OFFICE OF THE GOVERNOR

August 26, 2005

Via Facsimile (951) 276-6641 & U.S. Mail

Mr. James J. Fletcher, Superintendent
United States Department of the Interior
Bureau of Indian Affairs
Southern California Agency
1451 Research Park Dr., Suite 100
Riverside, California 92507-2154

Re: Notice of Non-Gaming Land Acquisition (5.68 Acres) Santa Ynez Band of Mission Indians

Dear Mr. Fletcher:

This is in response to a notice received by the Governor's Office regarding the Santa Ynez Band of Mission Indian's ("Tribe") pending application to have the United States of America accept the conveyance of approximately 5.68 acres of property located in Santa Barbara County in trust for the Tribe ("Trust Acquisition"). Though the Governor's Office received this notice in late June, at our request, your office courteously extended the time for comment to August 26, 2005.

From the materials submitted with the application, it is our understanding that the proposed Trust Acquisition consists of 13 parcels. All 13 parcels are contiguous to one another and two of the parcels appear to be contiguous to the Tribe's existing trust lands. From the notice of application it appears that ten of the parcels are vacant properties and that three of the parcels have vacant houses or buildings on them. The application asserts that while no immediate change of use is planned as a result of the proposed Trust Acquisition, there may be commercial or residential development on those parcels in the future. Seven of the parcels, Assessor's Nos. 143-253-002, 003, 004, 005, 006, 007 and 008 are currently zoned as commercial lots. The other six, Assessor's Nos. 143-254-001, 003, 143-252-001, 002, 143-242-001, and 002 are currently zoned as commercial highway.

In compliance with 25 C.F.R. section 151.10(b), the Tribe lists, in section 4 of its application, six Tribal needs this acquisition would purportedly fulfill. These are to help the Tribe: (1) meet its needs to have jurisdictional control over its land base; (2) meet its long-range needs to establish its reservation land base by increasing the land base; (3) meet the Tribe's need to preserve its land base; (4) meet its needs to "land-bank" property for future generations; (5) meet its needs to expand its Tribal government; and (6) meet its need to preserve cultural resources and protect the land from environmental damage, trespass or jurisdictional conflict.

In its essence, the Tribe's need for this acquisition amounts to a desire to fulfill what it concedes is a "top philosophical priority" – "the re-acquisition of its aboriginal lands." (Application ("App."), p. 8.) Secondarily, this acquisition appears to fulfill a Tribal goal to acquire more commercially viable land now so that it may be "land-banked" for future Tribal economic or residential development. (App., p. 10.) This is attractive to the Tribe because such land, if placed in trust, would allow the Tribe to argue that State and local land use regulation did not apply. Moreover, it would invest that land with the commercial advantage of being free of property tax, and potentially State income and State and local sales tax liability for certain types of economic activities. Additionally, the Tribe suggests that a trust acquisition at this time is necessary in order to protect Tribal cultural resources. (App., p. 11.)

In support of its claim that the Trust Acquisition would constitute re-acquisition of the Tribe's aboriginal lands, the Tribe appears to assert an entitlement to any lands that were part of the "Chumash cultural group's" territory prior to the first European contact. (App., p. 7.) Generally, this would encompass seven thousand square miles of land extending from Malibu in the South to Paso Robles in the North, to Kern County in the East and the Northern Channel Islands to the West. (*Id.*) More specifically, the Tribe seems to contend that the Trust Acquisition is part of lands that were purportedly granted by the Mexican Governor Micheltoreno to certain "tribal leaders" of the "Santa Ines Indians." (*Id.*)

Underpinning the assertion of its need for additional developable land is the Tribe's claim that only 50 of its existing 139 acres of trust land is developable and that "much" but not all of that land has already been developed. (App., pp. 10-11.)

The Tribe's asserted justification for acquisition as a means of preserving Tribal cultural resources is the suggestion that because cultural resources were discovered on another site nearby, there might be cultural resources on these lands and that this possibility justifies a trust acquisition at this time. This suggestion is, of course, speculative.

The Department of Interior policy for trust acquisitions provides that land may be taken in trust when the Secretary of the Interior 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, there has been no showing that the United States' failure to accept the proposed Trust Acquisition will: (a) preclude the Tribe from developing any needed housing for its members; (b) prevent the Tribe from proceeding with an economic development; or (c) leave Tribal cultural resources at risk. Similarly, there has been no showing that this trust conveyance is essential to the Tribe's ability to exercise sovereign authority.

In contrast to the absence of any immediate impact to the Tribe of a denial of its instant trust application, this Trust Acquisition, if approved, would have a significant individual and cumulative adverse impact on the State and its political subdivisions within the meaning of 25 C.F.R. section 151.10, subdivisions (e) and (f) and should, therefore, be denied.

