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The Honorable Kevin Washburn
Assistant Secretary–Indian Affairs
MS-3642-MIB
1849 C Street, N.W.
Washington, D.C. 20240

Paula Hart, Director
Office of Indian Gaming
1849 C Street, N.W.
Washington, DC 20240

Re: Response to the Tejon Tribe Request for Indian Lands Opinion

Dear Mr. Washburn and Ms. Hart:

On behalf of Stand Up for California! ("Stand Up!"), we are responding to arguments made by the Tejon Indian Tribe ("Tribe" or "Tejon") regarding the gaming eligibility of certain property in Mettler, California (the "Mettler Parcels").[1] On May 5, 2014, the Tribe asked the Department for an opinion determining that the Mettler Parcels qualify for gaming under the "last recognized reservation" exception to the prohibition on off-reservation gaming in the Indian Gaming Regulatory Act ("IGRA"), 25 C.F.R. § 2719(a)(2)(B).

The Mettler Parcels, however, do not qualify as the Tribe's "last recognized reservation" for three key reasons. First, the land that was set aside by the United States for the use and benefit of the Tejon (and other tribes) is the Tule River Reservation. According to the Department's 2012 "reaffirmation" of the Tejon in 2012, the Tribe's status as a recognized tribe

[1] Stand Up! is a non-profit organization that focuses on gambling issues affecting California, including tribal gaming.

never lapsed; it was only left off the list of recognized tribes due to "administrative oversight."[2] If so, it necessarily follows that the Tribe was not only a recognized tribe when IGRA was enacted in 1988, it also had a reservation, the Tule River Reservation, which was established by Executive Order in 1873 for several tribes, including the Tejon, and is still in existence. The Tribe therefore does not qualify for the "last recognized reservation" exception. In fact, it does not qualify for any off–reservation gaming; the Tribe can conduct gaming on the Tule River Reservation.

Second, the Tribe's arguments regarding the establishment of a reservation in and around Tejon Ranch have been rejected by federal courts on several occasions. The United States did not and could not establish a reserve or reservation at Tejon because the land was in private ownership, subject to Spanish land grants, which were proven in court and for which the United States issued patents. Nor does an unratified treaty—which is a legal nullity—constitute a "recognized reservation."

Third, the United States' effort to set aside land for Indians living on Tejon Ranch was not a "recognized reservation," but in any case, the Mettler Parcels are certainly not located within that area. Accordingly, the Mettler Parcels are not within the boundaries of any possible reservation. The plain language, structure, and legislative history of IGRA confirm that the Mettler Parcels are not the type of lands to which the "last recognized reservation" exception is intended to apply.

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[2] This analysis does not address the legality of the "reaffirmation" of the Tejon Indian Tribe, whether it was proper for the Department to base its decision on its 1916 attempt to set aside land, or whether the current Tejon Indian Tribe can trace back to the signatories of the 1851 "Treaty with the Castake, Texon, etc.," also known as "Treaty D." As the Department is aware, several other groups claim to be the beneficiaries of Treaty D. Because the Department did not comply with 25 C.F.R. Part 83 in reaffirming Tejon, there is substantial controversy regarding membership and lineage to the Indians living in and around Tejon Ranch.

If the Tribe wishes to conduct gaming on the Mettler Parcels, the appropriate avenue is to pursue the "two-part determination" process under 25 U.S.C. § 2719(b)(1)(A). That process will ensure, subject to gubernatorial concurrence, that any gaming on the Mettler Parcels will be in the best interest of the Tribe and its members and will not be detrimental to the surrounding community.

The Mettler Parcels Do Not Qualify for Gaming Under Any Provision of Section 20 of IGRA.

IGRA generally prohibits gaming on lands acquired in trust after 1988, with limited exceptions. 25 U.S.C. § 2719(a). The most commonly invoked exceptions—settlement of a land claim, the initial reservation of a new acknowledged tribe under 25 C.F.R. Part 83, and restored lands of a restored tribe—do not apply to "reaffirmed" tribes. *See* 25 U.S.C. § 2719(b)(1)(B). Thus, the only other avenues for a gaming eligibility determination are set forth in subsection (a) of Section 20.

