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CITY OF YREKA, CITY COUNCIL OF
THE CITY OF YREKA

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

CITY OF YREKA, CITY COUNCIL OF THE
CITY OF YREKA,

Plaintiffs,

v.

KEN SALAZAR in his official capacity as
Secretary of the Interior; LARRY
ECHOHAWK in his official capacity as
Assistant Secretary for Indian Affairs of the
United States Department of Interior and
BUREAU OF INDIAN AFFAIRS; DALE
MORRIS in his official capacity as Pacific
Regional Director, Bureau of Indian Affairs;
MICHAEL MALLORY in his official capacity
as Siskiyou County Assessor-Recorder; Does
through 100,

Defendants.

CASE NO. 2:10-cv-01734-WBS-EFB

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS CITY OF YREKA AND CITY
COUNCIL OF THE CITY OF YREKA'S
MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE, MOTION
FOR SUMMARY ADJUDICATION**

DATE: May 23, 2011
TIME: 2:00 p.m.
CTRM 5
JUDGE: Hon. William B. Shubb

ACTION FILED: July 6, 2010

TO EACH PARTY AND THE COUNSEL OF RECORD FOR EACH PARTY:

Plaintiffs CITY OF YREKA and CITY COUNCIL OF CITY OF YREKA (collectively,
"Plaintiffs" or "City") hereby submit this Memorandum of Points and Authorities in support of their

1 Motion for Summary Judgment, or in the alternative, Motion for Summary Adjudication (“Motion”)
2 as to the cause(s) of action set forth in the Complaint for Violation of the Administrative Procedures
3 Act, Declaratory and Injunctive Relief, filed by Plaintiffs on July 6, 2010 (“Complaint”).

4 INTRODUCTION

5 The Complaint alleges that the decision of the federal government (embodied in the Notice
6 of Determination or “NOD”) to take certain property within the City into trust for the benefit of the
7 federally-recognized Karuk Tribe of California (“Tribe”) is in violation of the Administrative
8 Procedures Act. The City alleges the NOD is legally deficient in that the criteria contained in 25
9 CFR sections 151.10 and 151.11 have not been satisfied, due to the Bureau of Indian Affairs’
10 (“BIA”) failure to apply the regulatory standards for taking land into trust, which amounts to an
11 abuse of discretion.

12 The Federal Defendants have articulated no rationale in support of the NOD to take the
13 subject property into trust, have misapplied the applicable factors contained in 25 CFR section
14 151.10 and 151.11 for off-reservation acquisitions and have misstated facts and/or failed to respond
15 to arguments raised in the underlying appeal of the NOD and the Complaint.

16 The Federal Defendants filed an Answer on September 9, 2010. The Federal Defendants’
17 Answer provides no additional support for the NOD, instead merely stating numerous times that
18 “the NOD speaks for itself” (see, e.g., Federal Defendants’ Answer, Paragraph No. 22, p. 5).

19 Pursuant to Federal Rule of Civil Procedure 56, granting of this motion is appropriate
20 because there are no genuine issues of material fact. For the reasons stated herein, the City is
21 entitled to judgment as a matter of law.

22 UNDISPUTED MATERIAL FACTS

23 The Tribe already has approximately 620 acres of property presently held in trust by the
24 federal government. (SUF No. 1.) Of those 620 acres, approximately 272 acres is within the City
25 of Yreka limits. (SUF No. 2.)

26 In 1999, the Tribe purchased additional property which is the subject of this litigation, with
27 title held in fee simple, in order to operate a new tribal medical clinic (the “Property”).
28 (SUF Nos. 3, 4.) The Property is not within the exterior boundaries of the Karuk Tribe’s

1 reservation, not adjacent thereto, and not within a tribal consolidation area. (Federal Defendants’
2 Answer, p. 4, lines 4-8.) (SUF No. 5.) The Property is approximately 0.9 acres. (SUF No. 6.)

3 The Karuk Tribe seeks to have the Property put into trust because, “[t]he tribe has indicated
4 that the clinic operates on a limited budget, and acceptance of the land into trust is critical to the
5 tribe’s continued operation of the clinic for residents of the Yreka area.” (NOD, at p. 3.)
6 (SUF No. 7.)

