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

Re: Land Acquisition Application of the Sycuan Band of the Kumeyaay Nation (1,357 acres)

Dear Ms. Dutschke:

This is submitted on behalf of the State of California at the behest of the Governor's Office in response to a notice received regarding the Sycuan Band of the Kumeyaay Nation's (Sycuan or Band) revised application to have the United States of America accept the conveyance of approximately 1,357 acres of property comprising twenty-one separate legal parcels located in San Diego County in trust for the Band (Trust Acquisition). Thank you for granting the request to extend the time within to comment to November 18, 2011.

From the materials submitted with the revised application, it is our understanding that the proposed Trust Acquisition consists of twenty-one parcels of property that, in the immediate future, will be utilized for the following purposes:

1. Restoration of the Band's control and administration over "part of the Tribe's aboriginal territory";
2. Management, protection and conservation of the Band's land bases, and natural and cultural resources through Sycuan's exercise of its governmental powers;
3. Economic development consistent with proposed management priorities, including at this time the expansion of the Sycuan Resort with a new outdoor events center and parking, a fifteen- to twenty-vehicle RV park and an equestrian facility and all the necessary electrical, telephone and water and sewer line extensions;

4. Creation of additional tribal housing (fifty units in three different locations) to accommodate the growth of the Band's population some of which will utilize groundwater wells and septic systems;
5. Provision of an alternative access and evacuation route from the Band's existing reservation; and
6. Construction of permanent facilities for the Band's annual Pow Wow event currently held within the Band's existing reservation boundaries.

FACTUAL BACKGROUND

This comment is made with reference to the following facts.

According to Sycuan's website, its commercial investments include ownership of the very successful Sycuan Resort and Casino, with 2,000 slot machines, three golf courses (Singing Hills Country Club), eleven tennis courts, a 103-room hotel, six restaurants and the 460-seat Sycuan Showcase Theatre, which routinely hosts top-level entertainment. It recently built the 235-room Hotel Solamar in downtown San Diego. In 2003 it purchased the historic U.S. Grant Hotel in downtown San Diego for \$45 million, which, after \$10 million in upgrades, is recognized as a five-star luxury hotel. The Band has also recently completed the 173-room Sycuan Marina Gateway Hotel project and restaurant in National City that cost approximately \$35 million to construct. Sycuan recently became a mutual fund manager and launched the first of many mutual funds it plans to offer. It is reportedly the first tribe to offer financial services and the first tribally-owned investment advisor. The Band also owns Sycuan Ringside Promotions to manage and promote boxers and boxing events. It is the nation's first tribally-owned boxing promotion company. In addition, Sycuan is a major sponsor for the San Diego Padres and Chargers professional sports franchises.

Sycuan also has a significant infrastructure. It offers free medical, dental and vision coverage for its 188 members. It operates its own water reclamation and treatment plants. It maintains 10,000 lineal feet of roadways and landscaping throughout the Reservation. It provides emergency backup power to assist the region. It provides tribal housing, day care, a recreation center, gymnasium, fire and emergency services, security, insurance, administrative services and numerous employment opportunities.

It also offers various education programs, including scholarships, a community college, an elementary learning center (K-6), a language institute, high school education classes to obtain diplomas, tutors for K-12, and preschool activities. Through an endowment, it supports the Sycuan Institute of Tribal Gaming at San Diego State University.

Finally, any aboriginal claims Sycuan possessed were extinguished as a matter of federal law by the Indian Claims Commission and Ninth Circuit and United States Supreme Court decisions construing the Land Claims Act of 1851. *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 483 (1924); *Super v. Work*, 3 F.2d 90 (D.C. Cir. 1925), *aff'd*, 271 U.S. 643 (1926) (per curiam); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986).

ANALYSIS

Sycuan asserts that its application complies with the standards the Secretary of the Interior has established for approval of fee to trust applications in 25 C.F.R. Part 151 because: (a) the Band was under federal jurisdiction in 1934 and thus eligible to have land taken in trust for it under the rule enunciated in *Carciere v. Salazar*, 129 S. Ct. 1058 (2009); (b) the entire Trust Acquisition is adjacent to Sycuan's existing reservation; and (c) the acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing.

