UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

COUNTY OF SAN DIEGO, CALIFORNIA; VIEJAS BAND OF KUMEYAAY INDIANS; and SYCUAN BAND OF THE KUMEYAAY NATION Appellants, v. PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIR Appellee.	APPELLANTS VIEJAS BAND OF KUMEYAAY INDIANS & SYCUAN BAND OF KUMEYAAY NATION'S REPLY BRIEF ON THE MERITS

I. INTRODUCTION

Appellants Viejas and Sycuan agree that the legal dispute over the off-reservation trust land acquisition requests of Ewiiaapaayp and its related actions seeking to terminate the lease of the Southern Indian Health Clinic (SIHC) have unnecessarily expended substantial resources by all parties over the last 20 years. The reasons for this decades-long dispute are simple: 1) Ewiiaapaayp has repeatedly failed to provide full disclosure of its true plans for the SIHC, the Walker parcel, and the Salerno parcel and provide the business plan required by 25 U.S.C. § 151.11(c) , relying on the incorrect claim that the Walker Parcel is contiguous to the SIHC parcel as the justification for doing so; and 2) the BIA Pacific Regional Director has repeatedly allowed Ewiiaapaayp to follow this unlawful practice by ignoring the clear mandates of the Interior Board of Indian Appeals in three separate decisions[1] and the February 14, 2108 memorandum from the Office of the Assistant Secretary for Indian Affairs (AS-IA), which, taken together,

[1] Ewiiaapaayp Band of Kumeyaay Indians v. Acting Pacific Regional Director, Bureau of Indian Affairs, 56 IBIA 163 (2013) (SIHC Parcel); *County of San Diego v. Pacific Regional Director*, 58 IBIA 11 (2013) ("*Walker I*"); and *County of San Diego v. Pacific Regional Director*, 63 IBIA 75 (2016) ("*Salerno I*").

simply demand transparency and proper application of the trust land acquisition regulations in 25 C.F.R. Part 151. Appellants are asking the AS-IA to bring an end to this cycle of unlawful Ewiiaapaayp actions and Regional Director decisions by providing certainty and clarity to the definition of "contiguous" and setting the precedent for a meaningful role by all interested parties and the general public in a fair and transparent off-reservation trust land acquisition review process. These are policy level issues of the highest order, and Viejas and Sycuan commend the AS-IA for taking jurisdiction over this matter to resolve them.

II. ARGUMENTS

A. As a Matter of Good Public Policy, the AS-IA Should Resolve the Definition of "Contiguous"

As previously stated in Appellants' Opening Brief, there has seen a steady rotation of appeal cases before the Board to find clarity and certainty to the meaning of the word "contiguous,"[2] including this present case before the Assistant Secretary of Indian Affairs ("AS-IA"). Ewiiaapaayp advocates in its response brief filed on October 09, 2019, ("E Brief") that "To the extent the Board's standard for assessing contiguity is at odds with the definition of ['']contiguous['] promulgated in 25 C.F.R. § 292.2, it should be overruled." (E Brief at 4).

Appellants strongly object to overruling the Board's long-standing precedent on this matter, but more importantly, this statement underscores the need for the AS-IA to resolve and harmonize the definition of "contiguous." As a matter of sound policy, the AS-IA should not overrule the Board's numerous decisions on "contiguity" that have been built on each another. At this point in time, the Board cannot be any clearer on how to determine contiguity for Part

[2] *County of Santa Barbara v. Pacific Regional Director*, 65 IBIA 204 (2018); *County of San Diego v. Pacific Regional Director*, 65 IBIA 188 (2018), *Preservation of Los Olivos v. Pacific Regional Director,* 58 IBIA 278 (2014); *County of San Diego v. Pacific Regional Director,* 58 IBIA 11 (2013); *Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187 (2008).

151 trust acquisitions. The AS-IA should affirm the Board's numerous cases on Part 151 trust acquisitions that define contiguousness to mean a parcel (1) sharing a boundary with an existing Indian reservation, (2) whether through surface or subsurface and (3) irrespective of the length. This can only be accomplished through a factual analysis of the ownership interests.

Moreover, the Board should apply the correct standard. The two side-by-side rules are not identical. 25 CFR §151.10 applies to *on-reservation* acquisitions, while 25 CFR §151.11 is for *off-reservation* applications, such as here. Appellee and the Ewiiaapaayp Band attempt to bootstrap the definition of contiguous in 25 CFR §292.2 (for gaming on lands acquired after 1988) while at the same time asserting that the land won't be used for gaming, and that any postulation of gaming is speculative and remote. Nevertheless, the Ewiiaapaayp Liquor Control Ordinance evidences the applicant's true intent, and it is immaterial whether the ordinance references the "Walker Parcel," the intent is obvious. 25 CFR §151.11 contains the correct criteria, and should be applied here, where the land is non-contiguous to the tribe's reservation.

