-questions must be answered before the application may be approved. The Tribal materials we reviewed do not address the questions raised by the Guidance Memorandum. Accordingly, additional information may be needed to properly evaluate the proposed acquisition.

VII. Conclusion

It is the State's position that because the proposed acquisition would be used to build and operate a class III gaming facility, which can only occur with the Governor's concurrence, it is premature to proceed with this Application unless and until the Secretary determines that gaming on the newly acquired land would not be detrimental to the surrounding community, and requests gubernatorial concurrence.

We believe that for these reasons the Secretary should not proceed with the acquisition. Thank you for considering our comments.

Sincerely,



ANDREA LYNN HOCH
Legal Affairs Secretary

05-435

OFFICE OF YUBA COUNTY COUNSEL



MEMORANDUM

TO: BOARD OF SUPERVISORS

FROM: DANIEL G. MONTGOMERY, COUNTY COUNSEL *DGM*

DATE: JULY 26, 2005

SUBJECT: CONSIDER PLACING ADVISORY MEASURE G ON THE BALLOT FOR ELECTION TO BE HELD NOVEMBER 8, 2005 AND TAKE APPROPRIATE ACTION

RECOMMENDATION: Consider placing Advisory Measure G on the Ballot for Election to be held November 8, 2005 and take appropriate action.

BACKGROUND: The County has entered into a Memorandum of Understanding with the Eestom Yumeka Maidu Tribe, Enterprise Rancheria, relating to establishment of a destination resort/hotel and American Indian gaming casino on Forty Mile Road in the Sports Entertainment Zone.

DISCUSSION: It appears advisable that the County determine the current local support level for the proposed project. This Measure is designed to satisfy one of the areas of concern the Governor has when considering the terms of a State compact with a tribe seeking to engage in gaming activity.

COMMITTEES: This matter has not been to a committee.

FISCAL EFFECT: This is presently unknown. The best estimate is \$0.00 to \$100,000.00.

DGM/eod

**BEFORE THE BOARD OF SUPERVISORS
OF THE COUNTY OF YUBA**

IN RE: RESOLUTION CALLING A SPECIAL ADVISORY ELECTION TO BE HELD TUESDAY, NOVEMBER 8, 2005))))))))	RESOLUTION NO. _____
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WHEREAS, Yuba County has entered into a Memorandum of Understanding with the Easton Yumeka Maldu Tribe, Enterprise Rancheria to, among other things, offset costs to the County associated with the establishment and operation of a destination resort/hotel and American Indian gaming casino to be located within the sports/entertainment zone on Forty Mile Road in the County of Yuba; and,

WHEREAS, under current State policy, it appears advisable the County of Yuba electorate be provided an opportunity to express their opposition to or support of the location of a destination resort/hotel and American Indian gaming casino in the sports/entertainment zone on Forty Mile Road in the County of Yuba; and,

WHEREAS, the Yuba County Board of Supervisors wishes to provide an opportunity for the voters of the County of Yuba to voice their opinion regarding location of a destination resort/hotel and American Indian casino in the sports/entertainment zone on Forty Mile Road in the County of Yuba.

NOW, THEREFORE, BE IT RESOLVED that this Board of Supervisors hereby calls a Special Advisory Election to be held on the same day as the State-wide Special Election, that is, Tuesday, November 8, 2005, commencing at 7:00 a.m. Pacific Daylight Time and ending at 8:00 p.m. Pacific Daylight Time, at which election an issue to be presented to the voters of the County of Yuba shall be:

MEASURE G

"Should a destination resort/hotel and American Indian gaming casino be located within the sports/entertainment zone on Forty Mile Road in the County of Yuba?"

BE IT FURTHER RESOLVED that this Board hereby authorizes and directs the County Clerk to provide all necessary election services and to canvass the results of the election has hereinabove called.

BE IT FURTHER RESOLVED that the County Clerk is hereby authorized and directed to include Notice of the aforesaid Special Advisory Election in any Notice published by the County Clerk respecting the Statewide Special Election to be held on November 8, 2005.

PASSED AND ADOPTED at a regular meeting of the Board of Supervisors of the County of Yuba, State of California on the ____ day of _____, 2005 by the

following vote:

AYES:

NOES:

ABSENT:

CHAIRMAN

ATTEST: DONNA STOTTEMEYER
Clerk of the Board of Supervisors

By: _____

APPROVED AS TO FORM



DANIEL G. MONTGOMERY
COUNTY COUNSEL