7 On April 8, 2003, the Tribe submitted an application to the BIA, pursuant to 25 C.F.R. Part
8 151, requesting that the BIA accept the Property into trust on behalf of the Tribe. (SUF No. 8.)
9 The Tribe claimed that taking the Property into trust was appropriate because the Tribe could not
10 build the new medical clinic on existing Tribal trust property because the State of California had
11 issued a cease and desist order prohibiting all new construction within the City due to the
12 inadequacy of the City’s sanitary sewer system. (SUF No. 9.)

13 The NOD claims: “[t]he Tribe’s goal is to have a sufficient land base in order to meet their
14 goals of cultural and social preservation, self determination, self-sufficiency and economic growth,”
15 (NOD, at p. 3.) (SUF No. 10.) The clinic presently operated by the Tribe is just one of many
16 service providers in the City accepting Medicare and MediCal patients. Others include Siskiyou
17 Family Healthcare, All Family Health Care, Fairchild Medical Group and Fairchild Medical Center.
18 (Complaint, p. 7.)

19 On June 18, 2004, the BIA issued a Notice of Off Reservation Land Acquisition Application
20 (“Notice”), seeking comments from state and local governments concerning, *inter alia*, property
21 taxes, special assessments and whether the intended use was consistent with gaming.
22 (SUF No. 11.)

23 In response to the BIA’s Notice, the City submitted comments arguing, *inter alia*, the land
24 was more than 100 miles from the Tribe’s traditional lands, is approximately one mile from the
25 Tribe’s housing project and is located in the heart of the City which will cause direct adverse effects
26 (e.g., inappropriate uses such as future gaming or other uses inconsistent with the general
27 plan/zoning, failure to adhere to encroachments or setbacks, etc.). (SUF No. 12.)

28 The City also cited economic concerns due to lost property tax revenues if the Property was

1 taken into trust. (SUF No. 13.)

2 On May 14, 2008, Defendant Dale Morris, acting in his capacity as the Pacific Regional
3 Director, BIA, issued a NOD to take title to the Property in trust for the benefit of the Tribe. In
4 addition to other legal deficiencies, the NOD failed to respond to arguments raised by the City.
5 (SUF No. 14.)

6 On June 18, 2008, the City timely appealed the NOD to the BIA's Interior Board of Indian
7 Appeals and said appeal was denied on or about June 7, 2010 by Order Affirming Decision.
8 (SUF No. 15.)

9 All challenged agency actions and determinations are final agency actions pursuant to the
10 Administrative Procedures Act (5 U.S.C. sections 701, et seq.) ("APA").

11 The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq* ("IGRA"), imposes a general
12 prohibition on gaming on Indian lands unless those Indian lands were held in trust on behalf of a
13 tribe prior to the enactment of the Act (October 17, 1988). (25 U.S.C 2710(b)(1); 25 U.S.C.
14 2710(d)(1).)

15 There are exceptions by which gaming may be authorized on so-called "after-acquired"
16 lands. (25 U.S.C. 2719(a).)

17 The Karuk Tribe's original notice was, "NOTICE OF OFF RESERVATION LAND
18 ACQUISITION APPLICATION (NON-GAMING)," yet the current notice and the NOD fail to
19 refer to the non-gaming exclusion. (SUF No. 16.)

20 In a similar strategy, the Ponca Tribe of Nebraska sought to change the notice provided to
21 the public. (Decision of the National Indian Gaming Commission, dated December 31, 2007
22 ("NIGC Ponca Decision"), pp. 3-5.) (Federal Defendants' Answer p. 7, lines 14-16 ["[the] decision
23 of the National Indian Gaming Commission, dated December 31, 2007, [is] a document which
24 speaks for itself"].) (SUF No. 17.)

25 As set forth in the NIGC Ponca Decision, the BIA's position is that tribal "representations
26 that it intended to use the land for a health care facility and the IBIA ruling that gaming was only a
27 speculative use" are irrelevant and unenforceable. (SUF No. 18.)

28 The real property which is the subject of this litigation, once taken into trust, will be

1 removed from the jurisdiction of the City of Yreka. The property could be put to uses which do not
2 conform to City codes and the general plan, including gaming.