B. Even If the Part 292 Definition Is Applicable, the Director's Interpretation Is Wrong As a Matter Of Law.

The Director's interpretation of the definition of "contiguous" in the 25 C.F.R. Part 292 regulations is incorrect as a matter of law. IGRA regulations defined "contiguous" as "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point". *Id.* The most recent U.S. Supreme Court case on point regarding the meaning of a "notwithstanding" clause is that it "clarifies that the mandatory language [and] does not prevail over [another section] in the event of a conflict." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 933 (2017). The court further stated that the word "notwithstanding *does not limit* the reach of" a section. *Id.* at 938 (emphasis added). Thus, the "notwithstanding" clause in the definition indicates that the dependent clause

("notwithstanding the existence of non-navigable waters or a public road or right-of-way") does not prevail over the basic rule ("having a common boundary"). *Id.* at 939-40. However, the Director's interpretation completely negates the mandatory requirement of "having a common boundary" or even as little as "touching at a point" if she emphatically finds contiguity even when an intervening public road owned in fee simple absolute by another party (in both surface and subsurface interests); this would simply means that there is *no* requirement of "a common boundary" or "touch" at all. The "notwithstanding" clause cannot dissipate such mandatory requirement of having a common boundary or touch.

Second, Part 292 definition of "contiguous" is a choice between *two* items: one, "non-navigable waters," and two, "a public road or right-of-way." This means "public road" is synonymous or interchangeable with "right-of-way." The Solicitor's brief filed on October 09, 2019 ("S Brief") correctly demonstrates the difference the grammatical construction if the regulations mean *three* different choices: "the existence of a public road, right-of-way, or water body." (S Brief at 8). Therefore, the regulations would have appeared correctly like the following if it meant *three* different choices: "non-navigable waters, a public road, *or* a right-of-way" and *not* "non-navigable waters or a public road or right-of-way."

As stated in our opening brief, the exclusion of navigable waters in the clause makes clear that a common boundary is required. Under the common law, riparian owners have title to the beds of adjacent non-navigable waters. For example, under California common law and codified in California law, abutting owners to non-navigable waters are deemed to be owners to the middle of such waters. Therefore, they *do* share a common boundary. *Bishel v. Faria*, 347 P.2d 289, 292 (Cal. 1959); Cal. Civ.Code § 830; Cal.Civ.Proc.Code § 2077.

In contrast, contiguity is defeated by navigable waters separating two parcels because of state ownership of the beds underlying navigable waters, thus preventing the abutting owners from sharing a common boundary. Therefore, the inclusion of non-navigable waters in the definition only makes sense if intervening roads are considered in the same light: contiguity is not defeated by an intervening road only if there is nonetheless a common boundary in the subsurface. Otherwise, navigable waters would be included in the definition as the equivalent of intervening public roads with no common subsurface boundary.

C. The AS-IA Should Issue a Final Decision that the Walker Parcel is Non-contiguous and that Ewiiaapaayp Must Submit a Business Plan with Full Disclosure Under 25 C.F.R. § 151.11

In both the 2016 and 2019 notices of decision, the Director relied on a 2013 solicitor's opinion ("Solicitor's Opinion") that found the Walker Parcel contiguous to the SIHC Parcel. In that opinion, the solicitor did not identify an intervening fee interest. *Id.* at 6. At this point, there are ample title records to show multiple intervening interests surface and subsurface.

Additionally, since the Solicitor's Opinion has been withheld in both the 2017 appeal and this pending appeal, the AS-IA should not give any credence to the Director's reliance on the Solicitor's Opinion. There has been a long-standing precedent that court reviews are limited to the administrative record that was available before the administrative agency, with very few exceptions. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005). Since the Solicitor's Opinion is not available to Appellants or the AS-IA, such opinion should be disregarded and should not be given any weight in the Director's decision for an on-reservation acquisition.

With ample records available, the AS-IA should issue a finding that the Walker Parcel is not contiguous with the SIHC Parcel. The history of this matter confirms that another remand to the Regional Director on this issue is useless. For the same reason the AS-IA should direct that

future Ewiiaapaayp trust land acquisition requests for the Walker Parcel must fully comply with 25 C.F.R. § 151.11 as off-reservation land, including the preparation of a business plan. Through this decision, the AS-IA has the opportunity to, at long last, set the Ewiiaapaayp trust land acquisition requests on a course for decision-making that is based on a full and complete record and open disclosure so that objective and fully informed decisions can be made that address the concerns and interests of all affected parties.

III. CONCLUSION

Appellants respect Ewiiaapaayp's sovereignty and do not wish to impede Ewiiaapaayp's quest for self-sufficiency. However, as a matter of public policy and fairness, Appellants are entitled to a chance to participate and a full, fair, and transparent trust acquisition process as afforded by law. Appellants themselves have participated in their own fee-to-trust acquisitions and have followed the letter of the law with full and transparent participation by the public. Appellants are asking only that the AS-IA ensure that the same principles are met for the Ewiiaapaayp trust land acquisition requests. To achieve this result, the AS-IA should vacate the Regional Director decision, rule that the Walker Parcel is non-contiguous, and require full compliance with 25 C.F.R. § 151.11.

Date: 10/23/2019

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Appellants Viejas Band of Kumeyaay Indians & Sycuan Band of Kumeyaay Indians' Reply Brief on the Merits was served on each of the following party on October 23, 2019.

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