A. The Tribe Has Failed to Provide the Demonstration of Immediate Need or Necessity Required by 25 U.S.C. Section 465 and 25 C.F.R. Section 151.3(a)(3).

The Tribe notes in its application that it currently exercises sovereign control over 139 acres of land including 12.6 acres of recently acquired land that allowed the Tribe to consolidate the northern and southern portions of its territory into a single geographic unit. The Tribe also notes that its current membership is 157. Despite the fact that this equates to more than .885 acres of land for each man, woman and child, or approximately 3.5 acres for each family of 4, the Tribe asserts that it does not have enough land. Its principal contention is that only 50 acres of the 139 are developable and that "most" of those acres have been taken up by its recently expanded and highly successful casino and hotel commercial venture and existing residential development. Though it concedes that there is land that can be developed for "small scale residential enhancements" (App., p. 11), the Tribe suggests that it needs additional land for possible future residential use or possible future commercial activities.

A desire for additional land, however, does not render an acquisition of land "necessary" within the meaning of 25 C.F.R. section 151.3(a)(3). Nothing in the legislative history of 25 U.S.C. section 465 ("IRA" or "Section 465") suggests any Congressional intent for the Secretary of the Interior to take land into trust for a tribe in the absence of a demonstrable immediate need. To the contrary, that history establishes that Section 465 was enacted in response to the immediate need to provide land for homeless Indians for the purpose of creating subsistence homesteads, consolidating areas within a reservation, for grazing and other similar agricultural purposes. (See House Report No. 1804, 73rd Cong. 2d. sess. (May 28, 1934) at 6-7; 78 Cong. Rec. at 9,269, 11,123, 11,134, 11,726-30, 11,743.) Neither the term nor the concept of "land-banking" for future generations or future speculative needs appears anywhere in Section 465, the Department of Interior's regulations or the legislative history of either. (See, for example, 25 C.F.R. section 151.11(c) which requires the submission of a business plan detailing the economic benefit to a tribe of a proposed economic activity where, as here, some of the parcels at issue are not contiguous to the Tribe's existing "reservation" as that term is defined in those regulations.)

Similarly speculative is the Tribe's assertion that some of its cultural resources might be at risk if this Trust Acquisition were not approved. In this regard, the Tribe argues that "[a] significant archaeological/cultural resource was recently discovered on property adjacent" to the Tribe's trust lands and that because of the "proximity" of the Trust Acquisition to that discovery, there is a "potential" that such resources might exist on the Trust Acquisition as well. (App., p. 11.) The Tribe has had control of the Trust Acquisition for more than two years and the complete ability to conduct an archaeological survey. The fact that the Tribe has not uncovered any sites on the property in this period of time suggests strongly that no such sites exist. In any event, the mere possibility that such a site might exist is not a valid basis for a trust acquisition.

Further, while the Tribe seeks to justify the acquisition as a re-acquisition of the "Chumash cultural group's" aboriginal territory, it has not demonstrated either a political entitlement to that territory or, assuming such an entitlement were established, that an acquisition of this nature is essential either to its existence as a tribe or to its ability to function.

While there are numerous discrepancies on details, historical accounts of the Chumash[1] agree that prior to European contact the Chumash did not constitute a single political entity but rather were an amalgam of peoples speaking roughly six to eight different but related languages in contiguous linguistic territories. Within each linguistic territory there were villages typically of 15 to 50 dwellings that constituted separate and independent political entities each controlled by a chieftain (although some chieftain at various times may have controlled more than one village). Altogether it is estimated that there were about 150 such villages in all of these linguistic territories. The Tribe's trust lands are located in the territory of a single linguistic group that by some accounts could have contained up to 50 different politically independent villages. Thus, in the absence of a more detailed explanation from the Tribe, there does not appear to be any basis for a claim by the Tribe to all Chumash linguistic group aboriginal territory. Acceptance of such a claim by the United States could justify the acquisition in trust of seven thousand square miles of land now occupied by an overwhelmingly non-Native American population well beyond the needs of a 157 member tribe that already exercises sovereign authority over more land than it is currently utilizing.

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[1] See generally, California's Chumash Indians, Santa Barbara Museum of Natural History, EZ Nature Books 1996, Rev. Ed. 2002; The Chumash Indians After Secularization, Johnson, California Mission Studies Association, Nov. 1995; Anthropology and the Making of Chumash Tradition, Haley & Wilcoxon, Current Anthropology vol. 38, no. 5. Dec. 1997; Encyclopedia of North American Indians, Chumash, Houghton Mifflin.

