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

May 17, 2013

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

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

RE: Mechoopda Indian Tribe of Chico Rancheria Land Acquisition for 645.20 acres

Dear Ms. Dutschke:

This comment letter is submitted on behalf of the State of California (State) at the behest of the Governor's Office in response to the Notice of Trust Land Acquisition Application (Notice) issued by the Bureau of Indian Affairs (BIA) on April 1, 2013, regarding the application (Application) of the Mechoopda Indian Tribe of Chico Rancheria (Tribe) to have real property identified as two parcels consisting of "645.20 acres, more or less," in Butte County (Trust Acquisition) accepted into tribal trust. Any comments regarding the Notice were originally due on May 2, 2013. Thank you for granting the State's request to extend the time within which to comment to May 17, 2013.

The State respectfully requests that this Trust Acquisition be denied at this time for the following reasons:

(1) The holding of the United States Supreme Court in *Carcieri v. Salazar* prevents the Secretary of the Interior from taking this property into trust on behalf of the Tribe.

(2) The Application and the Notice fail to state a sufficient need for the property to be taken into trust.

(3) The Application fails to demonstrate that the Trust Acquisition qualifies as restored lands within the meaning of 25 U.S.C. § 2719.

(4) Serious environmental issues regarding the Trust Acquisition property have not been adequately addressed.

(5) The Notice fails to clearly describe the Trust Acquisition property.

BACKGROUND

The Tribe traces its history to a 26-acre Rancheria in Chico, California that was terminated in 1967. (*Butte County v. Hogen* (D.C. Cir. 2010) 613 F.3d 190, 192.) The Tribe was restored to federal recognition. (*Ibid.*) The former Rancheria is today in the center of the city of Chico. (*Ibid.*) The Tribe's Application at page 5 indicates that it is currently landless. While the Tribe has no property that is currently held in federal trust, it does own significant other acreage in Butte County, including a 46 acre parcel that appears to be adjacent to the Trust Acquisition. The State also notes that the records of the Butte County Assessor indicate that the current owner of the Trust Acquisition property is not the Tribe but SC Butte Development, an LLC located in Las Vegas, Nevada. The Tribe proposes to conduct gaming and related operations on approximately 91 acres of the Trust Acquisition. (Revised Environmental Assessment, June 2006, p. 2-1.)

The current Notice concerns trust status for property (identified as approximately 645 acres: APN 038-150-026 (46.68 acres) and APN 041-190-020 (592.52 acres)) that is 619 acres more than that of the original Rancheria, and 554 acres more than the Tribe plans to use for its proposed gaming operation and related facilities. While the Tribe proposes to develop approximately 91 acres for purposes it describes as related to economic well being and self-sufficiency, the remaining 554 acres of the Trust Acquisition serve no such purpose but they are of great environmental importance to the surrounding local community.

ANALYSIS

The Secretary may not acquire this land in trust since the Tribe was not under federal jurisdiction in 1934

The Secretary of the Interior's (Secretary) authority to take land into trust on behalf of Indian tribes is found in the Indian Reorganization Act (IRA), specifically 25 U.S.C. § 465. In *Carcieri v. Salazar* (2009) 555 U.S. 379, the Supreme Court held that the Secretary's authority is limited to tribes that were under federal jurisdiction when the IRA was enacted in 1934. As discussed in *Carcieri*, the question is not one of the existence of a tribe or of tribal ancestors in 1934, but one of whether or not a specific tribe can show evidence that it was *under federal jurisdiction in 1934*. (*Id.* at pp. 382-384, 395.) The Tribe herein has not shown that it was under federal jurisdiction in 1934 and the State is not aware of any basis upon which it may make such a claim. Consequently, the Secretary is without the legal authority to acquire this land in trust for the Tribe.

Indeed, from various federal documents and information Butte County submitted to the BIA, it appears that the Tribe was not named among the tribes listed as receiving services from the federal government in 1934, as shown in the Haas Report entitled Ten Years of Tribal Government under the IRA. In addition, the Tribe is not named in the BIA's list of Governing

Bodies of Indian Groups Under Federal Supervision in 1965. Further, Senate Report No. 1874, dated July 1958, notes that the Tribe had never received any social services from the BIA due to the status of its members as Indians. Thus, the available evidence indicates that the Tribe was not a political entity under federal jurisdiction in 1934 but, rather, that it only became such an entity at some later date. Consequently, the State believes the evidence submitted so far in connection with the Tribe's Application is consistent with the conclusion that the Tribe has failed to demonstrate that the Secretary has the authority to take this property into trust on its behalf.

