

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (619) 645-2020
Facsimile: (619) 645-2012
E-Mail: peter.kaufman@doj.ca.gov

April 8, 2013

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

Amy Dutschke, Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, CA 95825

RE: Re-Issued Notice of (Non-Gaming) Land Acquisition Application for 878.55 acres by the
Tule River Indian Tribe dated February 1, 2013

Dear Ms. Dutschke:

This is submitted on behalf of the State of California (State) at the behest of the Governor's Office in response to a re-issued notice received regarding the Tule River Indian Tribe's (Tule River or Tribe) amended application to have the United States accept the conveyance of 878.55 acres of land in trust for the Tribe (Trust Acquisition). We appreciate the extension of time (to April 8, 2013) granted the State to submit its comments on this re-issued notice of amended application.

For the reasons more fully set forth below, the State respectfully requests that the Bureau of Indian Affairs deny the amended application at this time.

FACTUAL BACKGROUND

Based on our review of the amended application, a federal government environmental assessment, a Tulare County Mitigated Negative Declaration, federal government press releases, the Tribe's official website and other publicly available information, the following facts emerge:

1. The Trust Acquisition consists of four parcels (APN Nos. 305-120-006, 305-130-017, 305-130-011 and 305-130-010). Based upon Tulare County's records and the Tribe's amended application, it appears there may be a discrepancy as to the total number of acres in the Trust Acquisition. While the re-issued notice indicates that these four parcels total 878.55 acres, the amended application describes the Trust Acquisition as consisting of 876.12 acres and a review of Tulare County's records confirms this latter total for the four parcels.

2. The Trust Acquisition will be utilized for the construction and operation of a Membrane Biological Reactor wastewater treatment plant and drainfields (MBR) (App. at 1) to be located on 37 acres of the Trust Acquisition, while the balance of the property would continue to be utilized as horse pasture under the Tribe's Range Management Ordinance. Tule River states in its amended application that in 10-15 years the land might be utilized for 21-single family homes, apparently contingent upon the Tribe's receipt of appropriations under the Native American Housing and Self-Determination Act. (App. at 2.)

3. Though the amended application states the four parcels are contiguous to the Tule River Indian Reservation, a review of Tulare County records demonstrates that only one parcel, APN 305-130-010 is contiguous to the boundaries of the reservation. The other parcels, including APN 305-130-017 on which the MBR will be constructed, do not share a boundary with the reservation. Further, APN 305-120-006 does not share a boundary with APN 305-130-010 and APN 305-130-017 only touches APN 305-130-010 at a single corner.

4. The purpose and need for the MBR is set forth in a May 2010 Environmental Assessment prepared by the U.S. Department of Health and Human Services, Indian Health Division (<http://co.tulare.ca.us/civica/filebank/blobload.asp?BlobID=6314>) as follows:

1.2 PURPOSE OF THE PROJECT

The proposed project would provide a reliable and sanitary wastewater collection, treatment, and disposal system for Tribal members living on the reservation, as well as non-Tribal employees and guests at community facilities and offices on the reservation. Development of this system would support Tribal housing on the reservation, and would reduce potential health problems associated with the failure or improper siting of existing septic tank drainfield systems.

1.3 NEED FOR THE PROJECT

The Tule River Tribe is a community of approximately 1,623 members, including approximately 876 living on the reservation in approximately 285 homes (DeSoto, 2009). These reservation residents have for many years relied on individual or small community septic tank and drainfield systems for sewage disposal and treatment. At least 30 percent of these septic tanks have failed, and another 30 percent can be expected to fail within the next ten years, according to Indian Health Services' Sanitation Deficiency System (SDS) and reports from the Tule River Public Works Department. Reasons for the failure of existing systems include the exceedance of systems' design life or flow capacity, improper installation or maintenance, and undersized or inadequate drainfields. Indian Health Services has tested the soil at over 160 existing and proposed home sites since 1999, and has found that local soils are shallow and contain large quantities of rock and/or clay, making them unsuitable for drainfields. In addition, neither existing nor proposed home sites have sufficient room for replacement or new drainfields (CAIHS OEHE, 2007).

This situation is a potential public health threat and is preventing new home sites from being developed on the reservation. The Tribe has a list of over 300 members who would like to move onto the reservation, but cannot due to the unavailability of reliable wastewater treatment and disposal. Existing and planned future community developments on the reservation, including schools, a gymnasium, health clinic, and Tribal offices also require larger capacity and more reliable sewer services in order to maintain or improve sanitary conditions for Tribal members, employees, and guests. As discussed below, the absence of a comprehensive wastewater disposal and treatment system constitutes a potential health hazard to the citizens residing on the reservation.

5. Three of the four parcels, including the one upon which the MBR is to be located, are currently under a Williamson Act Contract that will not expire until January 1, 2015. The Tribe asserts in its amended application that funding for the MBR "is largely from American Recovery and Reinvestment Act (ARRA) funds which need to be used or returned to the federal government by September 30, 2014.

6. According to an Environmental Protection Agency press release:

EPA is contributing \$6.3 million to the project through the Clean Water Indian Set Aside program and the Indian Health Service is providing an additional \$1.8 million.
<http://yosemite.epa.gov/opa/admpress.nsf/de9ade70d6ffa90d8525757e005bf8b4/62d70a7e56787ec48525783b005248d5!OpenDocument>

7. The May 2010 Environmental Assessment (EA) for the MBR prepared by the U.S. Department of Health and Human Services, Indian Health Services, indicates the MBR will be constructed in two phases. The first phase is expected to take two years and is designed to serve existing tribal on-reservation uses. The second phase is anticipated to be constructed over a 15-year period to serve anticipated build-out on the reservation. (EA § 2.2.) According to the EA, "the Project would not serve the Eagle Mountain Casino or any other areas outside of the Reservation." (*Id.*)

8. Though the MBR would be located on agricultural preserve land were it to be constructed prior to January 1, 2015, under the Williamson Act Contract, local jurisdictions can determine whether certain non-agricultural uses are compatible and allow uses pursuant to special use permits. In January 2012, the Tulare County Planning Commission indicated that it could approve a special use permit for the MBR subject to certain conditions. (<http://recovery-and-reinvestment-act.theblaze.com/1/160143/Tule-River-WWTP>.) Two of the conditions for a special use permit were that the Tribe agree that the MBR would only serve uses on the reservation and that the Tribe waive sovereign immunity for purposes of the enforcement of the special use permit. (*Id.*) For reasons we have not been able to ascertain, Tule River refused to agree to those conditions and the project has stalled on land located outside of the reservation. (*Id.*) In addition, because the MBR piping would have to cross Tulare County roads, an encroachment permit is also required. This permit would be subject to the same conditions and, therefore, has been held up as well. (*Id.*)

9. According to Tulare County's Mitigated Negative Declaration for approval of a special use permit and road encroachment permit (MND) for the MBR prepared in 2011, total build-out is expected to occur in 2027 at which time the project would serve 501 homes on the reservation. (MND at 12-19; see <http://co.tulare.ca.us/civica/filebank/blobdload.asp?BlobID=6313>.)

10. As of early 2012, something less than 50 percent of the MBR had been completed on the reservation. Approximately \$4 million of an appropriated \$7.1 million has been received and presumably expended by that date. (<http://recovery-and-reinvestment-act.theblaze.com/l/160143/Tule-River-WWTP>.)

11. The Tribe has three economic enterprises and, according to its official website, it is "through these enterprises, [that] the Tule River Tribe is able to be a self sufficient entity improving the everyday lives of their members." (<http://www.tulerivertribe-nsn.gov/enterprises>.)

12. Tule River's three economic enterprises are: (a) The Eagle Mountain Casino, with over 1,400 slot machines, 12 table games, live poker tournaments, the Acorn Room Steakhouse and many other dining options; (b) Tule River Aero-Industries, a 20,000 square foot facility that is an FAA major engine and airframe repair station; and (c) Eagle Feather Trading Post, one of the largest convenience stores in Tulare County containing a full line of groceries; cold beer, wine, fishing and bait supplies, cigarettes and tobacco products, gasoline, diesel fuel and propane, a sandwich shop, and an R.V. park and dump station. (<http://www.tulerivertribe-nsn.gov/enterprises>.)

ANALYSIS

A. Completion Of The MBR Does Not Require The Trust Acquisition

The Department of the Interior's policy for trust acquisitions provides that land may be taken in trust when the Secretary of the Interior (Secretary) determines that the "acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing." (25 C.F.R. § 151.3(a)(3).) Though the amended application implies that in the absence of this Trust Acquisition the MBR could not be completed prior to September 30, 2014, there is no factual support for this conclusion. In this case, there has been no showing that the United States' failure to accept the proposed Trust Acquisition will preclude the Tribe from timely completing the MBR.

Tule River's claim that its amended 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 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 purpose and 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 threaten a tribe's ability to house its members, secure its political existence and develop a tribal economy in order to become self-sufficient and restore the damage resulting from the federal government's prior allotment policies (*South Dakota v. U.S. Dept. of Interior*, (8th Cir. 2005) 423 F.3d 790, 798-99). For the following reasons, nothing in the facts surrounding the MBR supports the conclusion that the Tribe would face such a threat in the absence of the Trust Acquisition.

First, the Trust Acquisition is not necessary for the construction of the MBR and, in turn, facilitation of both safe and additional reservation housing because that facility is a permissible use under Tulare County zoning and, in fact, as noted above, the Tulare County Planning Commission indicated the MBR could be approved. (<http://recovery-and-reinvestment-act.theblaze.com/1/160143/Tule-River-WWTP>.)

Indeed, the only reason the MBR project has not proceeded to completion in the absence of the Trust Acquisition is the Tribe's apparent unwillingness to agree to two conditions imposed on the special use permit and a road encroachment permit (that the MBR only serve on-reservation uses and that the Tribe waive its sovereign immunity to allow for enforcement of that condition). (<http://recovery-and-reinvestment-act.theblaze.com/1/160143/Tule-River-WWTP>.) Those conditions, however, are entirely consistent with the purpose and need for the MBR as set forth in the federal government's environmental assessment for the project—which is to provide safe sanitation for existing and planned residential and other public uses on the Tribe's reservation. (<http://co.tulare.ca.us/civica/filebank/blobdload.asp?BlobID=6314> at §§ 1.2 and 1.3.) Indeed, as set forth in Tulare County's Mitigated Negative Declaration for the MBR project, the project was sized to serve the anticipated build-out on the reservation. (MND at 12-19.)

Second, the Trust Acquisition is not necessary in order to permit the MBR project to be completed prior to September 30, 2014, when the Tribe asserts that it must have expended the Environmental Protection Agency and Health and Human Services funds granted pursuant to the ARRA.¹ As noted above, almost 50 percent of the two-year Phase I portion of the MBR project

¹ Since Phase II of the MBR project is not scheduled to be completed until 2027, it is not clear why the September 30, 2014 date is even relevant with respect to the necessity to preserve

(continued...)

has been completed to date within the reservation's boundaries. (<http://recovery-and-reinvestment-act.theblaze.com/1/160143/Tule-River-WWTP>.) Indeed, Donald Brafford, of the Indian Health Services, has opined that the project could be completed in 180 days. Thus, if the Tribe were prepared to accept the conditions on the special use and encroachment permits, it could complete the project well before September 30, 2014.

Third, in a September 15, 2010 letter, the Tribe states that the Department of the Interior Solicitor has taken the position that even if the Trust Acquisition were accepted, the property would still be subject to the Williamson Act restrictions. It is not clear whether the United States Department of Justice agrees with that conclusion. Assuming that this is true, however, it raises the question of whether the United States would agree to be bound by all the Williamson Act restrictions, including the restriction requiring the landowner, in this case the federal government, to obtain a special use permit from the County for construction of a wastewater treatment plant. Obviously, if that restriction applied, the Trust Acquisition would not alter the necessity of obtaining a special use permit from Tulare County in order to construct the MBR before September 30, 2014.

Finally, even if the need for Tulare County's special use permit were removed as a result of an approval of the Trust Acquisition, the project could not proceed to completion either before or after September 30, 2014, because the MBR project would still need to obtain an encroachment permit for the project pipelines that must utilize a road that will remain under Tulare County jurisdiction even if the Trust Acquisition is approved. It is our understanding that under Tulare County's ordinances, the encroachment permit can be denied without explanation.

B. The Amended Application Cannot Be Approved As An On-Reservation Application Because The Majority Of The Parcels Proposed for Acquisition And The Ones On Which the MBR Will Predominately Be Constructed Are Not Contiguous To The Tribe's Reservation And The Amended Application Has Failed To Demonstrate Compliance With The Standards For An Off-Reservation Application

As noted above, though the amended application states that the four parcels are contiguous to the reservation, a review of Tulare County records demonstrates that only APN 305-130-010 is contiguous to the boundaries of the reservation. The other parcels, including APN 305-130-017 on which the MBR will be constructed, do not share a boundary with the Reservation. Further, APN 305-120-006 does not share a boundary with APN 305-130-010, and APN 305-130-017 only touches APN 305-130-010 at a single corner.

(...continued)

ARRA funding. Indeed, the Tribe does not assert that it would be impossible to obtain an extension with respect to this deadline. In fact, it is our understanding that the original September 30, 2013 deadline for using the ARRA funds was extended by the Office of Management and Budget to the September 30, 2014 date. Thus, it appears that a further extension is not impossible.

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 Tule River, to circumvent the requirements of section 151.11 by simply buying up land between its reservation and the parcels on which it desires to conduct an activity, 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 four parcels could be construed as a single parcel contiguous to the Tribe's pre-1988 reservation and thus eligible for gaming).

As a matter of record and public knowledge, on two previous occasions Tule River has sought to relocate its existing Eagle Rock Casino in order to bring it closer to Porterville. Thus, it is reasonably foreseeable that if the Trust Acquisition were deemed contiguous to the Reservation, the Tribe could seek to develop portions of the Trust Acquisition, either as a second or a replacement casino, given the provisions of Tule River's existing Tribal-State Gaming Compact and the Tribe's previously expressed desires for a casino closer to Porterville.

As a result, treating all four parcels included in the Tribe's amended application as if they are all contiguous to the 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, the Tribe's amended application should be denied on the basis of its failure to demonstrate compliance with the requirements of 25 C.F.R. § 151.11.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Bureau of Indian Affairs deny the Tribe's amended application. Thank you for the opportunity to comment on this amended application. If there are any further questions regarding this comment, please feel free to contact the undersigned at 916 324-5571.

Sincerely,



PETER H. KAUFMAN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General