



NATIONAL CONGRESS OF AMERICAN INDIANS

October 25, 2017

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable John Tahsuda
Acting Assistant Secretary-Indian
Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

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NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
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Re: Request to Withdraw Proposed Amendments to the Land into Trust Regulations

Dear Secretary Zinke and Acting Assistant Secretary Tahsuda:

On behalf of the National Congress of American Indians, we write to thank the Department of the Interior for hosting a listening session with tribal leaders on the Department's proposed amendments to 25 C.F.R. Part 151 at our Annual Conference last week in Milwaukee, Wisconsin. Tribal leaders had the opportunity to discuss and consider the Consultation Draft and passed the attached resolution. The resolution requests that the Department withdraw its proposal, and urges that any proposal of such profound importance to tribal governments must include consultation with tribal leaders before drafting the regulations. We hope to find a better way to move forward on the issue of tribal land restoration.

As an initial matter, the Department has yet to confirm the recently nominated Assistant Secretary-Indian Affairs (AS-IA) Ms. Tara Sweeney, and the Department has yet to appoint a Deputy Solicitor-Indian Affairs. As you know the AS-IA assists the Secretary in carrying out the Department's trust responsibility to Indian tribes, and is primarily responsible for developing policies in concert with Indian tribes. It will not be possible for Ms. Sweeney to participate in the decision-making process meaningfully unless she is able to attend the consultation meetings. The Deputy Solicitor-Indian Affairs is critically important to ensure such policy initiatives are consistent with principles of federal Indian law. To that point, the Consultation Draft raises several important legal and policy questions that would benefit from having in place the recently nominated AS-IA and a Deputy Solicitor-Indian Affairs.

For example, the Consultation Draft proposes two categories of off-reservation acquisitions: gaming and non-gaming, which raise concerns about whether the proposal violates 25 U.S.C. § 2719(c). In addition, the creation of the two-step review violates the National Environmental Policy Act (NEPA) by segmenting environmental considerations into a documentation requirement after the decision. 40 C.F.R. § 1501.2. Integrated NEPA decision-making is important for some tribal applicants, because it addresses critical social and environmental impacts affecting the decision. Further, the reinstatement of the Department's previous 30 day stay policy invites litigation for Tribes that successfully navigate the proposed process.

Finally, the Department failed to consult with tribal governments prior to developing the Consultation Draft. The Part 151 regulations govern a critical aspect of the federal government's obligations as trustee. Amending these regulations, i.e., the process by which the trustee places real property assets in trust, has a "substantial direct effect[] on . . . Indian tribes, [and] on the relationship between the Federal Government and Indian tribes . . ." Exec. Order No 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000). The Department is obligated to engage in government-to-government consultation before formulating any proposed rule impacting this process.

In addition to failing to include tribal voices in the initial formulation of the Consultation Draft, the consultation schedule proposed is wholly inadequate. The proposed consultation schedule is regionally limited to the Pacific Northwest, Western, and Pacific regions. Also, the consultations are proposed to conclude in less than one month. Such a limited scope of meetings cannot be seen as meaningful consultation on the part of the Department, especially when considering how important this issue is for Indian Country.

Moreover, trust land is essential to strong tribal governments and tribal economies. The principal goal of the Indian Reorganization Act of 1934 (IRA) was to halt and reverse the decline in the economic, cultural, governmental, and social well-being of Indian tribes caused by the disastrous federal policies of allotment and sale of reservation lands. Section 5 of the IRA (25 U.S.C. § 5108) imposes a continuing active duty on the Secretary of the Interior, as trustee for Indian tribes, to acquire land for the benefit of tribes until their needs of self-support and self-determination are met.

The Consultation Draft appears to be built on an assumption that tribes generally have adequate reservation land bases, and off-reservation acquisitions are needed only for a handful of unusual cases. These are simply not the facts. Many tribes have only scattered trust parcels and no reservation boundary, many have extremely small or diminished reservations, many are landless, and many have a reservation insufficient as a viable land base for their people. For most tribes, off-reservation acquisitions are vital, since on-reservation acquisitions are not an option. Creating a heavy presumption against taking land into trust off-reservation would have a devastating impact on the majority of Indian tribes. This is clearly not what Congress intended in the IRA.

For these reasons, we strongly urge the Department to withdraw the Consultation Draft. In addition, it is important that future initiatives potentially affecting Tribal interests be developed only after the Department has a confirmed AS-IA, an appointed Deputy Solicitor-Indian Affairs, and after engaging in full, meaningful consultation with all of Indian Country. If you have any questions, please contact me, or NCAI Executive Director Jacqueline Pata, jpata@ncai.org, or John Dossett, NCAI General Counsel, at jdossett@ncai.org.