Subsection (a) provides, in relevant part, that a tribe can game on newly-acquired lands if "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act," or the lands "are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located." *Id.* § 2719(a).

The regulations that implement Section 20 define "reservation" as:

> (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;
>
> (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

> (3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or
>
> (4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

25 C.F.R. § 292.2. The Tribe argues that the "Tejon reservation has traits in common with all four of these categories" but "[i]f it is necessary that the Tribe's reservation qualify under a single category," it meets the requirements of subpart (2). Because the United States neither "set aside" nor "acquired" any land for Tejon reasonably proximate to the Mettler Parcels, there is no basis for concluding that the Parcels are eligible for gaming under "subpart (2)" or any other provision of Section 20. The Mettler Parcels cannot qualify as the Tribe's "last recognized reservation."

A. The only reservation that the United States set aside for Tejon is the Tule River Reservation.

The Department administratively "reaffirmed" the Tejon Tribe in 2012.[3] Thus, the Tribe's government–to–government relationship with the United States never lapsed nor was terminated. Accordingly, Tejon was a recognized tribe in 1988.

The Tribe's "last recognized reservation"—and, indeed, its only reservation—is the reservation the United States established for the Tejon, among other bands, in 1873: the Tule River Reservation. In 1864, Congress enacted a statute known as "the Four Reservations Act" authorizing the President to consolidate all the tribes of California into no more than four reservations in the State. Act of April 8, 1864, 13 Stat. 39. All other reservations were abandoned, as a matter of law. One of the four reservations the United States formally

[3] *See* Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Kathryn Montes Morgan, Chairwoman - Tejon Indian Tribe (Jan. 6, 2012) and Memorandum from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Regional Director - Pacific Region and Deputy Director - Office of Indian Services (April 24, 2012) ("2012 Reaffirmation Memorandum"); attached as Exhibits 3 and 4, respectively, of the Tejon's request.

established pursuant to the 1864 Act was the Tule River Reservation, which President Grant established by Executive Order in 1873.

Prior to the passage of the 1864 Act, the United States had begun its effort to relocate the Tejon Indians to the Tule River Reservation. The Tribe, in fact, acknowledges this history. Likewise, the Department states in its decision to reaffirm the Tejon that, "[i]n 1873, the Tule River Reservation was established by executive order *for the Tejon (Manche Cajon) and other bands of Indians*." 2012 Reaffirmation Memorandum at 4 (emphasis added); *see* Executive Order of January 9, 1873; I Kapp. 831.[4]

The Tribe, however, claims that the majority of its members refused to relocate to the Tule River Reservation. Although Charles C. Royce, the authoritative source on tribal land cessions in the United States, states that "[t]he last of the Indians were removed to Tule River, as reported by Superintendent Wiley, July 11, 1864," Tejon insists that Royce's conclusion is incorrect and that many members remained in and around Tejon Ranch. Whether some Indians remained near Tejon, however, is irrelevant. Pursuant to Part 292, what is legally significant for gaming purposes is what the United States "set aside" or "acquired" for the Tribe. *See* 25 C.F.R. § 292.2. And what the United States "set aside" or "acquired" for the Tejon Tribe is the Tule River Reservation. *See* Executive Order of January 9, 1873; *see also* 2012 Reaffirmation Memorandum at 4 ("In 1873, the Tule River Reservation was established by executive order for the Tejon (Manche Cajon) and other bands of Indians.").

The Tule River Reservation continues in existence to this day. The United States has not disestablished the Reservation, nor revised the Executive Order to change its purpose. That the Indians living on the Tule River Reservation chose to organize in 1935 under the IRA does not

[4] *See also* Executive Orders of October 3, 1873 and August 3, 1878 (modifying boundaries).

change the fact that the Tule River Reservation was formally set aside for the Tejon Indians, among others, and therefore constitutes a "recognized reservation" for the Tribe. Under IGRA, if the Tejon were to acquire land on the Tule River Reservation, it could game there without undergoing additional review under IGRA. No other parcels qualify for gaming without undergoing review under 25 U.S.C. § 2719(b)(1)(a).