3 As set forth below, the City brings this action because the BIA, by failing to specifically cite
4 which of the three legal bases were relied upon in making the decision, arbitrarily and capriciously
5 abused its discretion in issuing the NOD.

6 ARGUMENT

7 **1. The BIA's Decision to Take the Property Into Trust Failed to Apply The Required** 8 **Regulatory Criteria**

9 The NOD is legally deficient in that the criteria contained in 25 CFR sections 151.10 and
10 151.11 have not been satisfied, due to the BIA's failure to apply the regulatory standards for taking
11 land into trust. The NOD states that:

12 The applicable act for this acquisition is the Indian Reorganization
13 Act, codified at 25 U.S.C. § 465. The applicable regulations are
14 set forth at Code of Federal Regulations, Title 25, INDIANS, Part
15 151, as amended. These regulations specify that it is the
16 Secretary's policy to accept lands "in trust" for the benefit of tribes
17 when such acquisition is authorized by an Act of Congress and,
18 (1) when such lands are within the exterior boundaries of the
tribe's reservation, or adjacent thereto, or within a tribal
consolidation area, or (2) when the tribe already owns an interest
in the land, or (3) when the Secretary determines that the land is
necessary to facilitate tribal self-determination, economic
development, or tribal housing.

19 The NOD, by failing to specifically cite to which of the three legal bases were relied upon in
20 making the decision, amounts to an abuse of discretion. For example, the failure to provide the
21 basis effectively prohibits a party from rationally and succinctly addressing the legal basis for the
22 decision as well as depriving interested parties from knowing whether an appeal is appropriate.

23 The failure to provide the specific legal basis is likely due to the fact that none of the three
24 bases provides legal justification for taking the subject property into trust.

25 Criteria No. 1: The Property is not within the exterior boundaries of the Tribe's reservation,
26 not adjacent thereto and not within a tribal consolidation area. The Tribe's historic land base did
27 not include the City of Yreka and is in fact over one hundred miles away. Criteria number one
28 cannot form the basis for the Secretary's determination.

1 Criteria No. 2: While it is true the Tribe has a real property interest in the Property in the
 2 form of fee title, such an interest, standing alone, is not enough and fails to meet the legal standard.
 3 The Supreme Court rejected a similar argument in *City of Sherrill v. Oneida Indian Nation* (2005)
 4 544 U.S. 197, holding historical title alone is insufficient for trust status to be restored.

5 Criteria No. 3: The Tribe has 620 acres held in trust at the present time. The Tribe seeks to
 6 have the additional 0.9 acres of the Property put into trust because, “[t]he tribe has indicated that the
 7 clinic operates on a limited budget, and acceptance of the land into trust is critical to the tribe’s
 8 continued operation of the clinic for residents of the Yreka area.” (NOD, at p. 3.) However, the
 9 NOD fails to articulate the factual and legal basis for the Tribe’s assertion that acceptance of the
 10 Property into trust is “critical.” In fact, the Tribe’s operating costs would be higher if the medical
 11 clinic were operated on the Property instead of on existing trust lands because the existing trust
 12 lands are closer to tribal housing. The NOD acknowledges this fact: “The [present] Yreka Clinic is
 13 located approximately 1.4 miles from Tribal housing, *within walking distance of Karuk trust land.*”
 14 (NOD, at p. 5; emphasis added.)

15 The NOD claims: “[t]he Tribe’s goal is to have a sufficient land base in order to meet their
 16 goals of cultural and social preservation, self determination, self-sufficiency and economic growth,”
 17 (NOD, at p. 3) yet nowhere in the NOD does the Secretary explain why, or even how, the act of
 18 taking 0.9 acres into trust – for use by Tribal and non-Tribal members – will assist the Karuk Tribe
 19 in cultural and social preservation or self-determination/self-sufficiency.

20 Finally, the NOD contains factually incorrect information while other relevant information
 21 was disregarded. The clinic presently operated by the Tribe is just one of many service providers in
 22 the City accepting Medicare and MediCal patients. Others include Siskiyou Family Healthcare, All
 23 Family Health Care, Fairchild Medical Group and Fairchild Medical Center. Thus this
 24 “conclusion” is based upon incorrect facts thereby undermining the BIA determination and amounts
 25 to an abuse of discretion.

