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**Via Facsimile & U.S. Mail**
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Amy Dutschke, Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, CA 95825

RE: San Pasqual Band of Diegueno Mission Indians
Notice of (Non-Gaming) Land Acquisition Application (29 acres)

Dear Ms. Dutschke:

This is submitted on behalf of the State of California (State) at the behest of the Governor's Office in response to a notice received regarding the (Non-Gaming) Land Acquisition Application of the San Pasqual Band of Diegueno Mission Indians (San Pasqual or Band). The application requests that the United States of America take into trust for the benefit of the Band a 29-acre parcel (APN 189-181-13) of property located in San Diego County (Acquisition). The Band's Application at page 3 indicates that its Reservation includes approximately 1,380 acres consisting of five separate parcels in a semi-checkerboard configuration. It indicates that there are approximately 230 residential units on the Reservation and that other developments include the Valley View Casino with supporting offices, "Tribal facilities consisting of Administration Offices, the Gaming Commission Offices, a Community Hall, and Education Resource Center, a Fire Station, a Housing and Community Development Office and Environmental Protection Offices." (App. at p. 3.) The Band has approximately 300 enrolled members. (App. at p. 2.)

The Band describes that the acquisition will facilitate self-determination and economic development as follows:

> Accepting the Subject Parcel into trust status will facilitate Tribal self-determination and economic development, and allow the Tribe to exercise sovereignty over lands currently held in fee title. The Tribe intends to develop non-gaming, non-commercial government facilities on the Subject Parcel, consisting of Tribal administrative offices, a medical clinic, a recreation center, a fire station, and a sports field and a play area. Such facilities will aid tribal self-

> determination and the promotion of the health and welfare of Tribal members and the community generally. In addition, the centralization of these Tribal governmental facilities will allow the Tribe to minimize its environmental impact, while at the same time maximizing the use of available lands, and minimizing development of other Tribal lands, which still exist in their natural states.

(App. at p. 5.)

The Application should be denied at this time because approval would be inconsistent with the purposes of 25 U.S.C. § 465 (Section 465). Section 465 was intended to restore tribal land lost through the federal allotment process and to allow for the acquisition of land in trust until such time as a tribe had sufficient land to be economically self-sufficient. In this case, the Acquisition does not constitute land lost to the Band as a result of the federal government's allotment process. Indeed, the Reservation established in 1910 comprised 1,214.73 acres and the San Pasqual Reservation now consists of approximately 1,380 acres. (App. at p. 3.) The Band has several profitable economic enterprises and currently has adequate land to be economically self-sufficient.

## ANALYSIS

The purpose underlying the Secretary of the Interior's (Secretary) authority to take land in trust for Indian tribes was described in *South Dakota v. U.S. Department of Interior* (8th Cir. 2005) 423 F.3d 790, 798-799, as follows:

> The legislative history of the [Indian Reorganization Act] IRA indicates that "[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe*, 411 U.S. at 152, 93 S.Ct. 1267 (quoting H.R.Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934)). Numerous sections in the act itself and in its legislative history indicate that Congress believed that a critical aspect of that broad goal was "to conserve and develop Indian lands and resources." H.R.Rep. No. 1804, 73rd Cong., 2d Sess., at 5 (1934) (the first phrase included in the title of the bill); S.Rep. No. 1080, 73rd Cong., 2d Sess., at 1 (1934) (same). The act includes six sections addressed to land policy. 25 U.S.C. §§ 461–466 (providing means to preserve and increase the amount of Indian lands). Representative Howard, the sponsor of the bill in the House of Representatives, described the tremendous loss of land that resulted from the government's allotment policy, begun in 1887, 78 Cong. Rec. 11,726 (1934), and indicated that the act would help remedy the problem by preventing "any further loss of Indian lands" and permitting "the purchase of additional lands for landless Indians." *Id.* at 11,727; see also 78 Cong. Rec. 11,123 (June 12, 1934) (statement of Senator Wheeler, sponsor of the bill in the Senate, echoing the remedial goals in relation to Indian lands).

> Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities. S.Rep. No. 1080, at 2 (stating that section 5 would "meet the needs of landless Indians and of Indian individuals and tribes whose land holdings are insufficient for self-support"); H.R.Rep. No. 1804, at 6 (noting that the purchase of lands would help "[t]o make many of the now pauperized, landless Indians self-supporting"); 78 Cong. Rec. 11,730 (statement of Rep. Howard that section 5 would "provide land for Indians who have no land or insufficient land, and who can use land beneficially"). Although the legislative history frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians. The House and Senate reports imply that members of Congress believed that that would be the most common application of the statute—giving land to landless Indians would enable them to farm or work in stock grazing or forestry operations—but the statutory language and the expressions of purpose for section 5 in the reports indicate that Congress placed primary emphasis on the needs of individuals and tribes for land and the likelihood that the land would be beneficially used to increase Indian self-support. *See, e.g.*, S.Rep. No. 1080, at 2; 78 Cong. Rec. 11,732 (statement of Rep. Howard that a long-term goal is "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it").FN7
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> FN7. We have also previously concluded that the language and legislative history did not limit the application of § 465 to landless Indians. *Chase,* 573 F.2d at 1015–16.
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> Accordingly, we conclude that an intelligible principle exists in the statutory phrase "for the purpose of providing land for Indians" when it is viewed in the statutory and historical context of the IRA. The statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to the Department.

Thus, the purpose of Section 465 was to restore lands once held by Indian tribes that were previously lost through the federal allotment policy and to "build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it." (*Id.*)

The Department of the Interior's policy for trust acquisitions set forth in 25 C.F.R. Part 151 must be construed in light of this Congressional purpose when it provides that land may be taken in trust when the Secretary determines that the "acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing." (25 C.F.R. § 151.3(a)(3).)

In this case the land on which the Band's Reservation was established in 1910 is already in trust and it is not necessary that the 29-acre Acquisition be taken into trust to restore lands lost

by the Band. Furthermore, the uses specified by the Band could be developed on fee land while meeting the San Diego County zoning requirements. (App. at p. 9.) We also note that many of the uses specified by the Band appear to already be met by existing development on the Reservation. There is, in any event, no information showing that the United States' failure to accept the Acquisition into trust will preclude the Band from using the property (in fee status) for the proposed development. If the property is held in fee and developed for commercial purposes, it contributes to the strength of the local community as well as the Band, while respecting local concerns for development and avoiding jurisdictional and land use conflicts. Thus there is no showing that the trust conveyance "is necessary to facilitate tribal self-determination," nor has the Band demonstrated a need for the additional land. (25 C.F.R. § 151.11(a) [incorporating § 151.10(b)].) Consequently, any decision to approve this application would constitute an arbitrary and capricious action subject to judicial invalidation.

As the 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:

> 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." *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n,* 419 F.3d 1194, 1198 (D.C.Cir.2005) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856) (internal quotation marks omitted). In articulating the reason for its action, the agency "must have provided a 'rational connection between the facts found and the choice made.'" *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.,* 626 F.3d 84, 90 (D.C.Cir.2010) (quoting *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856). 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).

Given that none of the Band's territory was lost as part of the allotment process, no basis exists for approving this trust acquisition as one that is necessary to restore historic lands lost as part of the federal allotment process.

There, likewise, is no basis for approving this application as necessary to assure tribal economic self-sufficiency because of the lack of economic potential of the Band's existing reservation or trust lands. The Band currently operates the successful Valley View Casino (with 2000 slot machines) and an adjacent "luxurious boutique hotel," (www.valleyviewcasino.com) and the Valley View Casino Center, an entertainment and sports complex

(www.valleyviewcasinocenter.com). The Band already has tribal offices and a fire station on its Reservation, and any expansion of these facilities or any medical or sports and recreation facilities can be located on the Acquisition while it remains as fee land. There is no necessity for the Acquisition to be taken into trust.

While tribes are certainly entitled to strive for the greatest possible economic success, the trust acquisition provisions of the Indian Reorganization Act were not designed to subsidize such strivings *ad infinitum*, but rather to provide an economically secure foundation from which tribes could thereafter climb on their own to secure the American dream.

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.

The State appreciates the opportunity to provide these comments and urges the BIA to deny this application.

Sincerely,

KATHLEEN E. GNEKOW
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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