B. The United States never established a reservation in or around Tejon Ranch.

The history of the land at Tejon Ranch, which has been extensively litigated, clearly establishes that the United States did not—at any point—establish a reservation in or around the Mettler Parcels. *See Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1020-21 (E.D. Cal. 2012), *appeal filed, sub nom. Robinson v. Jewell*, No. 12-17151 (9th Cir. Sept. 26, 2012); *United States v. Title Insurance & Trust Company*, 265 U.S. 472 (1924). Indeed, as is evident from those cases and the Department's files, the United States could not establish a reservation at Tejon because the land was privately owned. As a consequence, the United States established a reservation for the Tejon Indians at the Tule River Reservation in 1864. Tejon's arguments have no legal or factual support.

1. The United States never formally established a reserve or reservation at Tejon Ranch.

The Tribe claims that the Mettler Parcels are eligible for gaming under the "last recognized reservation" exception because the Parcels are within the boundaries of an area that was to have been reserved for various tribes under the 1851 treaty, commonly referred to as Treaty D. The United States negotiated Treaty D with the historical "Texon" tribe, among others. Treaty D, and 17 other similar treaties negotiated at approximately the same time, were never ratified. *Indians of California by Webb v. United States*, 98 Ct. Cl. 583, 598 (1942). An

unratified treaty has no legal effect.[5] *See Robinson v. Salazar*, 885 F. Supp. 2d at 1020-21. Thus, whatever area was encompassed within Treaty D is irrelevant because the United States did not and could not, as a matter of law, "set aside" or "acquire" any land pursuant to an unratified treaty.

The Tribe also argues that Edward Beale, the federal Superintendent of Indian Affairs for California in the early 1850s, established the "Tejon reservation" under the Act of March 3, 1853 (10 Stat. 226, 238) ("1853 Act"). The 1853 Act authorized the President to set aside five military reservations from the public domain, up to 25,000 acres each, for Indian purposes in California. Beale did identify an area within Tejon Ranch that he attempted to set aside as the Tejon or Sebastian Reserve. Scattered Indian bands, including apparently the Tejon, moved onto the site between 1853 through 1864. The land, however, was never formally set aside as a reservation by the President as required by the Act. *See Robinson*, 885 F. Supp. 2d. at 1021-23. There is no legal basis for concluding that the United States "set aside" or "acquired" this land within Tejon Ranch pursuant Treaty D or the 1853 Act.

2. The United States could not "set aside" or "acquire" land at Tejon Ranch because the land was privately owned.

The United States did not "set aside" land at Tejon Ranch for the Tejon/Sebastian Reserve, as subpart (2) of the Part 292 definition of "reservation" requires, because the land was

[5] In addition to questions about the appointments of the negotiating commissioners and the specific areas of land involved, one of the reasons the 1851 treaties were not ratified was the uncertainty of land rights in California after the United States acquired the territory through the Treaty of Guadalupe Hidalgo, which obligated the United States to honor existing land rights. *See* Larisa K. Miller, *The Secret Treaties With California's Indians*, Prologue Magazine at 39 (National Archives, Fall-Winter 2013), *available at:* http://www.archives.gov/publications/prologue/2013/fall-winter/treaties.pdf. The purpose of the Act of March 3, 1851 was to resolve all existing land rights, including Indian land rights or aboriginal rights of occupancy, and establish clear title throughout California, including the public domain. In 1928, the United States compensated the Indians of California for its failure to ratify Treaty D and the 17 other Indian treaties (known as "the 18 unratified treaties"). *See* Act of May 18, 1928, 45 Stat. 602 (codified at 25 U.S.C. § 652); *Indians of California by Webb*, 98 Ct. Cl. at 598 ("The failure of Congress to set apart certain reservations for these Indians in 1852, and its failure to provide the goods, chattels, school houses, teachers, etc. was recognized as a loss to these Indians and was made by the Congress an equitable claim to be paid in money value.").