The State of California respectfully requests that this Trust Acquisition be disapproved for four reasons. First, Sycuan incorrectly argues that its application should be analyzed as if it were an "on-reservation" request because some of the twenty-one parcels in the proposed trust conveyance have a common boundary with the Band's existing reservation and other parcels are contiguous to those parcels which, in turn, are contiguous to still other parcels in the proposed trust conveyance. Section 151.11, however, requires that an application be considered "off-reservation" when the lands proposed for conveyance are "located outside of and noncontiguous to the tribe's reservation." In its July 13, 2011 Fee to Trust Handbook; Version II (Handbook II), the term contiguous is defined as "two parcels of land having a common boundary" including "parcels that touch." Thus, where, as here, an application proposes to convey multiple parcels in trust, each individual parcel must have a common boundary or touch the Band's reservation for that parcel to be considered under the "on-reservation" criteria. As a consequence, the application should be returned to the Band with instructions that the parcels that do not share a common boundary with Sycuan's reservation should be analyzed for compliance with the provisions of Section 151.11.

Second, because most of the parcels on which Sycuan proposes to conduct business activities are located "off-reservation," given their lack of a common boundary with the Band's reservation, Sycuan's application fails to comply with the requirements for an economic development off-reservation trust application because the Band has failed to provide "a plan which specifies the anticipated economic benefits associated with the proposed use" as required by 25 C.F.R. § 151.11(c). Most of the parcels on which Sycuan proposes to conduct business activities are not contiguous to the Band's existing reservation. They are only contiguous to other parcels that are contiguous to parcels that touch Sycuan's existing reservation. As previously discussed, each parcel proposed to be conveyed in trust must be considered on the basis of whether it itself is contiguous to a tribe's reservation. If that contiguity does not exist, the application for that parcel must be considered an "off-reservation" acquisition subject to the provisions of 25 C.F.R. § 151.11. A contrary construction would allow tribes, such as Sycuan, to

circumvent the requirements of section 151.11(c) by simply buying up land between its reservation and the parcels on which it desired to conduct a business and submit those parcels and the ones actually contiguous to the reservation for approval at the same time. Such a construction would also allow tribes to circumvent the provisions of 25 U.S.C. § 2719 by enabling them to avoid the prohibition on off-reservation gaming absent the Secretary of the Interior's two-part determination and gubernatorial concurrence through this simple expedient (e.g., once in trust, all twenty-one parcels could be construed as a single parcel contiguous to the Band's 1988 reservation and thus eligible for gaming). Indeed, as the State demonstrated in its comments on Sycuan's original environmental assessment, it is reasonably foreseeable that the Band's existing resort facility could be developed either as a second or a replacement casino, given the provisions of Sycuan's existing tribal-state class III gaming compact (which authorize a second casino) and the Band's previously expressed desires for a second casino. Thus, treating all twenty-one parcels included in Sycuan's application as if they were all contiguous to the Band's existing reservation could create an impermissible conflict with the provisions of the Indian Gaming Regulatory Act (IGRA) by allowing these regulations to be utilized as a means for evading the prohibitions on off-reservation gaming established by IGRA. For these reasons, not only should the Band be required to submit a business plan with its application, but the application itself should be considered an application to take land into trust for a gaming purpose. In this fashion, a binding determination could be made that the non-contiguous parcels included within the application either were or were not eligible for class III gaming.

Third, contrary to Sycuan's assertions, the Band has failed to properly demonstrate that placing these twenty-one parcels in trust is necessary to facilitate tribal self-determination, economic development, or Indian housing. Sycuan's claim that its application is consistent with the requirements of 25 C.F.R. Part 151 confuses the mere intent to use land for Indian housing and economic development purposes with the actual need for the protections afforded tribes by trust status in order to actually accomplish an economic development or Indian housing purpose.