Sincerely,



Jefferson Keel



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #MKE-17-059

TITLE: Opposing the Department of the Interior's Efforts to Amend the BIA's Land into Trust Regulations

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, between the years of 1887 and 1934, the Federal Government took more than 90 million acres of land from Indian tribes, an amount making up nearly 2/3 of all reservation lands, and sold it to settlers; and

WHEREAS, the Indian Reorganization Act (IRA) was enacted to halt and reverse the decline in the economic, cultural, governmental, and social well-being of Indian tribes caused by the disastrous federal policies of allotment and sale of reservation lands; and

WHEREAS, the IRA authorizes the Secretary "to acquire . . . any interest in lands, within or without existing reservations . . . for the purpose of providing land to the Indians;" and

WHEREAS, off-reservation acquisitions are vitally important, because many tribes have extremely small or diminished reservations, many are landless, many have only trust parcels with no reservation boundary, and most reservations are insufficient as a viable land base for long term self-determination; and

WHEREAS, the acting Assistant Secretary-Indian Affairs sent notice to all Bureau of Indian Affairs (BIA) Regional Directors on April 6, 2017 stating "the delegated authority for off-reservation land-into-trust acquisitions under 25 CFR 151.11 will lie with the Acting Assistant Secretary-Indian Affairs" effectively freezing off-reservation acquisitions for tribes moving forward; and

WHEREAS, On October 4, 2017 the Department of the Interior issued a Dear Tribal Leader Letter with a Consultation Draft of suggested revisions, stating that it was considering revisions to the land into trust regulations at 25 C.F.R. Part 151, which would “create a two-step review and approval process for off-reservation trust acquisitions, while distinguishing off-reservation trust acquisitions for the purposes of gaming from off-reservation trust acquisitions for other purposes;” and

WHEREAS, the inclusion of gaming considerations in the land into trust process is prohibited by the Indian Gaming Regulatory Act (IGRA), at Section 2719(c), which states “Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust;” and

WHEREAS, the proposed revisions would “affect” and “diminish the authority and responsibility of the Secretary to take land into trust;” and

WHEREAS, the proposed two-step review process affects all off-reservation acquisitions by adding significant application requirements and another layer of federal decision-making that forces tribes to incur additional technical expert and legal fees; and

WHEREAS, the proposed revisions include enhanced requirements for Tribes to address state and local interests, including the completion of an MOU and/or other agreements with state and local governments, and if not to explain why not; and

WHEREAS, the two-step review process adds a land use approval process into the land into trust process effectively allowing the federal government to intrude on tribes’ civil regulatory authority by withholding land acquisitions from trust status until the tribe proposes a use the federal government signs off on; and

WHEREAS, this land use approval process, when tied to gaming concerns, suggests the Department is attempting to regulate gaming through the land acquisition process without proper statutory authority since IGRA prohibits gaming on certain lands but does not include land acquisition authority; and

WHEREAS, the reinstatement of the 30 day stay before taking land into trust both on and off reservation would invite costly litigation, which would keep the land out of trust until the litigation tolls, all the while subjecting the tribe, with an otherwise approved application, to tax liability during the entire phase of litigation; and

WHEREAS, the Department of the Interior has posted a consultation schedule with only three consultations, all occurring during the month of November, and all located in the western part of the United States; and

WHEREAS, the Interior’s scheduled tribal consultation violates Presidential Executive Order 13175, the Department of the Interior’s Tribal Consultation Policy, and the Bureau of Indian Affairs consultation policy; and

WHEREAS, creating a heavy presumption against taking land into trust off-reservation would have a devastating impact on the majority of Indian tribes, and increasing federal regulatory burdens is contrary to the fundamental mission of the Trump Administration to advance economic development and local self-determination.

NOW THEREFORE BE IT RESOLVED, that NCAI strongly opposes the proposed revisions to 25 C.F.R. Part 151 and asks that the Department immediately withdraw and cease any efforts to amend the land into trust regulations; and

BE IT FURTHER RESOLVED, that NCAI request that the Congress and Administration work with Indian Nations on a government-to-government basis and include consultation with all Indian Nations on matters that affect Indian Homelands, including the recovery of traditional homelands and land into trust regulations; and

BE IT FURTHER RESOLVED, that NCAI requests that there should be in place a Deputy Solicitor-Indian Affairs and an Assistant Secretary-Indian Affairs at the Department of the Interior prior to undertaking a major overhaul of regulations in a decidedly short timeframe and without proper consultation; and

BE IT FURTHER RESOLVED, that NCAI urges the Department to rescind the April 6, 2017 notice to BIA Regional Directors centralizing all decision-making for off-reservation land acquisitions and allow Regional Staff to begin processing off-reservation land acquisitions under the current Part 151 regulations.

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2017 Annual Session of the National Congress of American Indians, held at the Wisconsin Center in Milwaukee, WI, Oct 15, 2017 - Oct 20, 2017, with a quorum present.



Jefferson Keel, President

ATTEST:



Juana Majel Dixon, Recording Secretary