not in the public domain.[6] Superintendent Beale recognized from the start that the area he chose for the Tejon/Sebastian Reserve was largely covered by Spanish land grants and proceeded only on the hope that Congress would either purchase the lands if necessary "or remove the Indians to some less suitable locality." 1853 Annual Reports of the Commissioner of Indian Affairs ("ARCIA") at 230. The United States upheld the Spanish land grants and issued patents for the land pursuant to the Act of March 3, 1851 (9 Stat. 631) ("1851 Act"), which Congress enacted to provide clear title to land in California after the United States acquired that territory from Mexico under the Treaty of Guadalupe Hidalgo. Failure to file claims by the deadline set forth in the 1851 Act precludes the assertion of any claim to land, including claims based on aboriginal rights.[7] *See Robinson*, 885 F. Supp. 2d at 1017-19; *see also Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1019 (E.D. Cal. 2012), *citing Super v. Work*, 271 U.S. 643 (1926); *Title Insurance & Trust Company*, 265 U.S. at 484-86; *Barker v. Harvey*, 181 U.S. 481, 491 (1901); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 646 (9th Cir. 1986).

That the United States was aware of the Spanish land grants and that they precluded the establishment of a reserve at Tejon is evident from the 1859 record of J. R. Vineyard, an Indian agent located at the site:

> During the time Congress was authorizing the changes referred to [reducing the original, surveyed 50,000 acre extent of the Tejon or Sebastian reservation to 10,000 acres, then increasing it to 25,000 acres, but leaving it unsurveyed], *the entire reservation* was claimed as private property under a grant from the Mexican government; which claim has been submitted to two of the United States courts in California, and, in both, the decisions have been in favor of the claimants, and adverse to the United States.

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[6] Further, the United States never acquired the lands, nor was it authorized to under the 1853 Act, which provided for the establishment of reservations "out of the public domain" and only appropriated funds for "subsisting the Indians in California and removing them to said reservations[.]"

[7] Thus, the public domain in California was not defined prior to March 3, 1853, the deadline for filing claims under the 1851 Act, and also the date of the enactment of the 1853 Act authorizing the establishment of reservations "from the public domain in the State of California."

> In consequence of the uncertainty brought about by the above causes, as to what is or is not reserved land, also as to who are the rightful owners of the premises, has induced several white men to settle upon the land embraced within the first survey, and what evidently must belong to the reservation, *if such an institution has existence*.

1859 ARCIA at 443-44 (emphases added); *see also* 1862 ARCIA at 325. Although Vineyard erroneously expressed the belief that the Indians had some rights and privileges to the land, he nonetheless acknowledged that the entire reservation was subject to land grants, and these grants were incompatible with the existence of a reservation. The Superintendent ultimately conceded that the patents issued required him to "yield the possession of the property under that title without reserve and on the instant." 1863 ARCIA at 102. The United States officially abandoned efforts to establish the Tejon/Sebastian Reserve by 1864. *See also* 1864 ARCIA at 118 (all the Indians of the southern district removed to Tule River); 1865 ARCIA at 111 (noting abandonment of reservations in California); 1866 ARCIA at 105 (noting Indian agent report of July 24, 1863, that the Tejon reservation Indians had been removed to Tule River farm).

The1853 Act only authorized the creation of reservations "from the public domain." Because the area of the Tejon/Sebastian Reserve was never in the public domain, no reserve was established.[8] Indeed, the Tribe even acknowledges that the United States never established any boundaries, which are necessarily required to establish a reservation. Yet the Tribe does not explain how a 75,000-acre reservation could be established under the 1853 Act, which authorized only 25,000-acre reserves. In fact, Royce notes that the originally surveyed 75,000 acre reserve was ordered reduced to 25,000 acres by the Secretary of the Interior on November 25, 1856, in order to bring it within the limits of the 1853 Act. H.R. Doc. No. 736, 56th Cong.,

[8] The two National Indian Gaming Commission land opinions cited by the Tribe each involved lands acquired by the United States for the benefit of a tribe, and are therefore inapposite.