26 **2. The BIA Failed To Consider The Impact of Potential Gaming On The Site**

27 The City contends that the Tribe is not really seeking to have the BIA take the Property into
 28 trust because the Tribe wants to site a medical clinic on the Property. The City reasonably believes

1 that Tribe's end goal is to site a gaming facility on the Property. The Indian Gaming Regulatory
2 Act, 25 U.S.C. § 2701 *et seq* ("IGRA"), imposes a general prohibition on gaming on Indian lands
3 unless those Indian lands were held in trust on behalf of a tribe prior to the enactment of the Act
4 (October 17, 1988). There are, however, exceptions by which gaming may be authorized on so-
5 called "after-acquired" lands. (See, 25 U.S.C. 2719(a).) Thus, it is possible that land taken into
6 trust for a non-gaming purpose may ultimately be used for gaming.

7 The City's belief that the Tribe's ultimate plan is to game on the Property is based by the
8 actions of the Tribe. To point out just one example, the Tribe's original notice was, "NOTICE OF
9 OFF RESERVATION LAND ACQUISITION APPLICATION (NON-GAMING)," yet the current
10 notice and the NOD fail to refer to the non-gaming exclusion. This tactic is similar to the tactic
11 taken by the Ponca Tribe in which the Ponca Tribe sought to change the notice provided to the
12 public. (NIGC Ponca Decision, pp. 3-5.)

13 The BIA's handling of matters such as this also demonstrates that the City's concerns
14 regarding potential gaming are reasonable. As set forth in the NIGC Ponca Decision, the BIA's
15 position is that tribal "representations that it intended to use the land for a health care facility and
16 the IBIA ruling that gaming was only a speculative use" are irrelevant and unenforceable. (*Id.*, at
17 p. 9.) Thus, BIA has acknowledged that once it has approved a fee-to-trust application, it has no
18 authority to limit the use of the trust property to that which was represented by the tribe in its fee-
19 to-trust application. Because the Tribe's representation that it intends to site a medical center on the
20 Property is not binding and does not preclude eventual gaming use on the Property, BIA must
21 consider the impact of eventual gaming use in the NOD.

22 Gaming use of the Property would cause severe municipal conformity issues for the City.
23 The Property, once taken into trust, will be removed from the jurisdiction of the City of Yreka,
24 which creates the likelihood that the Property will be put to uses which do not conform to City
25 codes and the general plan. The existing building could be expanded or the use modified without
26 regard to zoning or building codes, mandatory setbacks, sufficient on-site parking and on-site storm
27 drain detention provisions for expanded impervious surfaces. Resolution of such situations will be
28 more difficult than previously if the Property is taken into trust.

1 The difficulties created by the piecemeal placing of property into trust and putting it outside
2 the jurisdiction of such a small city, without articulating the correct factual history or articulating
3 the legal basis for such action, amounts to an abuse of discretion based upon arbitrary and
4 capricious action and/or inaction. Moreover, the failure of the NOD to articulate the legal basis
5 upon which the Property is to be taken into trust deprives the City of notice and an ability to
6 meaningfully participate in the appellate process. This failure amounts to an abuse of discretion.

7 **CONCLUSION**

8 The Federal Defendants have failed to adhere to the requirements of the Administrative
9 Procedures Act (5 USC 706) by: (1) failing to respond to extensive public comments the City
10 submitted regarding the NOD; (2) failing to apply the criteria contained in 25 CFR sections 151.10
11 and 151.11; (3) failing to articulate the legal basis for issuing the NOD; (4) failing to apply the
12 statutory standards for taking land into trust; and (5) failing to consider the impact of possible
13 gaming on the Property. As a consequence, the Federal Defendants actions are arbitrary,
14 capricious, and abuse of discretion, and/or otherwise not in accordance with law.

15 For the reasons stated herein, Plaintiffs respectfully request that this Court grant the
16 Plaintiffs' Motion for Summary Judgment.

17 Dated: April 4, 2011

SCHARFF, BRADY & VINDING

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19 By: /s/Michael E. Vinding
20 MICHAEL E. VINDING
21 Attorneys for Plaintiffs
22 CITY OF YREKA and CITY COUNCIL OF
23 THE CITY OF YREKA
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