The Department of the Interior's 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). Though the application implies that in the absence of this Trust Acquisition none of the developments the Band has proposed would go forward, the application offers no support for this conclusion. In this case, there has been no showing that the United States' failure to accept the proposed Trust Acquisition will: (a) preclude the Band from developing any needed housing for its members; or (b) prevent the Band from proceeding with an economic development, such as the Pow Wow, the events center, the proposed equestrian facility, or the emergency access road. Similarly, there has been no showing that this trust conveyance is essential to the Band's ability to exercise sovereign authority.

While the Band states that it needs the hotel, resort, golf course, the events facility, equestrian center and RV park to provide a more diverse economic and thus more stable economic foundation, its application fails to demonstrate that these economic activities cannot succeed without the benefit of a trust acquisition. Further, apart from the absence of such a plan,

nothing in the application suggests that the apparently flourishing hotel, resort, and golf course would be in jeopardy absent a trust acquisition, or that these activities would fail absent the addition of a fifteen- to twenty-vehicle RV park, an outdoor site for weddings, small concerts, meetings and celebrations. Likewise, though Sycuan asserts that San Diego County's existing zoning may require either a zoning change or major use permit, nothing in the application indicates that the Band has sought or been denied such a change or permit for its proposed activities.¹ Similarly, though the Band claims that its proposed housing density is greater than could be accommodated under the County's existing zoning, nothing in the application indicates that Sycuan has applied for and been denied a variance, or a zoning change allowing that increased density. As a result, nothing in the application demonstrates that trust acquisition is necessary to allow the Band to develop the land in the manner it desires.

The State is aware of prior Interior Board of Indian Appeals (IBIA) decisions and federal court decisions, *e.g.*, *South Dakota v. United States Dep't of the Interior*, 314 F. Supp. 2d 935, 943 (D.S.D. 2004), *aff'd*, 423 F.3d 790, 801 (8th Cir. 2005), concluding that the Bureau is not required to determine with any specificity that placing property in trust is necessary or essential to the accomplishment of a tribal housing or economic development purpose and that it may be sufficient if a tribe merely asserts that it needs more land. In the State's view, these decisions misconstrue the fee to trust regulations and their interpretation of the regulations is inconsistent with the purpose and intent of the Indian Reorganization Act (IRA).

The benefit of a trust acquisition lies in the protection it affords tribes from state and local taxation and land use and other civil regulation that threatens a tribe's ability to house its members, secure its political existence and develop a tribal economy. Where such threats are absent, however, there is no valid purpose for a trust acquisition. Previously, the Department of the Interior appears to have recognized this fact in adopting fee to trust guidelines in 1994 that required tribes to demonstrate the need for additional land in trust status as opposed to simply asserting that they needed more land. Likewise, in its original fee to trust handbook adopted in May 2008 (Handbook I), the Department set forth policies consistent with the need to demonstrate why placement of the land in trust was necessary.

Section 5.2 of the original handbook provided that: "[A]pplications for trust land located within an urbanized and primarily non-Indian community must demonstrate that trust status is essential for the planned use of the property and economic benefits to be realized for said property." (Handbook I at 44.) According to San Diego County's September 12, 2011 comment on the Band's environmental assessment, 986 acres of the proposed trust acquisition are located in a County specific plan area while only 371 acres can be considered semi-rural (105 acres) or rural (266 acres). Thus, because the majority of the proposed acquisition lies in an urban area and because that community is primarily non-Indian, were Sycuan's application considered under Handbook I, the Band would be required to demonstrate that trust status is essential for the

¹ Indeed, were such an application denied, it would signal that the Band's proposal created a significant land use conflict justifying denial of this application.

accomplishment of its housing and economic development goals. The Bureau should reconsider its approach and return to its past policies and require such a demonstration from Sycuan.

Fourth, the Band's application makes no binding commitment to reimburse the County and the State for lost revenue stemming from its proposed trust acquisition. Likewise, Sycuan does not offer real mitigation for adverse impacts stemming from its proposed development activities and does not even acknowledge its outstanding obligation to fulfill the reclamation plan for its abandoned mining site if its trust application were approved.