1st Sess. 789 (1899). Royce also states that the boundaries of the reduced reserve were never surveyed, but there is no basis for assuming that the area was moved to include Mettler.[9] As is evident from the Tribe's own map (Exhibit A of the Tribe's request), the primary area being considered was at least five miles, and more likely 10–15 miles away, from Mettler.[10]

The United States did not and could not "set aside" or "acquire" land in the area the Tribe identifies because the land was not in the public domain. The fact that boundaries were never surveyed only underscores that fact. None of the area the Tribe identifies can qualify as a "reservation," let alone the Tribe's "last recognized reservation."

C. The only other land the United States set aside for Tejon does not encompass the Mettler Parcels.

The BIA independently raised the question of whether a 1916 withdrawal of land near Tejon would qualify as the Tribe's "last recognized reservation." The Tribe responded that the 1916 withdrawal of public lands for the Tejon Indians, which the United States revoked in 1962, cannot be the Tribe's last recognized reservation because a temporary withdrawal cannot be considered a "reservation." We agree that the 1916 withdrawal does not qualify as Tejon's "last

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[9] While the lack of boundaries alone proves that no reserve existed, the Tribe's arguments regarding the scope of the supposed reservation only underscore the fact that even if one could have been created, the Mettler Parcels still would not have fallen within those boundaries. For example, the Tribe notes that the area it wishes to claim was variously estimated by federal Indian agents as between 10,000 and 50,000 acres, but argues that its geographic scope was far more extensive than the 75,000-acre area identified and mapped by Royce. Although the Tribe argues that there are "informal indications" that the true extent is consistent with the vastly larger area encompassed by the 1851 treaty boundaries, Beale's description of the "broad range of tribes" with whom he met to establish the reservation indicate the area in which those tribes were found, not the area of the reservation on to which they were to be gathered. Similarly, the reliance on "resources found in the mountains and lakes" describes access to off-reservation areas; the Superintendent's reports confirm that the Indians were often forced to leave the reservation to provide for themselves when crops failed due to drought and other causes. *See, e.g.*, 1857 ARCIA at 389; 1858 ARCIA at 283; 1861 ARCIA at 143 (describing difficulty in estimating the number of Indians on the Tejon reservation "as many are, no doubt, driven to the mountains in search of those necessaries *denied to them on the reserve.*") (emphasis added). In any case, those areas are to the south and east, not northwest towards Mettler.

[10] The military officers' suggestion that the reservation extends north to the Kern River was just that, a suggestion, and again, would not have extended northwest towards Mettler. The roughly 5,000-acre area occupied by the remaining Tejon Indians that was the subject of the land claim litigation in *United States v. Title Insurance & Trust Company*, 265 U.S. 472 (1924) is approximately 15-20 miles almost directly due east of Mettler.

recognized reservation," but only because the Tule River Reservation was established for Tejon, among others.

Assuming that Tejon does not have rights in the Tule River Reservation, the 1916 withdrawal satisfies Part 292, contrary to Tejon's argument.[11] The plain language of the Part 292 definition of "reservation" includes "[l]and set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent." The 1916 withdrawal plainly satisfies this definition.[12] In promulgating this definition for Part 292 purposes, the Department did not include any temporal limitation. Given that temporal impermanence is necessarily inherent in the last recognized reservation exception (i.e., the exception only applies if a reservation no longer exists), the Department's interpretation is entitled to deference.[13]

Thus, the Tribe's last recognized reservation is either the Tule River Reservation or, if the Tribe claims to have somehow lost its rights to the Tule River Reservation before 1962, the 1916 withdrawal. The Mettler Parcels are not located within the boundaries of either.

