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

Mr. Clay Gregory, Regional Director
U.S. Department of the Interior
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1846

Re: Ione Band of Miwok Indians' Gaming Land Acquisition Application

Dear Mr. Gregory:

The Governor's Office of Legal Affairs has reviewed the Notice of (Gaming) Land Acquisition Application from the Bureau of Indian Affairs (BIA) dated November 20, 2006, and letter and application from the Ione Band of Miwok Indians (Tribe) requesting the United States accept 227.58 acres into trust for the Tribe.[1] We are concerned about the proposed acquisition because the Tribe intends to use the subject land for class II and class III gaming but the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2701 et seq.) prohibits gaming on land acquired in trust for a tribe after October 17, 1988, and the State does not believe that the land meets any of IGRA's exceptions to the general prohibition of gaming on newly acquired land (see 25 U.S.C. § 2719). Moreover, we believe the Secretary of the Interior (Secretary) is not authorized to proclaim a new Indian reservation in California. In addition, the significant loss of tax revenue to the State and local governments, the jurisdictional problems and conflicting land uses that will result from the acquisition, and the absence of an Environmental Impact Statement (EIS) and a Tribal economic benefits plan support the denial of the land acquisition application at this time.

[1] The proposed acquisition is described as 12 contiguous parcels totaling 227.58 acres, located in the City of Plymouth and in an unincorporated area of Amador County, with the following parcel numbers: 010-200-006, 010-200-007, 010-200-010, 008-110-009, 010-200-003, 010-200-004, 010-200-011, 008-110-026, 010-200-008, 010-200-009, 008-110-022 and 008-110-021. The Notice incorrectly identifies two parcels as beginning with book number 080, instead of 008. The subject parcel numbers are correctly identified in this footnote, as confirmed by the Amador County Planning Department.

Comments

The Tribe acknowledges in its application that, although it is landless, current Department of the Interior (Department) policy requires the instant request to be evaluated as an off-reservation acquisition under the criteria set forth in 25 Code of Federal Regulations part 151.11. (See Application cover letter.)

I. The Subject Land Does Not Qualify For the "Restored Lands" Exception to IGRA's General Prohibition of Gaming on Newly Acquired Land

As a general rule, IGRA prohibits commercial gaming on land acquired by the Secretary in trust for an Indian tribe's benefit after October 17, 1988. (25 U.S.C. § 2719(a).) This prohibition does not apply to gaming on, among other things, land taken into trust as part of "the restoration of lands for an Indian tribe that is restored to federal recognition." (25 U.S.C. § 2719(b)(1)(B)(iii).) On September 19, 2006, Carl J. Artman, Associate Solicitor, Division of Indian Affairs, determined the subject lands are eligible for gaming as the Tribe's "restored lands" under title 25 United States Code section 2719(b)(1)(B)(iii). On September 26, 2006, James E. Cason, Associate Deputy Secretary, concurred in Mr. Artman's determination. For reasons stated in our May 1, 2006, letter to the National Indian Gaming Commission and our Notice of Appeal to the Interior Board of Indian Appeals (IBIA) (courtesy copies enclosed herewith), the Department's findings are not supported by the facts or the law and, therefore, the proposed acquisition does not qualify for IGRA's "restored lands" exception. We maintain the exception is inapplicable because the Tribe's status as a federally recognized tribe was never formally terminated and if it were, the Department has not lawfully restored recognition to the Tribe. In addition, the Tribe has not demonstrated a sufficient historical or modern nexus to the proposed gaming site. Thus, the Secretary should not accept the land into trust for the stated purpose.

The Associate Deputy Secretary's determination that the proposed acquisition constitutes the Tribe's restored lands appears to be final agency action on that particular issue. The IBIA dismissed the State's appeal for lack of jurisdiction and, unless the Department specifies otherwise, the State appears to be without administrative remedy on the specific "restored lands" question. Therefore, we reserve the right to pursue judicial remedies as necessary to challenge the Department's "restored lands" determination in this matter.