The aboriginal political configuration of the Chumash linguistic territories, in which the Santa Ynez Valley was variously under the control of up to 50 independent tribal entities, was itself obliterated during the Mission era. Most sources appear to agree that very shortly after establishment of the Missions there were no politically independent villages in the Santa Ynez Valley, all Indians having been subsumed within the Spanish political system. Spain, the initial political successor to the aboriginal sovereigns after conquest, was succeeded in political authority by Mexico, neither of these sovereigns having recognized sovereignty in any aboriginal political entity. (See, Aboriginal Title: The Special Case of California, (1986) 17 Pac. Law Journal 391, 400.) Similarly, in the Treaty of Guadalupe Hidalgo, the United States recognized no sovereignty other than its own over the newly acquired land, and, upon admission of California into the Union, reserved no Indian lands from State jurisdiction as it had with other states. (See, California Admission Act of Sept. 9, 1850, 9 Stat. 452.)[2] Though the United States has subsequently compensated individual Indians for lost land in several acts (see, Aboriginal Title: The Special Case of California, supra, at pp. 400-415), the purpose of those enactments was not to recognize sovereign title by any government or title by any individual Indians. Instead, their purpose was to foreclose possible claims of aboriginal title altogether. (Id. at 419.) For the Secretary of the Interior to determine to add additional land to the Tribe's existing trust lands merely for the purpose of allowing the Tribe to re-acquire aboriginal lands would thus be contrary to established Congressional policy.

When the Tribe eventually received recognition from the United States, it was recognized as a new political entity comprised of the remnants of the many different independent villages– not as the continuation of any pre-existing political entity. Under the Mission Indians Relief Act of 1891, the Tribe was recognized and its reservation established in order to provide land for homeless Indians and a means by which those Indians could survive economically. When

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[2]Under the Land Claims Act of March 3, 1851, 9 Stat. 631, the United States determined, through a board of land commissioners, that the land in the Santa Ynez Valley had been granted to the Catholic Church and other private individuals. Additionally, in a report required by section 16 of the Land Claims Act, the board determined that Indians living in and around California Missions, though asserting grants to them by the Mexican Governor Micheltoreno, could not provide sufficient documentation supporting any such claims. A subsequent suit by the Catholic Church in 1853 likewise did not validate any Indian claims to lands around the missions. Thus, subsequent to California's admission to the Union, the United States not only did not reserve any lands otherwise ceded to State sovereignty for the sovereign use of any tribe of Indians, but it also did not recognize non-sovereign title to any such lands by individuals Indians or groups of Indians.

Section 465 was subsequently enacted in 1934, it had a nearly identical purpose. That purpose was not to re-establish the aboriginal territory of any pre-existing tribe. Rather, it was to provide a secure place for Indians to live and to become financially independent.

Simply put, in pre-contact times there was no Santa Ynez Band of Mission Indians or any single independent political entity constituting a collection of the many different villages in the Santa Ynez Valley. The Santa Ynez Band's, territory is the territory assigned to it by the federal government because of United States' policy to provide land for homeless Indians whose survival depended upon the provision of such land.

In summary, the Tribe has not demonstrated an entitlement to seek sovereignty over the aboriginal lands of Chumash villages in linguistic territories outside of the Santa Ynez Valley and has not demonstrated that it is the successor in interest to any of the independent political villages of the pre-contact Santa Ynez Valley. In any event, the objective of re-acquisition of aboriginal lands is not a valid basis for approval of a trust acquisition under the IRA. Certainly nothing in the IRA suggests that the establishment of tribal political control over land overwhelmingly populated by non-Indians is a valid basis for a trust acquisition. The United States Supreme Court recognized in *City of Sherrill, New York v. Oneida Indian Nation of New York* (2005) 125 S.Ct. 2290, 161 L.Ed.2d 1103, that the long passage of time and the creation of vested non-Indian political and private interests on former Indian territory argue strongly against any *legal* right to that territory. The ability to bring such territory under the sovereign control of the Tribe through the trust acquisition process exists only in the IRA. Where, as here, the Tribe has made no showing of an immediately cognizable need for the acquisition and has failed to show that the acquisition of purported aboriginal territory would not create intense adverse inter-jurisdictional conflicts as required by the IRA, its application should be denied.[3]

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[3]As the Supreme Court noted:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation." See *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998). The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the

B. Any Benefit to The Tribe From this Proposed Trust Acquisition is Far Outweighed by the Adverse Individual and Cumulative Adverse Effects Approval of this Trust Application Would Have on the State.

Approval of the Tribe's application absent a showing of immediate need or necessity could have potentially severe adverse cumulative impacts on California. There are 108 federally recognized tribes in the State. If this Tribe is permitted to acquire land in trust when it has no immediate need for that land, other tribes in the State may claim entitlement to the same treatment by the Department of the Interior pursuant to the provisions of 25 U.S.C section 476, subdivisions (f) and (g) which provide that no agency of the United States shall make a determination under the IRA that "classifies, enhances, or diminishes the privileges and immunities available to an Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes" and that any decision that does discriminate in that fashion "shall have no force or effect." Allowing up to 108 federally recognized tribes in California to place into trust land for which they have an aboriginal claim could involve more than 75 million acres—the amount of land many tribes in this State have claimed would have been theirs had the United States ratified 19th century treaties granting that acreage. Congress rejected those treaties because of the impact that granting tribes that amount of land would have had on California in the 1850s. Whatever impact those treaties might have had on California in the 19th Century pales in comparison to the impact of contemporary removal of a comparable amount of land from the State's authority over land use and taxation—both of which are fundamental attributes of its sovereignty. Such a result would constitute federal interference with the powers reserved to the State in a manner patently at odds with the intent of the Tenth Amendment.