D. The only way that the Mettler Parcels could possibly qualify for gaming is pursuant to 25 U.S.C. § 2719(b)(a)(A) .

Congress enacted IGRA on October 17, 1988 to regulate the inherent right of tribes to conduct gaming on tribal lands—even if contrary to state law—a right recognized by the

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[11] The Tribe actually does not cite any authority regarding the Part 292 definition of reservation, but only cases regarding whether Indians were due compensation when a withdrawal of lands from the public domain was later revoked (compensation is due for the revocation of a permanent withdrawal, but not a temporary withdrawal).
[12] Departmental Order of Nov. 9, 1916; revoked by Public Land Order No. 2738 (July 27, 1962).
[13] Moreover, if the Tribe's argument that temporary reservations do not qualify has any validity, it would apply equally to the "Tejon reservation" claimed by the Tribe. That area was only administered by the BIA provisionally, with the explicit acknowledgment that the area was likely subject to land grants, and would have to be either purchased by Congress (purchase was not authorized under the 1853 Act), or the Indians moved to some other locality. 1853 ARCIA at 230. Indeed, all claims under the 1851 Act were required to have been filed by March 3, 1853, the same date as the enactment of the 1853 Act. Superintendent Beale did not begin to administer the area of the Tejon/Sebastian Reserve until September 1853, at the earliest, and therefore acted conditionally, pending the outcome of the already-filed claims. Patents under the 1851 Act were eventually issued for the entire area of the Reserve, and by 1864, the Reserve was abandoned.

Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). As a compromise between state and tribal interests, the areas where tribal gaming would be allowed was restricted to the reservations and trust lands existing at the time of IGRA's enactment, with limited exceptions. For tribes without a reservation at the time of enactment, IGRA provides an exception for newly acquired lands within the tribe's "last recognized reservation" in the state(s) where the tribe is located.[14] 25 U.S.C. § 2719(a)(2)(B). A similar provision is made for tribes in Oklahoma for lands located within the tribe's "former reservation" or lands "contiguous to other land held in trust or restricted status[.]" *Id.* § 2719(a)(2)(A). The legislative history of these provisions confirms that the exception is intended to allow tribes who were without reservations in 1988 to game on lands within the areas of their last officially designated reservations:

> Subsection (a) makes Indian gaming unlawful on any lands taken into trust by the Secretary of the Interior after the date of enactment of this Act, if such lands are located outside the boundaries of such tribe's reservation. It also provides, however, that for purposes of Oklahoma, where many Indian tribes occupy and hold title to *trust lands which are not technically defined as reservations*, such tribes may not establish gaming enterprises on lands which are outside the boundaries of such tribes *former reservation* in Oklahoma, as defined by the Secretary of the Interior, unless such lands are contiguous to lands currently held in trust for such tribes. *Functionally, this section treats these Oklahoma tribes the same as all other Indian tribes.* This section is necessary, however, because of the unique historical and legal differences between Oklahoma and tribes in other areas. *Subsection (a) also applies the same test to the non-Oklahoma tribes whose reservation boundaries have been removed or rendered unclear as a result of federal court decisions, but where such tribe continues to occupy trust land within the boundaries of its last recognized reservation. This section is designed to treat these tribes in the same way they would be treated if they occupied trust land within a recognized reservation.* It is not intended to allow a tribe to take land into trust, for the purposes of gaming, on lands which are located outside the state or states in which the tribe has a current and historical presence. These limitations were drafted to clarify that Indian tribes should be prohibited from acquiring land outside their traditional areas for the expressed purpose of establishing gaming enterprises. Congress may, in the future, determine in specific situations that

[14] Assuming the Tribe was validly "reaffirmed" in 2012, and therefore is a tribe whose government-to-government relationship with the federal government had never lapsed or been terminated, the Tribe does not meet the requirement of having no reservation at the time of IGRA's enactment, as the Tule River Reservation continues in existence. The Tribe has not articulated its position regarding its rights to the Tule River Reservation.

> equity requires that a specific exemption to this rule be granted. The Committee feels, however, that such exemptions should be carefully considered on a case by case basis.

