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SENT BY FACSIMILE AND UNITED STATES MAIL

Virgil Townsend
Acting Superintendent
United States Department of Interior
Bureau of Indian Affairs
2038 Iowa Avenue, Suite 101
Riverside, California 92507

RE: Cuyapaipe Band of Mission Indians Request to Proclaim Trust Lands a Reservation Pursuant to 25 U.S.C.§ 467

Dear Mr. Townsend:

The Governor's Office, on behalf of the State of California, has reviewed the Cuyapaipe Band of Mission Indian's request that the Secretary of the Interior proclaim as a reservation under 25 U.S.C. § 467 two parcels of property held in trust for the Band by the United States. The first parcel contains 8.60 acres, more or less and was conveyed to the United States in trust for the Band on April 1, 1986. The second parcel contains approximately 1.42 acres and was conveyed to the United States in trust for the Band on October 29, 1997. The notice of that request indicates that the parcels of property are "located on the Cuyapaipe Band of Mission Indians (hereafter the Band) Reservation." The stated purpose of the proclamation is to enable the Band to "participate in special Federal assistance programs" and to clarify "tribal jurisdiction over "trust" property."

While the State has no desire to unnecessarily interfere with the Band's ability to participate in Federal assistance programs, it does question how these parcels of property can meaningfully be said to be a part of the Band's existing Reservation or to be appropriately included within the Band's Reservation. As you are no doubt aware, the Band has a 4,000 acre Reservation established under the Mission Indians Relief Act of 1891 which is located approximately 40 miles to the northeast of these two parcels of property. To state, as the notice does, that these parcels are located within that Reservation seems to stretch unreasonably

common notions of geographic contiguity. As you also know, the two parcels were originally placed in trust for the purpose of establishing the Southern Indian Health Council facility that serves the health needs of seven local tribes. This health facility is operated by the Council as a California non-profit organization under a 50 year lease with the Band and its board consists of representatives from the Band as well as the other affected tribes. To suggest that land utilized in this fashion should be part of the Band's Reservation conflicts with the commonly accepted meaning of the term "reservation." As the Handbook of Federal Indian Law states:

> The term "Indian reservation" originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure. During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the ***residence*** of tribal Indians, regardless of origin.

F. Cohen, Handbook of Federal Indian Law, 34 (1982 Edition) (emphasis added). In this case, the land in question was not set aside for the ***residence*** of members of the Band and is not intended to be utilized for that purpose. It also is not intended to be used exclusively by members of the Band and is located more than 40 miles away from 4000 acres of land that was set aside for the ***residence*** of the Band. Thus, it appears to be particularly inappropriate to designate these parcels of property as a "reservation."

Furthermore, 25 U.S.C. § 467 makes it clear that the Secretary lacks the power to add lands to an existing "reservation" unless those lands are designated for the exclusive use of Indians entitled to residence at such a "reservation." Section 467 states the following in this regard:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations . . . 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.

Here, because the land is not designated for the exclusive use of Band members but rather has been set aside for use as a health clinic serving members of six other tribes, the Secretary simply lacks the authority to proclaim this property a "reservation" of the Cuyapaipe.

In addition, it also does not appear that there has been any compliance with the

requirements of the National Environmental Policy Act. In this regard, there is no indication that an environmental assessment has been prepared or will be considered prior to agency action.

Finally, the designation of this property as a "reservation" could unnecessarily complicate both the status of this property under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (hereafter "IGRA") and the relationship between the Band and the State. Under IGRA, gaming may not occur on lands conveyed into trust after October 17, 1988, unless those lands are contiguous to a reservation in existence prior to that date (25 U.S.C. § 2719(a)) or the Governor has concurred that use of the land for gaming purposes would be in the best interests of the State. (25 U.S.C. § 2719(b)). Currently, while gaming may occur on the 8.60 property because it was conveyed into trust prior to 1988, it may not occur on the 1.42 acre parcel because that property was not conveyed into trust until 1997 and is not contiguous to a "reservation" within the meaning of IGRA.

Should these properties be proclaimed a "reservation," however, it is conceivable that the Band (which has a Tribal-State Gaming Compact and which has publicly stated plans to place a gaming facility on at least the 8.60 acre parcel) might argue not only that gaming would be appropriate on the 1.42 acre parcel without gubernatorial concurrence but also that gaming could occur (again without gubernatorial concurrence) on subsequently acquired property thereafter conveyed into trust that is contiguous to the 1.42 acre and the 8.60 acre parcels. While such contentions ultimately would not prevail because they are inconsistent with both the letter and the intent of IGRA (see, for example, *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001) where the court found that land not utilized for a residential purpose could not be considered a "reservation" under IGRA), they could generate considerable issues between the State and the Band that are not subject to easy resolution. Moreover, the possibility of such a contention might well force the State into the posture of opposing all trust acquisitions by the Band in the vicinity of these two parcels. Such a result would be most unfortunate because it would frustrate the State's goal of working cooperatively with the Band on gaming and land use issues. As a consequence, the State respectfully requests that the Secretary decline to proclaim these parcels a "reservation."

The State appreciates that opportunity to provide these comments. Should you have any

questions concerning them, please feel free to contact the undersigned at your convenience

Sincerely,

PETER H. KAUFMAN
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc. Cuyapaipe Band of Mission Indians