The Application and the Notice fail to state a sufficient need for the property to be taken into trust

The Tribe's Application indicates that the Tribe is in need of land because "[a]t the present time, the Tribe remains landless," and states that the Tribe "intends to use the land as part of its initial reservation and plans to commercially develop" it for a proposed gaming facility. It also notes that the Tribe's administrative headquarters will be located at the facility. (Application, pp. 5-6.) The Application, however, does not contain any discussion of why the identified 645 acres is necessary to accomplish this purpose. The Notice indicates only that the Tribe intends to use the land ("totaling 645.20, more or less") as part of its restored lands and plans to commercially develop the parcels to offer gaming to the public, and that the Tribe's administrative headquarters will also be located at the facility. (Notice, p. 2.) The Revised Environmental Assessment, June 2006, at page 2-1, indicates that the Tribe has plans to utilize 91 acres of the Trust Acquisition for gaming and related facilities, but there is no indication that the remaining 554 acres have a planned use or that they are needed by the Tribe for identified reasons.

The State of California respectfully requests that this Trust Acquisition be denied because the Tribe has not indicated a need for use of 554 acres of the proposed Trust Acquisition. The Tribe's assertion that its Application is consistent with the requirements of 25 Code of Federal Regulations part 151 confuses the desire to bank land with the actual need for the protections afforded tribes by trust status in order to actually facilitate an articulated tribal purpose. The Tribe's mere statement, without explanation or discussion, that the acquisition will "enhance tribal self-determination and economic development" does not establish need. (Application, p. 4.) Furthermore, the Notice presents no explanation of why trust status is necessary for the 554 acres that will retain their existing uses. (See 25 C.F.R. § 151.10(b).) While the Tribe may want the federal government to acquire all this 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 the 554 acres into trust. There is no sufficiently articulated reason to support this 554-acre portion of the Trust Acquisition, and a simple desire for trust status of the land is inadequate to justify the federal action of removing property from the jurisdiction of the State and Butte County. Given that the Tribe has not articulated a need for this Trust Acquisition beyond the 91 acres it proposes to develop for gaming and related facilities, no basis has been shown for approving this 645-acre Trust Acquisition.

The State also notes that this Trust Acquisition, if approved, would have a significant

adverse impact on the State and Butte County within the meaning of 25 C.F.R. § 151.10(f). If future development of the 554 acres occurs, the County loses 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. This is especially significant in light of the fact that the Trust Acquisition is within an area identified as a key groundwater recharge area. Butte County noted in its letter to the BIA dated April 29, 2013, that "substantial sums of local, state, and federal dollars are being spent to determine ways in which this recharge area can be more narrowly defined, protected and developed to address critical water needs in the future." Any future development would be of great concern to both the County and the State.

As the court noted in *Butte County v. Hogen, supra,* 613 F.3d 190, 194, the Secretary's decision whether to take this particular 645 acres into trust for the Tribe

> must provide an interested party—here Butte County—with a "brief statement of the grounds for denial" of the party's request. As this court held in *Tourus Records, Inc. v. DEA,* 259 F.3d 731, 737 (D.C.Cir. 2001), the agency must explain why it decided to act as it did. The agency's statement must be one of "reasoning"; it must not be just a "conclusion"; it must "articulate a satisfactory explanation" for its action. 259 F.3d at 737 (*quoting* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders,* 1969 Duke L.J. 199, 222, and *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Inc. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).
>
> Second, an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706 [of the Administrative Procedure Act, 5 U.S.C. § 555 et seq.]. *See, e.g., State Farm,* 463 U.S. at 43, 103 S.Ct 2856; *Comcast Corp. v. FCC,* 579 F.3d 1, 8 (D.C. Cir. 2009). This proposition may be deduced from case law applying the substantial evidence test, under which an agency cannot ignore evidence contradicting its position. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-88, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Although we are dealing with the question whether agency action is arbitrary or capricious, "in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd of Governors of Fed. Reserve Sys.,* 745 F.2d 677, 683 (D.C. Cir. 1984); *accord. Am. Radio Relay League, Inc. v. FCC,* 524 F.3d 227, 243 (D.C. Cir. 2008).

Similarly, a district court recently found in *CS-360, LLC v. U.S. Department of Veteran Affairs* (D.D.C. 2012) 846 F.Supp.2d 171, 185, as follows:

> In order to avoid a finding that the challenged agency action was arbitrary or capricious, the "agency must [have] examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." [Citations.] In articulating the reason for its action, the agency "must have provided a 'rational connection between the facts found and the choice made.'" [Citations.] An agency's decision may be said to be arbitrary or capricious if any of the following apply: (i) its explanation runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference of view or the product of agency expertise; (ii) the agency entirely failed to consider an important aspect of the problem or issue; (iii) the agency relied on factors which Congress did not intend the agency to consider; or (iv) the decision otherwise constitutes a clear error of judgment. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856; *accord Jicarilla Apache Nation v. U.S. Dep't of Interior,* 613 F.3d 1112, 1118 (D.C.Cir. 2010).