In any event, even though the Tribe is landless and the United States has not created a reservation for the Tribe, the principle behind 25 Code of Federal Regulations part 151.11(b) should be applied here; that is, as the distance between the Tribe's traditional homeland and the land to be acquired increases, the Secretary shall give greater scrutiny to the Tribe's justification of anticipated benefits and greater weight to concerns raised by the State and local governments. (See 25 C.F.R. § 151.11(b).) In this case, the proposed acquisition is located about 13 to 16

miles from a 40-acre parcel near Ione, California, which BIA records suggest may be the Tribe's historic land base. (See letter from Andrea Lynn Hoch to Andrea Lord re Opposition to Tribe's Request for Restored Lands Determination, pp. 1-3 (May 1, 2006).)

We recognize at least one federal circuit court of appeals has held that restoration of lands encompasses more than simply "the return of a tribe's former reservation." (*City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1028.) In *City of Roseville*, the court held that "[g]iven the passage of years between termination and restoration of federal recognition of tribes, it is likely that earlier reservation land could not easily be reestablished as a reservation for a restored tribe." (*Id.* at p. 1030.) That holding, however, turned on a specific congressional finding that the tribe's pre-termination reservation was in fact unavailable to the tribe. (*Ibid.* [citing Sen. Com. Rep. that only 22 of 40 acres in the tribe's old reservation were "in Indian hands" when Congress enacted the tribe's restoration legislation].) The circumstances here are different. While the United States has not created a reservation or rancheria for the Tribe, or held land in trust for the Tribe, in 1916 the Department agreed to purchase the 40-acre parcel near Ione for the Tribe's benefit. (See Hoch-Lord letter at p. 2.) In 1996 a federal district court dismissed the Tribe's quiet title action involving the 40-acre parcel because the Tribe was, at that time, without a legitimate government and no individual had authority to act on its behalf. (*Id.* at p. 3.) Since then, however, the BIA has approved the Tribe's constitution and formally recognized its elected leadership. (*Id.* at p. 3, fn. 2.) We believe that, because the obstacles that apparently prevented the Tribe from proceeding with the quiet title action in 1996 no longer exist, it may be reasonable to require the Tribe to first renew its attempt to reacquire the 40-acre parcel before the instant land may be considered. If the 40-acre parcel is genuinely unavailable, then we believe it would be appropriate for the BIA to require the Tribe to document the steps it took to try to acquire its traditional land base, and demonstrate why the 40-acre parcel is otherwise unavailable before any other land can be considered for gaming under the restored lands exception.

This procedure is consistent with case law holding that before land can be taken into trust for gaming under the restored lands exception, the Secretary shall determine that doing so provides equitable relief to the tribe. (See *City of Roseville, supra,* 348 F.3d at p. 1029; *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.* (W.D. Mich. 2002) 198 F.Supp.2d 920, 935.) In fashioning an equitable remedy, the Secretary must consider all equities surrounding the application, and the remedy should balance the interests of all the affected parties. (See *British Motor Car Distrib. v. San Francisco Auto.* (9th Cir. 1989) 882 F.2d 371, 374; *FTC v. H.N. Singer, Inc.* (9th Cir. 1982) 668 F.2d 1107, 1113.)

In determining whether a parcel of land meets the restored lands exception, the lower court in *City of Roseville* recognized that "restoration of lands" referred to lands that would place the tribe in its "former" position. (*City of Roseville v. Norton* (D.D.C. 2002) 219 F.Supp.2d 130, 159.) In construing what was intended by a "restored" land base, the district court determined that Congress intended to provide a land base that was "roughly equivalent" and "which might

not be identical." (*Ibid.*) We do not believe that the 228-acre acquisition proposed here can be considered roughly equivalent to what BIA records suggest is the Tribe's 40-acre historic land base.

II. The Secretary Is Unauthorized to Create a New Indian Reservation in California

The Tribe requests that in addition to taking the subject land into trust, the Secretary also proclaim the land a new Indian reservation by the authority vested in him under the Indian Reorganization Act of 1934 (IRA) (Act of Jun. 18, 1934, ch. 576, § 7, 48 Stat. 986; see also 25 U.S.C. § 467) and the Indian Land Consolidation Act of 1983 (ILCA) (Pub.L. No. 97-459, tit. II, § 202 (Jan. 12, 1983) 96 Stat. 2517; Pub.L. No. 106-462, § 103(1) (Nov. 7, 2000) 114 Stat. 1992; see also 25 U.S.C. §§ 2201-2219). (Application at p. 3.) We believe the law prohibits the Secretary from doing so.