While the State has no interest in precluding Sycuan or any other tribe from providing housing for its members or establishing a viable tribal economy, the State does have an interest in assuring that the accomplishment of that objective is not subsidized by the State through lost tax revenue, and lost land use and civil regulatory control for a tribe that has the financial wherewithal to be subject to taxation and state civil regulatory control and still accomplish its objectives. While the federal government has the power and the trust responsibility to assure tribal housing, economic development and effective tribal government, it does not have the authority to accomplish those objectives by forcing states to pay the cost of those programs through lost taxation and lost regulatory control.

Previously, the Department appeared to recognize that fact in the policies set forth in Handbook I. That handbook required in Section 5.2 that: "In consultation with local, city, county, and state governments, an effort must be made by the tribe to resolve possible conflicts over taxation, zoning, and jurisdiction. If the acquisition is opposed or raises unresolved concerns from the governments, the proposal will automatically be referred to the Assistant Secretary for Indian Affairs for review and approval/disapproval." (Handbook I at 44.) Likewise, that handbook also required in Section 5.2, that a tribe must, as a condition of approval, commit to adopting "standards that provide at least comparable safeguards" contained in "local ordinances including (but not limited to) fire safety, building codes, health codes, and zoning requirements." (*Id.* at 44.)

Here, the County and State will lose substantial property, sales and transient occupancy tax revenue if the proposed trust acquisition were approved. As Sycuan concedes, the Band's current payments total \$864,729 per year and do not take into account lost income tax revenue to the State should additional tribal members receive an exemption from that tax because they reside on Indian trust lands. Though Sycuan states that this amount represents a tiny fraction of the County and State's total tax revenues from those sources, it ignores the fact that a policy of taking land into trust without requiring reimbursement governs more than Sycuan's contribution; it implicates contributions from every other tribe in California that could become exempt from State and local taxation as a result of a trust acquisition—especially when one considers that this loss will continue in perpetuity.

While Sycuan asserts that the Band has offered to "reimburse the county for lost tax revenues" no agreement has been reached in that regard and no offer was made to provide the State with lost income tax revenues. Furthermore, while the Band suggests it should get credit

for contributions it has made to local traffic circulation improvements, these improvements were necessitated in large part, if not entirely, because of the impacts of the Band's activities. In this regard, the lion's share of Sycuan's traffic contributions derive from the Band's Special Distribution Fund obligations under its tribal-state class III gaming compact. Likewise, the fact Sycuan has developed its own police and fire departments and brought utilities to its reservation has primarily benefited the Band.

The State adopts by reference San Diego County's October 19, 2011, comment letter as it relates to local taxes and fees for mitigation for impacts from the proposed trust acquisition. (Deputy Chief Administrative Officer Sarah E. Aghassi, letter to Regional Director Amy Dutschke (Oct. 19, 2011) 2-8.) The State also adopts the County's letter where it comments on Sycuan's obligation to comply with the reclamation plan for its abandoned mining site known as the Sloan Canyon Mine. The 575.36 acres comprising that mining site are included in eight of the twenty-one parcels proposed to go into trust and, as the County notes, the Band's violation of local and State laws related to the mine remains outstanding and the acquisition places in jeopardy the State's ability to enforce its laws related to abandoned mines. (*See id.* at 8-9.)


Because there has been no resolution of potential zoning and land use conflicts, no agreement to reimburse the County and the State for lost taxation revenue, no proposal for resolving other unmitigated adverse impacts resulting from Sycuan's proposal and no method for assuring the Band's compliance with its outstanding reclamation obligations, the Band, as a condition to the approval of its application should be required to enter into enforceable agreements with the County and the State providing reimbursement for lost tax revenue, mitigation of adverse impacts stemming from Sycuan's proposed development and guarantees that the Band will fulfill its reclamation obligations.

CONCLUSION

The State does not object to the principle that provision of housing on tribal trust land is integral to tribal sovereignty and self-determination, and we are reluctant to object to a trust application that seeks to provide housing for tribal citizens. That said, this application does not adequately show that the trust acquisition is necessary for this purpose.

Thank you for the opportunity to comment on this application. If you have any questions concerning this comment please feel free to contact the undersigned.

Sincerely,


PETER H. KAUFMAN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General