Further, the Tribe's claim that there would be no jurisdictional conflicts if this land were taken into trust is belied by the County of Santa Barbara's present inability to complete an agreement with the Tribe over land use restrictions on its pending 6.9-acre trust acquisition and the appeal of the Bureau's decision to approve that application by adversely affected residents in the surrounding community. It is also belied by the County's request (in its August 10, 2005, comment letter on the Trust Acquisition) that the Bureau refrain from approving this application pending execution of an agreement between the County and the Tribe over land use and other matters affecting the Trust Acquisition.

Additionally, as the County's comment letter demonstrates, and contrary to the Tribe's assertions, there are tremendous tax implications for local government should this property be taken into trust. The property is commercially zoned for the most part. In its application, the

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removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 CFR § 151.10 (2004).

(*City of Sherrill, New York v. Oneida Indian Nation of New York*, 161 L.Ed.2d at p. 1494.)

Tribe calculates only the current assessed value of the property in calculating the tax loss to the County. However, the County's comment demonstrates that if the property were commercially developed, the potential loss to the County would be over forty million dollars. (See, County comment attached hereto as Exhibit A.) The comment also demonstrates that even if the property were not developed, the loss to the County over the next 50 years for land that could be immune from taxation in perpetuity would be more than 2.3 million dollars.

Similarly, there are significant implications for non-Tribal businesses located in the adjacent business district. Freed from the requirement to pay State and local property, sales and income taxes, Tribal businesses could plainly undercut non-Tribal businesses to an unfair commercial advantage. That this concern is real is demonstrated by the newspaper article attached hereto as Exhibit B. Simply put, there is no basis in the IRA for continuing to grant the Tribe the political, regulatory and economic advantages of trust status when the Tribe's political and economic survival is no longer an issue. The Tribe does not claim that its casino and hotel business, which is exempt from State and local taxation, is insufficient to allow the Tribe to function as a tribal government or to provide for the economic well-being of its 157 members. Indeed, the Tribe's income from those two businesses alone by all accounts is able to provide income distributions to Tribal members that substantially exceed the average individual income in Santa Barbara County. The IRA combined with the Indian Gaming Regulatory Act has accomplished its purpose with respect to this Tribe.

C. NEPA Requires that the Bureau not Make a Decision on a Trust Application Until it has Examined All Reasonably Foreseeable Individual and Cumulative Adverse Impacts an Approval Might Have on the Environment.

The Tribe's application indicates that it has no plans to perform an analysis of the potential individual and cumulative adverse impacts this acquisition might have on the environment. Instead, the Tribe claims that this project is entitled to a categorical exclusion. A transfer of regulatory authority from the State to an Indian tribe that may have the consequence of eliminating regulatory preclusion of a development that is reasonably foreseeable compels the preparation of an environmental impact statement. (*Anacostia Watershed Soc. v. Babbitt* (D.D.C., 1994) 871 F. Supp. 475, 482-483; *Conner v. Burford* (9th Cir. 1988) 848 F.2d 1441, 1450-1451; *Sierra Club v. Peterson* (D.C.Cir. 1983) 717 F.2d 1409, 1412-1415.) In this case, while the Tribe has no apparent immediate plans to develop the Trust Acquisition, it has indicated that it may develop the property in the future for commercial or residential purposes. Thus, such development, without full federal or State regulatory control, is a reasonable foreseeable consequence of the approval of this Trust Acquisition and the potential individual and cumulative adverse impacts of such development must be analyzed in an environmental

impact statement. Further, as noted by the County in its comment letter, the Bureau has an obligation to consider the impact of the various trust acquisitions the Tribe has pursued and is pursuing on a collective rather than a piecemeal basis. The Bureau should not consider the Tribe's current application in isolation but rather in the context of its apparent intention to pursue further acquisitions for the sake of the "re-acquisition of its aboriginal lands."

CONCLUSION

For the foregoing reasons, the Governor's Office opposes the Trust Acquisition at this time and requests that the Bureau deny the Tribe's proposed Trust Acquisition. This acquisition does not seem justified under the requirements of, or in accord with the intent underlying, the IRA. Thank you for the opportunity to comment on this application.

Sincerely,

PETER SIGGINS
Legal Affairs Secretary

Attachments