



OFFICE OF THE GOVERNOR

October 8, 2009

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

Mr. Dale Morris, Regional Director
United States Department of the Interior
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Re: Environmental Assessment for Land Acquisition Application
of the Sycuan Band of the Kumeyaay Nation (1,966 acres)

Dear Mr. Morris:

This is in response to a notice received by the Governor's Office regarding an environmental assessment (EA) prepared in support of the Sycuan Band of the Kumeyaay Nation's (Sycuan or Band) pending application to have the United States of America accept the conveyance of approximately 1,966 acres of property located in San Diego County in trust for the Band (Trust Acquisition).

From the materials submitted with the EA, it is our understanding that the proposed Trust Acquisition consists of thirty 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, recreation facilities at Lake Emma including a pier, a 120-vehicle R.V. park and an equestrian facility and all the necessary electrical, telephone and water and sewer line extensions;

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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.

The EA states that each of these proposals is "important to the Tribe and provides a basis for taking the land into trust pursuant to 25 C.F.R. Part 151." The Governor's Office does not believe that the EA's conclusion in this regard provides a basis for accepting this Trust Acquisition.¹ Further, the EA is inconsistent with the requirements of the National Environmental Policy Act because it does not consider reasonably foreseeable consequences of this Trust Acquisition, in particular the possibility that the Trust Acquisition might be utilized for the construction of a second gaming facility or a new facility. In addition, the EA is insufficient to support its conclusion that there will be no adverse impacts on State and local tax bases through this trust transfer, or that local businesses will benefit from any commercial development located on the Trust Acquisition.

FACTUAL BACKGROUND

This comment is made with reference to the following facts.

Sycuan states this trust application is based on the ground that the land in question is part of the aboriginal lands of the Kumeyaay Indians. In previous trust applications, the Band has declared that its aboriginal lands "extended south well beyond the Mexican border, and many miles north into Riverside County."

The EA notes that Sycuan's Reservation is one square mile in size, or 640 acres. According to San Diego County, 69 acres of the Reservation are available for economic development and housing. San Diego newspapers have reported that the Band has completed twenty-five 3,000-square-foot single-family residences worth \$800,000 each that have been made available to tribal members at no cost.

¹ The Governor's Office has not received notice that any comments are due on the trust application itself. Thus, the Governor's Office reserves the right to provide appropriate comments on the application after any such notice is received. However, because the EA itself reaches a conclusion about the consistency of this application with the requirements of 25 C.F.R. Part 151, this comment addresses that conclusion.

Further, 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 through 6), a language institute, high school education classes to obtain diplomas, tutors for K through 12, and preschool activities. Through an endowment, it supports the Sycuan Institute of Tribal Gaming at San Diego State University.

ANALYSIS

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 EA repeatedly states that the no-project alternative would result in none of the developments the Band has proposed going forward, the EA 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, Emma Lake recreational facilities, 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.

In contrast to the absence of any immediate impact to the Band 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. § 151.10(e) and (f) that the EA fails to address.

A. There is No Demonstration of Immediate Need or Necessity Required by 25 U.S.C. § 465 and 25 C.F.R. § 151.3(a)(3).

The EA fails to establish facts demonstrating immediate need or necessity for this Trust Acquisition. The Band does not claim that its casino and hotel businesses along with its other commercial ventures, most of which are exempt from State and local taxation, are insufficient to allow the Band to function as a tribal government or to provide for the economic well-being of its 188 members. Sycuan has been able to re-establish its cultural identity, establish tribal economic self-sufficiency and establish a tribal community on its existing Reservation.

The EA recognizes that the Band currently exercises sovereign control over approximately 640 acres of land. According to San Diego County, at least 69 acres of the land over which the Band exercises sovereign control is available for residential and commercial development. The Band's principal contention, however, is that as its membership grows, so will its need for land, and that it must exercise sovereign control over any land that it acquires as long as that land is within the confines of the aboriginal territory of the Kumeyaay.

A desire for additional land does not render an acquisition of land "necessary" within the meaning of 25 C.F.R. §151.3(a)(3). Nothing in the legislative history of 25 U.S.C. § 465 ("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

B. Any Benefit to the Band From this Proposed Trust Acquisition is Outweighed by the Potential Cumulative Adverse Effects.

Approval of the Band's application absent a showing of immediate need or necessity could have potentially cumulative adverse impacts on California.

Contrary to the Band's assertions, there are significant tax implications for local government should this property be taken into trust. Currently, the property is minimally valued. In its application, the Band calculates only the current assessed value of the property in calculating the tax loss to the county. If the property were commercially developed as proposed, its assessed value would increase.

Further, if the property were more intensively developed in the future, the potential loss to the county could be in the millions of dollars, instead of the \$840,000 the Band presupposes. (EA at 4.7-2.) Sycuan does not argue that the level of development it is proposing could not be developed under existing county land use ordinances with permits or variances, or through a request for a land use plan change. Thus, consideration of this level of development and the tax revenue it would generate is required.

While the EA asserts that the Band has offered to “reimburse the county for lost tax revenues” (EA at 4.3-2), no documentary support is provided for that statement. It is unclear what the statement means, or how it would be enforceable. In addition, the Band does not take into account lost sales, income, and property taxes due the State stemming from additional residential and business uses located on the Trust Acquisition. Tribal members living on the trust land of their tribe are exempt from the State’s income and property taxes and some sales tax could also be exempt. The EA fails to adequately analyze this impact.

Similarly, there are significant implications for non-tribal businesses located in the same area. Unlike non-tribal businesses, tribal businesses on the Trust Acquisition will not be required to pay state and local property, sales and income taxes. Though the EA suggests that non-tribal businesses would benefit, no support for that statement exists in the EA and is at variance with logic where businesses on tribal lands compete with non-tribal enterprises located outside the Band’s reservation. This reasonably foreseeable eventuality is not analyzed in the EA.

C. The National Environmental Protection Act 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 Band’s EA does not perform an analysis of all the reasonably foreseeable impacts the Trust Acquisition might have on the environment. Where an agency has the statutory authority to preclude a specific activity and then takes an action that would eliminate its authority to preclude that action where that development is a reasonably foreseeable result, the courts have ruled that the impact of that activity must be fully analyzed. (*Dept. of Transp. v. Public Citizen* (2004) 541 U.S. 752, 769.)

In this case, the EA does not consider the impact development of a second or new Gaming Facility might have on the environment if it were located on the Trust Acquisition. Such a facility could not be constructed unless this trust conveyance is approved by the United States because a Gaming Facility must be constructed on trust lands contiguous to an existing pre-1988 reservation. The construction of such a project is not hypothetical or speculative in nature. The Band negotiated an amended tribal-state class III gaming compact with the State in 2006 that was ratified by the Legislature, approved by the California electorate through a referendum and approved by the Secretary of the Interior. This compact contemplated the location of a tribal gaming facility on new trust land

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contiguous to the Band's existing reservation. Though this agreement did not go into effect because the Sycuan Tribal Council did not ratify the compact (as required by the compact) because of current economic conditions, the Band, having once contemplated such a development, could do so again once economic conditions change. As a result, the EA does not comply with the requirements of the National Environmental Quality Act

CONCLUSION

For the foregoing reasons, the Governor's Office respectfully requests that the Bureau consider rejecting the Band's EA. Please note that these comments do not constitute the totality of the State's comments on this EA. Other state agencies with specific expertise on the environmental issues raised by the Trust Acquisition may comment as well.

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,



ANDREA LYNN HOCH
Legal Affairs Secretary