In 1864, Congress passed "An Act to provide for the better organization of Indian Affairs in California," (the Four Reservations Act) (Act of Apr. 8, 1864, 13 Stat. 39), which provided, among other things, that

> there shall be set apart by the President, and at his discretion, *not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations*, which shall be of suitable extent for the accommodation of the Indians of [California], and shall be located as remote from white settlements as may be found practicable, having due regard for the purposes for which they are intended.

(*Id.* at p. 40, italics added.) Thus, the Four Reservations Act specifically limited the number of Indian reservations the Executive Branch was authorized to create in California. (See *Mattz v. Arnett* (1973) 412 U.S. 481, 489 [confirming the Act limits the number of reservations that can be proclaimed within California].)[2]

Subsequently, in 1891, Congress provided for the creation of a limited number of additional California reservations in the Mission Indians Relief Act (Act of Jan. 12, 1891, 26 Stat. 712), which provided, in relevant part, as follows:

> That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within [California], which reservation shall include, as far as practicable, the lands and villages which have

[2] In *Mattz*, the Supreme Court recited the history of the Four Reservations Act, and identified the reservations established pursuant thereto as (1) Hoopa Valley, (2) Round Valley, (3) Mission and (4) Tule River. (*Mattz, supra,* 412 U.S. at pp. 489-494.)

> been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements.

(*Ibid.*)

The Mission Indians Relief Act thus created an exception to the reservation limit established by the Four Reservations Act, specifically for Mission Indians residing in Southern California.[3] (See generally *St. Marie v. United States* (9th Cir. 1940) 108 F.2d 876.) Subsequently, other congressional acts have also expressly authorized the establishment of specific reservations for California Indian tribes as exceptions to the general limitation established by the Four Reservations Act. (See, e.g., Auburn Indian Restoration Act (Pub.L. No. 103-434, tit. II, § 201 (Oct. 31, 1994) 108 Stat. 4533; see also 25 U.S.C. § 1300*l*-2(c) [restoring the Auburn Indian Rancheria to federally-recognized status and providing that land conveyed to the United States in trust for the Tribe "shall be part of the Tribe's reservation"].) Therefore, the only statutory exceptions to the reservation limit established by the Four Reservations Act are the Mission Indians Relief Act and congressional acts specifically establishing reservations for particular California Indian tribes, none of which are applicable in this instance.

Contrary to the Tribe's suggestion, the IRA does not currently authorize the Secretary to proclaim a new reservation in California. While the IRA authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by" certain enumerated IRA sections, including title 25 United States Code section 465, we believe Congress' specific restriction on the number of California Indian reservations, as set forth in the Four Reservations Act, controls the general reservation proclamation authority given the Secretary under the IRA. It is a settled tenet of statutory construction that absent clear intention otherwise, a general statute will not control or nullify a specific statute, regardless of the priority of enactment. (*Morton v. Mancari* (1974) 417 U.S. 535, 550; *California ex rel. Sacramento Metropolitan Air Quality Management Dist. v. United States* (9th Cir. 2000) 21 F.3d 1005, 1013.) The unambiguous purpose of the Four Reservations Act is to "provide for better organization of Indian Affairs in California." (13 Stat. 39.) On the other hand, Congress enacted the IRA principally to ameliorate the effects of the Indian General Allotment (or Dawes) Act (Act of Feb. 8, 1887, 24 Stat. 388; see 25 U.S.C. § 331) which broke up many Indian reservations, allotted parcels to individual Indians and made all or part of remaining parcels available for settlement by non-Indians. The principal purpose of the IRA was to end the allotment policy and authorize the rebuilding of Indian land bases through trust land acquisitions. (See *Mattz, supra*, 490 U.S. at p. 496, fn. 18.) There is no indication in the IRA's plain language

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[3] The Mission Indians are the those historically residing adjacent to, or near, the Catholic missions in Southern California who were members of four tribal groups: Serranos, Dieguenos, Coahuilas and San Luis Rey or San Luisenos living at 42 identified villages and named sites. (See Sen.Rep. No. 50-74, 1st Sess., pp. 1-4.)

or legislative history that by giving the Secretary general authority to proclaim Indian reservations to help rebuild Indian land bases, Congress intended to repeal the limit on the number of Indian reservations in California.