Sen. Rpt. 99-493, at 10 (emphases added). As this legislative history makes evident, there is a distinction between trust lands and "reservations." This distinction is also evident in the plain language of the Oklahoma provision, which distinguishes between reservations and lands held in trust or restricted status, and applies "the same test" as the non-Oklahoma provision. Thus, consistent with the plain meaning of "recognized," which indicates official or formal acknowledgment, or having official or legal authority, "recognized reservations" are not all lands set aside (even in trust) and administered by the United States for the benefit of Indians. "Recognized reservations" must be "technically defined" as reservations, and they must have clear boundaries. In addition, the exception is intended to treat tribes without reservations the same way as others, by treating trust lands within their "last" recognized reservation the same way as trust lands within an existing recognized reservation. This interpretation is confirmed by the definition in the Part 292 regulations of "former reservation" for the Oklahoma provision: "lands in Oklahoma that are within the exterior boundaries of the last reservation that was *established by treaty, Executive Order, or Secretarial Order* for an Oklahoma tribe." 25 C.F.R. § 292.2 (emphasis added). As noted in the legislative history, IGRA applies "the same test" to non-Oklahoma tribes. Thus, "last recognized reservation" should similarly be interpreted to mean the last reservation formally established for a tribe by treaty, Executive Order, or Secretarial Order.

The Mettler Parcels fail each of these requirements. As previously described, the "Tejon reservation" was never officially established, and lacked legal authority in any case; and therefore does not qualify as a "technically defined" reservation. The "Tejon reservation" never

had clear boundaries (and any plausible boundaries cannot possibly have encompassed the area of the Mettler Parcels). And even if validly was established, the "Tejon reservation" was not the Tribe's "last" recognized reservation in California.

Finally, the Tribe attempts to side-step the precise definition of "reservation" under Part 292, and the plain meaning of "last recognized reservation" under IGRA, by asserting that the Mettler Parcels meet the "spirit" of the last recognized reservation exception, and concluding that, "[i]n the end, the BIA's literal set aside and administration of the Tejon reservation as such is the most powerful evidence that it qualifies as the Tribe's last reservation. The actions of the BIA must have meaning." The actions of the BIA, however, cannot and do not have meaning when they exceed BIA's authority. It is Congress that authorizes BIA to act within certain parameters. The Tribe may wish that the language of the statute did not preclude its arguments, but it is the law that governs.

Putting aside that BIA did not, and could not have, validly set aside the "Tejon reservation," the Mettler Parcels do not meet the spirit of the last reservation exception. The plain text, structure, and legislative history of IGRA show that the equitable intent of the exception was to allow tribes without reservations to game in the last place in the state where they could have plainly exercised the inherent, sovereign tribal right to conduct gaming without state interference. For the Tejon Indian Tribe, that place is the Tule River Reservation or, possibly, the 1916 withdrawal. It is clearly not a non-existent "Tejon reservation," which would not have encompassed the Mettler Parcels in any case.[15]

[15] The 1916 withdrawal satisfies the intent of the exception, as the Tribe undoubtedly could have exercised its inherent, sovereign right to game on the withdrawn lands until revocation of the withdrawal in 1962. It only fails to be the Tribe's "last" recognized reservation if the Tribe claims it somehow lost its rights to the Tule River Reservation between 1962 and the enactment of IGRA in 1988, which the Tribe has not addressed. (And as previously noted, if the Tribe continued to have rights to the Tule River Reservation in 1988, it does not meet the exception's requirement that the Tribe have had no reservation at the time of IGRA's enactment.)

Conclusion

The Department must reject the Tejon Indian Tribe's request for an Indian lands opinion that the Mettler Parcels are within the Tribe's "last recognized reservation." The "Tejon reservation" claimed by the Tribe was never established as a matter of law, and in any case, the Mettler Parcels are not within the boundaries of the putative reservation. Assuming that the Tribe was validly "reaffirmed" in 2012, and was therefore a recognized tribe at the time of IGRA's enactment, the Tule River Reservation is the Tribe's reservation, and the Tribe does not qualify for any off-reservation gaming exception.

If the Tribe wishes to game on the Mettler Parcels, the only avenue open under IGRA is the two-part determination process under 25 U.S.C. § 2719(b)(1)(a). That process will ensure, subject to the concurrence of the Governor, that any gaming on the Mettler Parcels will be in the best interest of the Tribe and its members, and will not be detrimental to the surrounding community.

Sincerely,

Jena A. MacLean

cc: