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UNITED STATES DEPARTMENT OF THE INTERIOR

BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

STATE OF CALIFORNIA; TAHA SALEH, SHOP N SAVE MARKET, AND THE COALITION OF RETAILERS; AND TULARE COUNTY, CALIFORNIA, Appellants, **v.** **PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,** Appellee.	Docket Nos. IBIA 11-067 11-068 11-071 **APPELLANT STATE OF CALIFORNIA'S OPENING BRIEF**

INTRODUCTION

The State of California (State), by and through its Governor, appeals the Bureau of Indian Affairs (BIA), Pacific Regional Director's (Director) January 4, 2011 decision to accept approximately 40 acres of land in Tulare County, California (Property) into trust (Decision) for the benefit of the Tule River Indian Tribe of the Tule River Reservation (Tribe). The Decision to accept the Property into trust constitutes an improper use of the BIA's discretion because it did not adequately consider the criteria set forth in 25 C.F.R. §§ 151.10 and 151.11 and because it

was based on an inadequate Environmental Assessment prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.

FACTUAL AND PROCEDURAL BACKGROUND

The Tule River Reservation (Reservation) was originally established on January 9, 1873 by Executive Order, and currently consists of 55,396 acres in Tulare County. (AR[1] vol. II, 82, Decision.) Within the current Reservation boundaries, the Tribe has tribal housing, administrative offices, and operates a class III gaming facility, the Eagle Mountain Casino. In 1990, the Tribe bought the Property from the City of Porterville, California.[2] The Property consists of 17 parcels with a total acreage of approximately 40 acres. The Property is located approximately 20 miles from the Reservation, within the limits of the City of Porterville and adjacent to the Porterville Municipal Airport.

I. FEE-TO-TRUST APPLICATION FOR THE PROPERTY

On March 26, 2002, the Tribe filed its application (Application) with the BIA to have the Property accepted into trust by the federal government for the Tribe's benefit pursuant to 25 C.F.R. Part 151. (AR vol. I, 1, Appl.) The Application stated that the Tribe's intent was to maintain the current use of the Property, and that the "land may be suitable for warehouses and other future development." (*Id.*) On July 8, 2003, the BIA issued a "Notice of (Off Reservation/Non-Gaming) Land Acquisition Application." (AR vol. I, 10, BIA Notice of Appl.) On August 6, 2003, the City of Porterville (City) submitted comments on the Application expressing multiple concerns, including that the City was a co-applicant with the Tribe for a grant from the U.S. Department of Commerce Economic Development Authority. (AR vol. I, 17, Letter from City to BIA (Aug. 6, 2003).) The City's letter also noted that industrial development was "ongoing" on the Property and that "additional development is anticipated on the remaining

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[1] All references to "AR" are to the exhibits in the administrative record, which was prepared by the BIA on April 8, 2011. The "vol. I, vol. II, and vol. III" designation indicates in which binder the document is located, followed by the document number. Where a specific document is cited, it is designated with by "p.".

[2] The purchase agreement between the City and the Tribe was executed May 9, 1989, and the deed was recorded on October 29, 1990. (AR vol. II, 82, Decision, at p. 3.)

fifteen parcels." (*Id.*, at p. 1) The City asked that any action on the Application be postponed until its concerns were addressed. (*Id.*, at p. 7.) In September 2003, the City wrote to the BIA asking for information, including "[a] copy of the plan specifying the anticipated economic benefits associated with the proposed use as required by 25 C.F.R. Section 151.11(c)." (AR vol. I, 21, Letter from City to BIA (Sept. 30, 2003), p. 1.) The BIA responded that the request for a copy of the plan specifying the anticipated economic benefits associated with the proposed use as required by 25 C.F.R. § 151.11(c) was addressed in Tribal Council Resolution No. FY2003-39 and its amendment, the Application, and the preliminary title report prepared by Chicago Title Company. (AR vol. I, 22, Letter from BIA to City, at (Oct. 10, 2003), p. 1.)

A. March 2008 Memorandum of Understanding

At some point after the City submitted its August 2003 comments on the Application, the City and the Tribe began negotiations regarding the development of the Property and surrounding area and created the "South Tulare County Intergovernmental Coordinating Committee (STIG)." (See AR vol. I, 23 & 24, Correspondence between the City and BIA, and the Tribe and BIA.) At the request of the City and the Tribe, the BIA extended the deadline to respond to the Notice of the Application several times. (See AR vol. I, 25-30, 32-33, Correspondence between the City and BIA, and the Tribe and BIA.)

In a November 7, 2005 letter to the BIA requesting an extension to the comment period, the Tribal Chairman described the agreement being worked on with the City for development of the Property and surrounding area. (AR vol. I, 34.) The Tribal Chairman's letter stated that the plans included an "18-hole golf course just south of the Airpark with the southern half of the Airpark being converted to a hotel/conference center with the [A]irpark going into trust upon completion." (*Id.*) The Tribal Chairman's letter states that the Tribe's proposal for the development plans are shown on a map attached to the letter; however, the attachment is not included in the AR. (*Id.*)

On July 31, 2006, the City submitted to the BIA its objection to the Application. (AR vol. I, 36, Letter from City to BIA (Jul. 31, 2006).) The City objected that the issues raised in the City's August 2003 letter had not been resolved, including that the "proposed and anticipated land

uses were not addressed" in the Application. (*Id.*, at p. 2.) The City also noted that the Application's business plan was "comprised only of two sentences" and that the "lack of specificity with the plan" made it difficult for the City to address local control issues such as roads, water pumping and storm drainage. (*Id.*, at p. 3.)

In March 2008, the City and the Tribe entered into a memorandum of understanding (MOU) which envisioned relocation of the Tribe's casino to the Property. (State's Statement of Reasons, Ex. D, filed with Interior Board of Indian Appeals (IBIA) Mar. 7, 2011.) In September 2008, then-Governor Schwarzenegger vetoed the legislation which sought to authorize, in connection with the MOU, a joint powers agreement between the City and the Tribe in order to establish the "Porterville Area Development Authority." (AR vol. II, 61, Cal. Assem. Bill 1884, 2007-08 Legis. Session & veto, [Ex. E to State's Feb. 2010 comment letter] p. 62.) The MOU anticipated gaming on the Property. (State's Statement of Reasons, Ex. D.) The MOU provided that the pending trust Application was to be "amended for gaming and resort use." (*Id.*, at p. 1, para. 1.) The MOU also stated that "the Tribe desires to develop and construct a hotel resort and casino." (*Id.*) The "Porterville Area Development Authority" was to be legislatively authorized through the joint powers agreement legislation. (*Id.*, at p. 2.)

After the joint powers agreement legislation was vetoed, the Tribe approached the BIA for information regarding the steps needed to make the Application a gaming application. (AR vol. I, 42, e-mails and notes from Tribe to BIA (Feb. 23, 2009 - May 11, 2009).) After receiving information from the BIA that a stated "no change in use" would qualify the acquisition for the Categorical Exclusion under NEPA, the Tribal Council passed a resolution stating that the "proposed conveyance does not involve any changes in land use." (*Id.*; AR vol. I, 44, Tribal Council Resolution (Oct. 16, 2009).)

B. Notice of Land Acquisition Reissued December 2009 BIA

In December 2009, the BIA reissued its July 2003 "Notice of (Off Reservation/Non-Gaming) Land Acquisition Application" (Notice) for the Property. (AR vol. II, 53.) On February 10, 2010, the State, through the Governor's Office, submitted its comments on the Application. (AR vol. II, 61.) The State's comments noted its concerns that there had not been the requisite

showing of the need for the Property to be taken into trust, that the Application did not include a plan that specified the anticipated economic benefits, there were no intergovernmental agreements with the City regarding future development, and that the MOU and related proposed legislation—as well as news reports regarding the Tribe's plans to move the casino—indicated that the Tribe's stated plan of no change in use may have changed since the Tribe filed the Application in 2002. (*Id.*, at p 2.)

C. April 2010 Cooperation Agreement

On April 1, 2010, the City and the Tribe entered into a cooperation agreement (Agreement). (AR vol. III, 34, BIA Env. Assess., App. A.) The Agreement states that the terms and obligations in the MOU are superseded by the Agreement. (*Id.* at ¶ 9.) By its terms, the Agreement goes into effect after the Property is taken into trust and provides that the Tribe will not engage in any new development, construction or any new operation on the land unless a written agreement is executed by the City and the Tribe that assures consistency with the City's General Plan, regulations, and policies in effect at the time of the proposed development. (*Id.* at ¶¶ 1 & 2.) According to the terms of the Agreement, any such compliance agreement regarding development on the Property must provide that "any and all appropriate monetary and community contributions shall be committed to the City to account for the City's share of lost revenues related to taxes, licenses, and development impact fees and to mitigate various impacts that may arise in connection with any proposed development provided such fees would be imposed on other similarly situated developments in the City which are consistent with the City's land use regulations." (*Id.* at ¶ 1.) There is no reference to gaming in the Agreement.

D. June 2010 Draft Environmental Assessment

On June 24, 2010, a draft Environmental Assessment (EA), prepared on behalf of the BIA by LACO Associates, was issued for the Property. (AR vol. III, 34.) The EA was based on no future change in use of the Property (*id.* at pp. 9-10, ¶ 2.1.2) and included a copy of the April 2010 Agreement between the City and the Tribe (*id.*, App. A). On July 26, 2010, the State, through the Governor's Office, submitted a comment letter on the EA. (AR vol. III, 24.) The State's comments repeated the concerns noted in the State's February 2010 comment letter on the

Application. (*Id.*, at p. 3.) In addition, the State's July 2010 comment letter noted that, although the EA contained no specific plans for the Property, the EA also stated that the anticipated benefits to the Tribe of the land being taken into trust would accrue from the future development of the Property and that financing options for the development were dependent on the Property being taken into trust. (*Id.*, at p. 2.) The State's July 2010 comment letter noted that there was not enough information in the EA regarding the future use of the land to allow for the proper evaluation of the proposed economic benefit to the Tribe or to provide for a proper determination of whether the proposed acquisition met the Department of the Interior's standards for trust acquisitions. (*Id.*, at pp. 2-3.) Finally, the comment letter stated that, based on the noted deficiencies, the EA did not comply with the requirements of NEPA. (*Id.*, at p. 3.)

E. September 2010 Finding of No Significant Impact

On September 2, 2010, the BIA issued a Finding of No Significant Impact (FONSI). (AR vol. III, 17.) The FONSI did not address the State's July 2010 comments submitted in consideration of the EA. On September 9, 2010, the State, through the Governor's Office, asked that the State's July 2010 comment letter be considered. (AR vol. III, 14.) On September 17, 2010, an amended FONSI was issued, and acknowledged the State's July 2010 comment letter. (AR vol. III, 8.) On October 19, 2010, the State, through the Governor's Office, submitted a comment letter on the amended FONSI. (AR vol. III, 6.)

The State's October 2010 letter commented that the EA failed to adequately describe any proposed development and therefore did not allow for an analysis of whether the proposed Project would have a significant impact or whether the project's impact was great enough to require an Environmental Impact Statement (EIS). (AR vol. III, 6, pp. 1-2.) The State's October 2010 letter also commented that the EA and the FONSI contained the same inconsistency: both documents stated that the proposed conveyance would not result in any change in use of the Property, yet both documents also claimed that the Tribe would benefit from the future development of the Property. (*Id.*) The State's October 2010 letter noted that the Tribe's Agreement with the City was not a substitute for a business plan and that it provided no information regarding the future

development of the Property. (*Id.* at p. 2.) The letter also commented that the Secretary has a duty under NEPA to take "hard look" at all reasonably foreseeable uses of the Property. (*Id.*)

F. January 2011 Notice of Decision

On January 4, 2011 the BIA issued its Decision approving the proposed trust acquisition of the Property. (AR vol. II, 82, Decision, [erroneously dated January 4, 2010].) The Decision stated that, pursuant to 25 C.F.R. § 151.10, six factors were considered in formulating the Decision, then proceeded to address the factors. (*Id.* at p. 4.) Following its discussion of the six factors, the Decision discussed the NEPA requirements referring to them as Factors 7 and 8. (*Id.* at pp. 6-7.) The factors challenged by the State's appeal of the Decision are as follows.

Addressing "Factor 1 – Need for additional land," the Decision contains a single paragraph that merely gives a physical description of the property. (AR vol. II, 82, p. 4.) This paragraph contains verbatim the same language contained in the Tribe's 2002 Application's section regarding the Tribe's need for additional land.[3] (AR vol. I, 1, p. 2.) This paragraph acknowledges that the Tribe already has 55,396 acres in trust, but does not articulate a need for the additional land. (AR vol. II, 82, p. 4.) Elsewhere in the Decision, in response to the State's February 2010 comments regarding the Tribe's need for the Property to be taken into trust, the Decision reproduces the Tribe's response that the Property is within the historical or aboriginal lands of the Tribe. (AR vol. II, 82, p. 2.) The Tribe's response reproduced in the Decision also discusses the Tribe's long interest in the Property and notes that that the Application now includes the Agreement, "as requested by the Governor." (*Id.*, at p. 3.) However, none of this information shows why the Tribe, which already owns the Property, needs to have the additional Property taken into trust. The fact that the Decision contains no analysis regarding this factor, and merely

[3] The text of the paragraph reads:

> The current reservation was established by Executive Orders of January 9, 1873, October 3, 1873, and August 3, 1878. The current acreage of the reservation covers 55,396 acres, which is held in trust by the United States. The reservation is located in south-central California, approximately 75 miles south of Fresno in Tulare County. The reservation is situated on the western slope of the Sierra Nevada Mountains and lies almost entirely within the South Fork Tule River drainage basin. The topography is generally steep, with elevations from about 1,000 to 7,500 feet. Most of the inhabited land is along the lower head of the South Fork Tule River on the Western side of the reservation.

repeats the information from the Tribe's 2002 Application, demonstrates that the BIA did not give proper consideration to this factor.

Addressing "Factor 2 – Proposed Land Use," the Decision states only that there are currently two buildings on the property, that there is no planned change in land use, and that the Property is located approximately 20 miles from the Tribe's Reservation. (AR vol. II, 82, p. 5.) However the Decision references "Business Plans No. 1 and 2 for the Airport Industrial Park." (*Id.*, at p. 7.) As discussed in the Legal Analysis section below, these business plans were not provided by the Tribe to the BIA until November 2010—well after the EA and FONSI were drafted and any opportunity for comment had passed—and include the plan to build and operate a plastics manufacturing plant. (AR vol. II, 81, Letter from Tribe to BIA (Nov. 24, 2010), p. 2.) The Decision does not evaluate the business plans at all. The Decision also does not address the potential use of the Property for gaming.

Addressing "Factor 6 – The extent to which the applicant has provided information that allows the Secretary to comply with [NEPA]," the Decision references the EA and the amended FONSI. (AR vol. II, 81, p. 6.) The Decision's discussion of NEPA compliance does not address any of the comments submitted on the EA or FONSI. (*Id.*, at pp. 6-7.) The Decision concludes that the proposed Property acquisition does not constitute a major federal action that would significantly affect the quality of the human environment within the meaning of NEPA. (*Id.*, at p. 7.) The Decision does not evaluate the potential impact on the human environment of building and operating a plastics manufacturing plant on the Property. The EA did not evaluate "Business Plans No. 1 and 2 for the Airport Industrial Park." The plans were added to the Application in November 2010, five months after the EA was completed in June 2010. (AR vols. II, 81; & III 34.) As a result, the FONSI was issued without evaluation of the business plans because the plans were not part of the Application until after the FONSI was issued. Therefore, neither the EA, the FONSI, nor the Decision evaluated the potential impact of the industrial operations set forth in Business Plans No. 1 and 2.

Addressing "Factor 8 – Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated benefits associated with the proposed use," the

Decision notes that "industrial development has been gradual but ongoing on the subject site." (AR vol. II, 82, p. 7.) However, no specific information regarding the industrial development is provided. The Decision references the Tribe's "Business Plans No. 1 and 2 for the Airport Industrial Park" and the Agreement between the Tribe and the City. (*Id.*) No details or evaluation of the business plans is provided. (*Id.*) The Decision references the benefits the Tribe is currently receiving from the businesses located on the Property, but the Decision does not address how the trust acquisition of the Property will benefit the Tribe. (*Id.*) The reference to the Agreement concerns the limitations it places on the Tribe's future development and the potential economic benefit to the City, but the Decision does not address the economic benefits to the Tribe. (*Id.*)

G. Appeal of the Decision

On February 4, 2011, the State filed its notice of appeal of the Decision with the IBIA and on March 7, 2011, the State filed its statement of reasons. The County of Tulare, California and the Coalition of Retailers also appealed the Decision to the IBIA. In its February 15, 2011 order, the IBIA consolidated the three appeals.

II. LEGAL ANALYSIS

The Secretary of the Department of the Interior (Secretary) is "authorized, in his discretion, to acquire . . . lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The Department of the Interior's policy for trust acquisitions provides that land may be taken in trust when the 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).

Neither the Tribe's Application nor the EA provided information adequate to allow the BIA[4] to determine pursuant to 25 U.S.C. § 465 and 25 C.F.R. § 151.3(a)(3) that the Property is

[4] Although 25 U.S.C. § 465 gives the authority to take land into trust to the Secretary; the Secretary has redelegated that authority. As stated in the BIA Handbook on the Acquisition of Title of Land held in Fee or Restricted Fee: "The Secretary has the statutory authority to issue decisions to acquire land in trust for individual Indians or tribes. The Secretary has delegated this authority to the Assistant Secretary of Indian Affairs (AS-IA) through 209 DM 8, who in turn delegated non-gaming acquisitions to the Director of the Bureau of Indian Affairs through 230 DM 1, who in turn delegated the same to the Regional Directors through 3 IAM 4." (BIA Handbook on the Acquisition of Title of Land held in Fee or Restricted Fee, issued May 20, 2008, (continued...)

necessary to facilitate Tribal self-determination, economic development, or Indian housing. The EA did not demonstrate that, absent taking the land into trust, the Tribe would be unable to facilitate housing for its members, tribal self-determination, or economic development. The Decision merely repeats the physical description of the Property found in the Tribe's original Application, failing to address how the trust conveyance of the Property is essential to the Tribe's ability to exercise sovereign authority. Further, the Decision does not address how the failure of the United States to take the Property into trust would preclude the Tribe from developing any needed housing for its members or prevent the Tribe from proceeding with the further expansion of its current business enterprises on the Property.

In evaluating requests to acquire land that is located outside of, and non-contiguous to, an Indian reservation, the Secretary's decision must also be based on an evaluation of the criteria set forth in 25 C.F.R. § 151.11, which incorporates by reference 25 C.F.R. § 151.10. Relevant to this appeal, these criteria include consideration of the Tribe's need for the land, the anticipated economic benefits of the proposed uses of the proposed trust acquisition, and the submission of a business plan specifying the anticipated economic benefits. 25 C.F.R. § 151.11(b) & (c).

A. Standard of Review

BIA decisions to take land into trust are discretionary. *Aitkin County, Minn. v. Acting Midwest Regional Director, BIA*, 47 IBIA 99, 103 (2008). The IBIA does not substitute its judgment in place of the BIA's, but instead reviews the discretionary decisions "to determine whether [the] BIA considered the legal prerequisites to the exercise of its discretionary authority." (*Id.* (citations omitted).) The decision must reflect that the BIA considered the appropriate factors in 25 C.F.R. Part 151, although there is no requirement that the BIA reach a particular conclusion regarding each factor. (*Id.*)

(...continued)
p. 8, § 3.2., accessed at the BIA's web site at http://www.bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm.)
Therefore, for clarity, all references hereafter will be only to the BIA.

B. The BIA Failed to Adequately Consider the Requirements of 25 C.F.R. § 151 in Evaluating the Application

1. The BIA failed to adequately evaluate the Tribe's need for additional land as required by 25 C.F.R. § 151.10(b)

Title 25 C.F.R. § 151.10(b) requires the BIA to evaluate the Tribe's need for additional land. Because the Tribe already owns the Property in this case, 25 C.F.R. § 150.10(b) requires the BIA to determine the need to take the land into trust status. Title 25 C.F.R § 151.10(b) requires the BIA to consider the Tribe's need for additional land. The only information provided was that the Property was alleged to be formerly part of the Tribe's ancestral home lands. There was no explanation of why the Tribe, with over 56,000 acres already in trust, needed this additional 40 acres.

2. The BIA failed to adequately evaluate the anticipated economic benefits as required by 25 C.F.R. § 151.11(b) & (c)

The Tribe's Application states that it plans to utilize the land for the needs of the existing Tribal enterprise, Tule River Aero Industries, for warehouses, and for unspecified "other future commercial development." (AR vol. I, 1.) The EA does not provide any additional information regarding the proposed use of the Property once it is taken into trust. Section 2.1.2 of the EA states that "construction of future developments [is] not known at this time due to a combination of external issues" and that "the specific nature of future developments is speculative at this time as the financing options available are dependent in part on the trust conveyance of the property." (AR vol. III, 34, p. 9.) The EA also states that "there are no new or future changes in land use for the project parcels." (*Id.*, at p. 10.)

The only specific anticipated economic benefit indentified in the EA was a savings of the $33,459.98 in property taxes the Tribe currently pays to Tulare County. (AR vol. III, 34, p. 23.) However, in discussing the "no action" alternative, the EA states that the "project's contribution to the economy of the Tribe and the City of Porterville may not be sustained unless an infusion of cash is obtained through trust status designation" but there are no details provided regarding the project's economic contribution to the Tribe or the anticipated cash infusion that would result from the land being taken into trust.

Because this is an Application for an off-reservation trust acquisition, an evaluation of the anticipated benefits, financial or otherwise, of this acquisition is required by 25 C.F.R. § 151.11(b). In correspondence with the Tribe, the BIA noted that a land acquisition for an economic development must include a detailed explanation of the proposed development and how it would affect the Tribe. (AR vol. I, 7, p. 2, BIA letter to Tribe (Mar. 6, 2003).) The evaluation by the BIA required by 25 C.F.R. § 151.11(b) was not possible because a detailed explanation of the proposed development was not provided either in the Application or the EA. Not only was there not enough information regarding the future use of the land to allow proper evaluation of the proposed economic benefit to the Tribe, there was not enough information provided for a proper determination of whether the proposed acquisition met the applicable statutory and regulatory standards for trust acquisitions.

3. No business plan was submitted as required by 25 C.F.R. § 151.11(c).

Pursuant to 25 C.F.R. § 151.11(c), when land is being acquired for business purposes, the tribe must provide a plan which specifies the anticipated economic benefits associated with the proposed use. No separate business plan specifying the anticipated economic benefits of the proposed uses was submitted with the Application as required. In lieu of a business plan, the Application merely contained a one-paragraph statement to the effect that the Tribe proposes to utilize the land for existing Tule River Aero Industries' purposes, warehouses, and "other future commercial development." (AR vol. I, 1, p. 4.) The Application provided no business plan, even though the land was proposed to be utilized for business purposes.

On November 24, 2010, more than eight years after the Application was filed, the Tribe submitted in correspondence to the BIA two business plans, which the Tribe "incorporated into the Tribe's trust application by reference." (AR vol. II, 81, p. 2, Letter Tribe to BIA (Nov. 24, 2010).)[5] "Business Plan No. 1" includes plans for the construction and lease of commercial buildings, to "accommodate a variety of assembly, manufacturing and warehousing activities."

[5] These business plans were never referenced in any prior documents, nor were they available for review by the public or the appellants in this matter until the administrative record was produced in April 2011.

(*Id.*, at p. 57.) Business Plan No. 2 details the construction of a plastics manufacturing plant that will produce recyclable containers for the transportation of fruit. (*Id.*, at p. 70.)

While the business plans referenced in the Tribe's November 2010 letter demonstrate anticipated economic benefits to the Tribe upon the plans' implementation, they also raise important new issues: 1) the business plans' anticipated economic benefits are not dependent on the Property being in trust status; and 2) the business plans, specifically Business Plan No. 2, describe development that directly contradicts the claim in the Application, the EA, and the FONSI that there would be no future change in use for the Property.

4. The BIA failed to consider potential gaming uses for the Property.

Under 25 C.F.R. § 151.10(c), the BIA is required to consider the purposes for which the Property will be used. In addition to news articles, substantial evidence in the AR points to the potential for the Property to be used for gaming purposes—the MOU which specifically plans for gaming, proposed legislation, and Tribal inquiries regarding amending the Application to include gaming. (AR vols. I, 42, e-mails and notes from Tribe to BIA (Feb. 23, 2009 - May 11, 2009) & III, 43, Letter from Tribal Chairman to BIA (Dec. 1, 2005).) Although the Agreement between the City and the Tribe is portrayed in the EA and the Decision as limiting any future development on the Property to existing zoning purposes, there is nothing to preclude the City from changing the applicable zoning regulations in the future. Given the past MOU between the City and the Tribe that expressly contemplated the Tribe relocating its casino to this Property, it is anticipated that future zoning changes might result in a renewed attempt to use the Property for casino or casino-related purposes. The Tribe stated in correspondence to the BIA that the Agreement "specifies that the land use would not include gaming." (AR vol. II, 81, p. 7, Letter from Tribe to BIA (Sept. 13, 2010).) The Tribe appears to be relying on a newspaper article's statements about the Agreement; there is no such restriction found in the Agreement itself. (AR vol. III, 34, EA, App. A.)

Most recently, the County submitted evidence with its Notice of Appeal that the Tribe has current plans to relocate the casino to the Property. (County's Notice of Appeal, Ex. C [Jan. 26, 2011 Decl. of Dep. County Counsel Nina F. Dong].) Although the Tribe stated in pre-Decision

correspondence to the BIA that the news reports of the Tribe's plan to relocate the casino to the Property were outdated, the Tribe's radio advertisement was running after the Decision was issued in January 2011. The cumulative effect of this information amounts to more than mere speculation that that the land might at some point in the future be used for gaming.

The IBIA has held that "[i]n order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property." *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 139 (1998). The AR contains documents that evidence the Tribe's interest in using the Property for gaming purposes. The Tribe's actions after the issuance of the Decision demonstrate that the potential use of the Property for gaming is more than "mere speculation." The relevant facts were within the BIA's knowledge and should have been discussed and considered.

Conversely, if instead of gaming the Tribe intends to proceed with the development described in the two business plans provided to the BIA in November 2010, the Decision contains no discussion of the impact of those plans on the future use of the Property. The Decision did not comply with the *Ruidoso* requirement to include a discussion of facts known to the BIA regarding the future use of the Property either in terms of potential gaming uses *or* planned industrial development.

In sum, the BIA failed to consider the necessary factors of 25 C.F.R. Part 151 as described above and, therefore, improperly exercised its discretion to take the Property into trust.

III. THE BIA'S DECISION FAILED TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Because the planned use of the Property was not clearly defined,[6] the EA did not comply with the requirements of NEPA. Title 25 C.F.R § 151.10(h) requires the BIA to assess fee-to-trust applications under NEPA. Rather than preparing an EIS, the BIA, on the basis of the

[6] The business plans in the Tribe's November 24, 2010 letter were submitted after the BIA issued the FONSI and the amended FONSI in September 2010.

deficient EA, made a finding of no significant impact, the September 2010 FONSI. By issuing the FONSI, the BIA determined that taking the Property into trust would not significantly impact the human environment.

In considering a Tribe's trust application, the BIA has a duty under NEPA to consider all reasonably foreseeable uses to which the land could be put, and cannot simply limit consideration to the environmental impacts from the current use of the land. *See Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1075-1079 (9th Cir. 2002). NEPA requires that a "hard look" be taken at the environmental impacts of a proposed action. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1211 (9th Cir. 1998). However, without quantified or detailed information, there is no assurance that the required "hard look" was taken. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior,* 608 F.3d 592, 603 (9th Cir. 2010). "Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process." *Metcalf v. Daley* 214 F.3d 1135, 1143 (9th Cir. 2000).

The EA did not include a specific project description and, as a result, it was not possible to give the requisite "hard look" or to evaluate at all the potential impacts to the environment after the land is conveyed into trust. The BIA's statement in the Decision that there is no planned change in use for the Property is contradicted by the actions of both the Tribe and the City, as set forth in the Agreement. Further, the EA's failure to include a specific future project description is not sufficient to allow for the BIA's issuance of the September 17, 2010 FONSI. The EA fails to adequately describe any proposed development and states that "construction of future development [is] not known at this time due to a combination of external issues." (AR vol. III, 34, p. 9, § 2.1.2.) Without a specific project description, it is not possible to evaluate the potential impacts to the environment caused by development on the land after it is conveyed into trust. Because the EA for this application does not contain enough information to allow the BIA to comply with its NEPA obligations, a FONSI should not have been issued. *See* 25 C.F.R. § 151.11.

The claimed economic benefits as set forth claimed in the FONSI are based on future commercial development and are therefore inconsistent with the EA which states that the proposed conveyance will not result in any change in the present use of the land. Additionally, none of the economic benefits discussed in the FONSI were discussed in the EA. According to section 5.3 of the BIA's NEPA handbook, "The FONSI shall be based only on information included in the EA. If new information is developed between the EA and FONSI stages, amend the EA." 59 BIAM 3-H, Apr. 2005, p. 25.

The EA does not contain adequate information to allow the BIA to comply with its obligation under NEPA to consider all reasonably foreseeable uses to which the land can be put. Therefore, because the BIA's trust acquisition decision was based on an inadequate EA, the Decision does not satisfy the NEPA requirements for the acquisition of the Property.

CONCLUSION

For the reasons stated above, the BIA's decision to accept the Property into trust constitutes an abuse of discretion because it was not made in accordance with the factors set forth in 25 C.F.R. §§ 151.10 and 151.11 and because the EA did not contain enough information to allow the BIA to conclude that the Application satisfied the NEPA requirements for the acquisition of the land. Accordingly, the Decision must be rescinded by the IBIA and the matter remanded to the BIA Regional Office for the preparation of a full EIS that adequately describes the Tribe's proposed development plans for the land, analyzes all of the direct, indirect and cumulative impacts of those plans, examines a reasonable range of alternatives, and proposes adequate mitigation measures to offset the significant impacts identified.

Dated: July 22, 2011

Respectfully Submitted,

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State of California.

DECLARATION OF SERVICE

I declare:

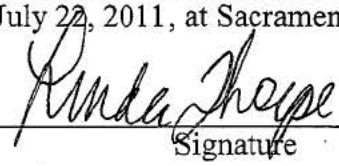
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On July 22, 2011, I served the attached **APPELLANT STATE OF CALIFORNIA'S OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

Michael V. Brady Brady & Vinding 400 Capitol Mall, Suite 2640 Sacramento, CA 95814	Superintendent Central California Agency Bureau of Indian Affairs 650 Capitol Mall, Suite 8-500 Sacramento, CA 95814	Amy Dutschke Pacific Regional Director Bureau of Indian Affairs 2800 Cottage Way Sacramento, CA 95825
Nina F. Dong, Deputy County Counsel Tulare County Counsel County Civic Center 2900 W. Burrel Visalia, CA 93291	Chairman Tule River Indian Tribe P.O. Box 589 Porterville, CA 93258	Cathy Christian Nielsen, Merksamer, Parrinello, Mueller & Naylor 1415 L Street, Suite 1200 Sacramento, CA 95814
Pacific Southwest Regional Solicitor Office of the Solicitor U.S. Department of the Interior 2800 Cottage Way, Room E-1712 Sacramento, CA 95825		Associate Solicitor - Indian Affairs Office of the Solicitor U.S. Department of the Interior 1849 C Street, NW, MS 6513 - MIB Washington, DC 20240
Larry Echo Hawk Assistant Secretary-Indian Affairs U.S. Department of the Interior 1849 C Street N.W., MS-4141-MIB Washington, DC 20240		California State Clearinghouse Office of Planning and Research P.O. Box 3044 Sacramento, CA 95812-3044

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 22, 2011, at Sacramento, California.

Linda Thorpe
Declarant


Signature