We do not assert the Secretary is forever precluded from proclaiming a new Indian reservation in California. Currently, however, there are at least four Indian reservations in California—the maximum number allowed by the Four Reservations Act, absent subsequent congressional authority establishing a reservation for a particular tribe or tribes, or express congressional action removing the limitations set forth in the Four Reservations Act. If that number should fall below four, then it appears that the Secretary could exercise his authority under the IRA to proclaim a new reservation in California.

The Tribe does not indicate whether it is organized under the IRA, or seeks land into trust under the Indian Lands Consolidation Act (ILCA) (25 U.S.C. § 2202), which is applicable to non-IRA tribes. (See Application at p. 3.) In any event, the ILCA contains no provision that either directly establishes any "reservation," or authorizes the Secretary to create one by proclamation or otherwise. Nor is the ILCA assimilated into the IRA as authority for the proclamation of a reservation in California. (See 25 U.S.C. § 467.) Therefore, the Secretary may not designate the proposed acquisition as a reservation.

III. The Proposed Acquisition Will Result in Significant Loss of Tax Revenue

In determining whether to accept the land into trust, the Secretary is required to consider the impact on State and local governments resulting from removing the land from the tax rolls. (25 C.F.R. § 151.10(e).) The Tribe contends the trust acquisition will have only a "de minimis" impact to State or local tax rolls. (Application at p. 8.) The Amador County Assessor's office informs us that it assessed $33,948.92 in taxes for all 12 parcels in 2004, and $34,689.60 for the parcels in 2005. These figures represent about a 20 percent increase in tax value since 2001, when the County assessed $27,526.54 in taxes. Given the significant increase in property tax assessments in recent years, it is inappropriate to evaluate the tax loss based on present value assessment. Such an analysis fails to consider appreciating property values and corresponding increases in property tax revenue.

The lost tax revenue must also be evaluated in light of the Tribe's plan to undertake considerable commercial development on the subject land. (Application at p. 4.) While the land's current tax value has increased significantly even though it remains largely undeveloped (see *id.* at p. 5),[4] logically the tax value will increase exponentially if the Tribe develops the property on the scale proposed by the application. Additionally, the development and increased

[4] The Shenandoah Inn—with 47 rooms—currently sits on one of the parcels in Plymouth. The Tribe, however, plans to build a hotel with up to 250 rooms (Application at p. 4), which would physically dwarf and have far-reaching tax, land use and environmental impacts beyond the much smaller Shenandoah Inn.

usage of all lands within or near the proposed acquisition, without any incoming property taxes to prevent, mitigate or offset damages to the land, will negatively impact the State and county. As the Tribe builds and operates its casino, hotel and retail complex in this rural area of the State, the development will require a substantial increase in State and county services but the costs of those services will not be paid from property, income or sales taxes generated by or on the subject land because it will be exempt.

IV. The Proposed Acquisition Raises Jurisdictional Problems and Land Use Conflicts

Part 151.10(f) requires the Secretary to evaluate any jurisdictional problems or potential conflicts of land use, which may arise from the proposed acquisition. (25 C.F.R. § 151.10(f).) As the Tribe notes, it is currently involved in litigation regarding application of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) to a municipal services agreement (MSA) it reached with the City of Plymouth regarding the proposed development on the subject acquisition. (See Application at p. 9; *County of Amador v. Ione Band of Miwok Indians* (C050066, app. pending).) Last year the trial court found CEQA applied to the project and froze the MSA. We disagree with the Tribe's contention that even if the court ultimately determines the Tribe must comply with CEQA to validate certain provisions in the MSA, compliance with CEQA "essentially mirrors" the requirements set forth in the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.). (See, e.g., *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1379 ["there are important distinctions between the requirements imposed by CEQA and by NEPA in assessing noise impacts that allow us to depart from federal cases on this subject"].)