Even assuming the Tribe's eligibility for the Trust Acquisition, the environmental concerns presented by Butte County (see discussion *infra*) require a thoughtful consideration of any need, as yet not articulated, identified by the Tribe. It would seem that there is no reason why the non-gaming related portion of the land in question (554 acres) should not remain fee land which can be owned by the Tribe.[1] There is no information showing that the United States' failure to accept the 554 acres into trust will preclude the Tribe from using the property (in fee status). If the property is held in fee it allows the Tribe and the County to work together to develop or preserve the land in a way that contributes to the strength of the local community as well as the Tribe, while respecting local concerns for development and avoiding jurisdictional and land use conflicts. Thus there is no showing that the acreage of the trust conveyance in excess of the gaming-related development "is necessary to facilitate tribal self-determination," nor has the Band demonstrated a need for the additional land. (25 C.F.R. § 151.10(b).) Consequently, any decision to approve this Application would constitute an arbitrary and capricious action subject to judicial invalidation.

The Application fails to demonstrate that the Trust Acquisition qualifies as restored lands within the meaning of 25 U.S.C. § 2719

Pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 et seq., gaming may not take place on lands taken into trust after October 17, 1988, absent specified circumstances. (25 U.S.C. § 2719.) One such circumstance is that the lands to be taken into

[1] As noted, the Butte County Assessor's records indicate that the current owner of the Trust Acquisition property is SC Butte Development, an LLC located in Las Vegas, Nevada, and until such time as the Tribe owns the property it may not be taken into trust. (25 C.F.R. § 151.4.)

trust are "restored" lands for a tribe that does not already have trust land. The National Indian Gaming Commission (NIGC) has noted that "[t]he phrase 'restoration of lands' is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied throughout its history." (NIGC's *Grand Traverse Opinion,* Aug. 31, 2001, at p. 10; see also Office of the Solicitor's undated *Memorandum Re: Confederated Tribe of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt,* at p. 8 ["restored land does not mean any aboriginal land that the restored tribe ever occupied"].) The district court in *Confederated Tribe of Coos, Lower Umpqua and Siuslaw Indians v. Babbitt* (D.D.C. 2000) 116 F.Supp.2d 155, 164, held the "term 'restoration' can"—and impliedly should—"be limited to avoid the result . . . that *any and all* property acquired by restored tribes would be eligible for gaming." (Italics added, quoting from *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Mich.* (W.D.Mich. 1999) 46 F. Supp. 2d 689, 698.) Such limitations include "the factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the restoration." (*Ibid.*)

The Tribe bears the difficult burden of demonstrating that the subject land qualifies as "restored lands" under IGRA. The State notes that Butte County has presented a serious challenge to the Tribe's claim of an historical connection to the Trust Acquisition and presented evidence regarding the same to the Secretary, among others. (See 45-page letter from Butte County to the Regional Director of the BIA, dated August 11, 2006, Re: Comments on the Revised Environmental Assessment for the Mechoopda Indian Tribe Casino Fee-To-Trust Acquisition.) The County's letter, at pages 1 through 5, discusses the Dr. Stephan Dow Beckham report entitled "Mechoopda Indian Tribe of the Chico Rancheria," which indicates that the Tribe has no cultural or historical ties to the Trust Acquisition. These issues must be addressed and, as directed by the court in *Butte County v. Hogen, supra,* 613 F.3d at p. 194, the agency must give a reasoned explanation for its action. The State does not believe that the record contains sufficient evidence that clearly establishes a longstanding or ancient geographical, historical, or cultural nexus between the modern Mechoopda Tribe members and the subject property.

Moreover, as mentioned above, the Tribe's original Rancheria consisted of 26 acres. This Trust Acquisition would be for 645 acres, which is 519 acres more than that of the original Rancheria. The Tribe cannot simply assume that any amount of property it proposes is an appropriate amount to be taken into trust by the federal government. The Tribe must demonstrate in some substantial way that it has a need and beneficial use for the proposed trust acquisition. While 26 acres may no longer be a sufficient amount of property to support the present-day Tribe, it must present a reasoned explanation as to why that is so, and the Notice must set forth sufficient information to indicate that the Tribe has met its obligation. Here the Trust Acquisition exceeds by 24 times the Tribe's Rancheria property. The Notice presents no discussion or justification for a restoration of this size. Absent any such analysis and discussion, the Trust Acquisition is arbitrary and premature. Since there is no sufficiently articulated reason to support the extensive acreage of the Trust Acquisition, it should not proceed. In *City of Roseville v. Norton* (D.D.C. 2002) 219 F.Supp.2d 130, 164, the court found that the restoration of property to the subject Indian tribe was meant to restore a land base "similar to the one that

they held previous to their disbandment." A stated tribal desire for trust acquisition of additional land—without more—is inadequate to justify the federal action of removing property from the jurisdiction of the State and the County. The Tribe is free to acquire in fee as much land as it chooses, and to use such land in the same manner as all other citizens of the State and the County are entitled to use their property.

Serious environmental issues regarding the Trust Acquisition property have not been adequately addressed

The National Environmental Policy Act (NEPA) requires that an Environmental Impact Statement (EIS) be prepared for all "major Federal actions significantly affecting the quality of the human environment." (42 U.S.C. § 4332(2)(C).) An agency may first prepare an environmental assessment to make a preliminary determination whether the proposed action *may* have a significant environmental effect. (*Nat. Parks & Conservation Assn. v. Babbitt* (9th Cir. 2001) 241 F.3d 722, 730; see 40 C.F.R. §§ 1501.4, 1508.9.) If such an effect is anticipated, a more detailed EIS is required. (*Native Ecosystems Council v. U.S. Forest Service* (9th Cir. 2005) 428 F.3d 1233, 1239.) NEPA also requires an agency to take a "hard look" at the environmental consequences of its actions and to provide a '"convincing statement of reasons to explain why a project's impacts are insignificant.'" (*Nat. Parks & Conservation Assn. v. Babbitt, supra*, 241 F.3d at p. 730, quoting *Metcalf v. Daley* (9th Cir. 2000) 214 F.3d 1135, 1141.) The State believes that the concerns raised by Butte County, as discussed below, require additional discussion and analyses to allow the BIA to take the required "hard look" at the environmental consequences of the proposed action, and that an EIS must be prepared for the Trust Acquisition.

Butte County raised serious concerns regarding the Revised Environmental Assessment prepared for the Trust Acquisition in its comment letter. (See 45-page letter from Butte County to the Regional Director of the BIA, dated August 11, 2006, Re: Comments on the Revised Environmental Assessment for the Mechoopda Indian Tribe Casino Fee-To-Trust Acquisition.) The County's letter, among other things, addresses multiple issues of water quality and availability that have not been adequately evaluated and addressed. The Trust Acquisition is within an area identified as a key groundwater recharge area for the County. These issues alone require the preparation of an EIS. Both availability of a local water supply and the continuing quality of that water is of immense importance to the local adjacent community. When combined with the County's multiple additional environmental concerns, not met by the to-date environmental analysis, it is more than evident that preparation and completion of an EIS must precede this trust acquisition. The State also notes that the very length of the BIA's January 24, 2006, Finding of No Significant Impact (FONSI), containing extensive additional mitigation, belies that a FONSI is an appropriate determination in taking 645 acres (with 91 acres to be heavily developed) of environmentally sensitive land into trust. Common sense suggests that the more issues that must be addressed and mitigated in the FONSI itself, the less likely that this administrative shortcut is an appropriate method for consideration of the articulated environmental concerns. Until all of the environmental concerns are addressed and resolved, the BIA should not move forward with this Trust Acquisition.

The land in question is not clearly described

Under 25 C.F.R. § 151.9 the request for trust acquisition shall set out a description of the land to be acquired. The Notice herein is inadequate because it fails to clearly describe the land that the Tribe seeks to take into trust and contains mistakes which must be corrected for purposes of clarity and notice. The Notice indicates that the Trust Acquisition property "consists of two contiguous parcels: APN 038-150-026 (46.68 acres) and APN 041-190-020 (592.52 acres) totaling 645.20, more or less." The State first notes that the acreage for the individual parcels, when added together only comes to 639.20 acres or 6 acres less than what is indicated in the Notice. In addition, the "revised Environmental Assessment, June 2006," for this property indicates that the California Department of Transportation has acquired approximately 20 acres of the Trust Acquisition site along its western boundary as part of the State Route 149 improvement project. If 20 acres are deducted from the combined acreage of the two parcels, the Trust Acquisition would constitute 619.20 acres. This is a difference of 26 acres between the acreage stated in the Notice and what the actual proposed Trust Acquisition acreage is likely to be. This is far from an insignificant amount and the actual acreage in question must be determined and clarified, with notice to interested parties, before the matter can proceed.

CONCLUSION

The State appreciates the opportunity to provide these comments and urges the BIA to deny this Application at this time. Please note that these comments do not constitute the entirety of the State's comments or those of its political subdivisions. Other State agencies with specific technical expertise may provide additional comments in separate letters.

Sincerely,

Kathleen E. Gnekow

KATHLEEN E. GNEKOW
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

KEG:lit

SA2003102137
31685927.doc