In addition, the Tribe's representation that "the land is primarily zoned for commercial use and used for commercial purposes" (Application at p. 5) may not be accurate. Our office is informed that four of the 12 parcels (217.76 acres) are located within Amador County, and currently undeveloped. The county reports the largest parcel, APN 008-110-009 (137.78 acres), is zoned as an "X District," meaning a special use permit is required for any use other than residential or agricultural. The remaining three parcels—008-110-026 (60 acres), 008-110-088 (7.86 acres) and 008-110-021 (12.12 acres)—are zoned for single-family residences and agricultural use. The Amador County General Plan, applicable to all four parcels, indicates that if the parcels are used for residential purposes, only one family residence may be built per acre. These current land-use restrictions are in direct conflict with the Tribe's proposed development.

The remaining eight parcels, totaling 9.82 acres, are located within the City of Plymouth and are zoned for commercial use. Therefore, only a small fraction of the land is zoned as commercial and used as such.

V. The Secretary Cannot Accept the Land Into Trust Unless and Until the Tribe Completes an EIS in Compliance With NEPA

NEPA applies to discretionary actions of federal agencies, and requires the preparation of an 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.) Construction of, among other things, a large gaming facility, a 250-room hotel with conference facilities, an unspecified number of retail shops and food and beverage services, a fire station, administration space, surface parking, a wastewater treatment facility, and various internal roadways on 228 acres of largely undeveloped land will undoubtedly have a significant affect on the environment in and around the proposed acquisition. An EIS is also required where, as in this instance, a federal agency proposes to transfer land out of the State's regulatory jurisdiction. (See *Anacostia Watershed Society v. Babbitt* (D.D.C. 1994) 871 F.Supp. 475, 482-483.) Therefore, an EIS is necessary under the circumstances.

We understand the Tribe published a Scoping Report for an EIS in March 2004. The information and analyses contained in the Scoping Report are nearly three years old and may be stale. As a result, we believe it would be appropriate for the BIA to require the Tribe to conduct another Scoping Report followed by a comprehensive EIS. In our opinion, the instant trust land application is incomplete because it provides insufficient data for the BIA, State and local governments, and the surrounding communities to assess the cumulative impacts that this acquisition will have on the environment. The State will address this matter in further detail in response to the Tribe's EIS. Until that process is complete, however, the Secretary should not accept the land into trust.

VI. The Secretary Must Deny the Application Because the Tribe Has Not Submitted a Plan Specifying the Acquisition's Anticipated Economic Benefits

Based on recent conversations with BIA staff on December 13, 2006, we are informed that the BIA had not yet received a copy of Exhibit L to the Tribe's land acquisition application, described as an August 2005 market study prepared by GVA Marquette. (See Application at pp. 4, 10.) Part 151.11(c) specifies that "[w]here land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." (25 C.F.R. § 151.11(c).) Because the instant application is one to acquire land for the Tribe's business purposes, the Secretary is not authorized to accept the subject land into trust without the requisite economic benefits plan. The State requests the BIA to produce a copy of the plan upon receipt, and further reserves the right to submit additional comments, as necessary, upon completing its review of the Tribe's supporting documents.

Conclusion

It is the State's position that the subject land does not constitute the Tribe's restored lands under IGRA, and is therefore subject to the general prohibition of gaming on newly acquired land. Therefore, the State believes that the Secretary may not acquire the land into trust for

gaming purposes without a two-part determination by the Secretary and concurrence by the Governor pursuant to title 25 United States Code section 2719(b)(1)(A). Nor can the Secretary designate the land a reservation for gaming purposes. In addition, we believe the significant lost tax revenue, the jurisdictional problems and conflicting land uses, the absence of an EIS, and the absence of an economic benefits plan preclude the Secretary from accepting the proposed acquisition into trust at this time.

Thank you for your consideration of our comments.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

Enclosures

cc: James E. Cason, Associate Deputy Secretary, U.S Department of the Interior
George Skibine, Acting Deputy Assistant Secretary, Indian Affairs for Policy and Economic Development, U.S. Department of the Interior
David Bernhardt, Solicitor, U.S. Department of the Interior
Carl J. Artman, Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior
Phil Hogen, Chairman, National Indian Gaming Commission
Penny Coleman, Acting General Counsel, National Indian Gaming Commission
Honorable Daniel Lungren, Representative, 3rd District of California, U.S. Congress
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