

Fond du Lac Band of Lake Superior Chippewa Reservation Business Committee

1720 Big Lake Rd.
Cloquet, MN 55720
Phone (218) 879-4593
Fax (218) 879-4146

June 30, 2018

Via electronic mail only: consultation@bia.org

Attn: Fee-to-trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240



Chairman
Kevin R. Dupuis, Sr.

Secretary/Treasurer
Ferdinand Martineau, Jr.

Dist. I Representative
Vanessa L. Northrup

Dist. II Representative
Bruce M. Savage

Dist. III Representative
Roger M. Smith, Sr.

Executive Director,
Tribal Programs
Miyah M. Danielson

Re: Fond du Lac Band of Chippewa comments on proposed fee-to-trust regulations

Dear Acting Assistant Secretary:

The Fond du Lac Band of Lake Superior Chippewa, a federally recognized, sovereign Indian Tribe (“Band”) submits the following comments on the United States Department of the Interior’s (DOI) consultation draft of revisions to 25 C.F.R. § 151.11, relating to off-reservation acquisitions and 151.12, which relates to Interior’s process for acting on trust transfer requests (Proposed Rule).¹ The Band has several significant concerns with the Proposed Rule both because of the additional burdens that it would impose on trust transfer applications *and* its failure to address weaknesses in existing processes that significantly delay transfers and add considerably to their costs. Ultimately, the Band submits that DOI should withdraw and reconsider the Proposed Rule with a focus on reducing rather than increasing burdens on tribes, and should consult with tribes in preparing the next proposal rather than soliciting comments from tribal leadership on proposals that tribes had no part in preparing.

The most significant change in the Proposed Rule is to bifurcate the off-reservation-application process into separate “initial review” and “final review.” This proposed process includes a host of new evaluation criteria, such as whether the applicant tribe has any historical or modern connection to the subject property. Moreover, Interior would use different criteria to review fee-to-trust applications depending on whether or not the proposed acquisition was for a gaming purpose.

¹ The Proposed Draft was circulated by letter to Tribal leaders dated October 4, 2017. On December 6, 2017, Interior posed a set of questions to Tribal leadership relative not only to off reservation trust acquisitions, but the so-called fee to trust process generally. Those questions, while overlapping with the Proposed Draft are addressed below.

DOI states that the Proposed Rule is designed to give tribes more certainty about the possible outcome of trust applications earlier and to avoid costly litigation. But the Administration has been clear since the early days of its election campaign of its intention to limit tribes' ability to transfer land in trust, particularly in off-reservation acquisitions and for gaming purposes. The Proposed Rule appears intended to implement that policy rather than to fulfill the DOI's fiduciary responsibility to tribes.

History of Need for Trust Land at Fond du Lac

The Band's experience with federal assimilation and allotment policies was catastrophic and the need for the federal government to fulfill its fiduciary obligation to assist the Band in reacquiring homelands lost to those policies remains.

The Band, whose sovereignty long predates the formation of the United States, has had a government-to-government relationship with the United States since the early 19th Century. The 1854 Treaty established a Reservation in excess of 101,000 acres in size for the exclusive use and benefit of the Band. *See* 1854 Treaty at Art. 4. Despite the purpose of the 1854 Treaty being to create a permanent homeland for the Band, later federal policies resulted in serious diminishment of the Band's land base. The Dawes Act of 1887 (24 Stat. 388), more commonly known as the General Allotment Act, and its implementation in Minnesota through the Nelson Act (25 Stat. 642), were instrumental features of both the assimilation/allotment and termination periods of federal Indian policy. These Acts were designed to break down tribal landholdings by enabling widespread seizure of reservation lands by non-Indians, often through devices of fraud, trickery, and taxation and, thereby, to dismantle tribes and assimilate tribal members into the European-American majority culture.

For the Band, the policies of the allotment and assimilation period diminished by *two-thirds* the original land mass reserved in the 1854 Treaty by the Band. While recent economic revival has enabled the Band to begin to remedy, in a very small way, the historical injustice of the allotment policies, the Band has to *repurchase* its former Reservation lands as they become available, generally at prices greater than fair market value, which is a bitter pill to swallow in light of the unconscionable means by which most of these lands were removed from tribal ownership. However, even after the Band has purchased back lands that were taken from it through the allotment process, the Supreme Court has determined to allow state and local governments to continue to tax that property even where the title to the property is held by the sovereign tribal government and not an individual.² Tribal governments are, thus, forced to either seek trust status for the property or to subordinate themselves to the tax authority of the county government—a result that blatantly contradicts the principles of tribal sovereignty and the federal policies of promoting tribal self-government.

The Indian Reorganization Act of 1934, the statutory authority for the Section 151 regulations, was intended to stop and to reverse the impacts of the allotment and assimilation policies on tribes, their people and their lands. Section 5 of the IRA calls for the acquisition of tribal lands for Indians and the Secretary is authorized by the Act to acquire lands through various means lands located within or without existing reservations for the purpose of providing land to Indians. This was intended and remains a fiduciary responsibility of the federal government who was “morally responsible for the damage that has resulted o the

² *See County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) and *Cass County v. Leech Lake Band of Chippewa*, 524 U.S. 103 (1998).

Indians from its faithless guardianship” and instrumental in the “legalized misappropriation of the Indian estate.”³ This responsibility remains, and the statute directing the means to fulfilling that responsibility is unaltered and unambiguous. The Department should not be engaged in a process that seeks to regulate around its statutory responsibility.

Shortcomings of the Proposed Rule

With this background, the Band lodges the following comments with respect to the content and process leading to the Proposed Rule:

1. Lack of meaningful consultation.

In October 2017, the Bureau issued its first set of proposed changes to the fee-to-trust regulations without initially seeking any tribal input. Instead of engaging in meaningful discussion with tribes about ways to identify problems or increase efficiency in the fee-to-trust process, the Bureau instead, unilaterally proposed a “solution” to a perceived problem. If the Bureau honestly wants to pursue fee-to-trust reform that benefits tribes, it is essential that the Bureau consult with tribes at the pre-drafting stage. This would ensure that real problems are identified and studied, instead of focusing on “problems” that do not exist. By issuing fully formed revisions to the fee-to-trust regulations, the Bureau has actually limited maximum tribal participation and impeded consultation and collaboration—both detrimental to an honest government-to-government relationship.

2. Gaming versus non-gaming acquisitions.

The proposed changes require tribes to meet different requirements depending on whether the acquisition is for gaming purposes or not. The Secretary’s authority to take land in trust is found in the Indian Reorganization Act and there is absolutely no distinction made regarding the underlying purpose of a proposed acquisition. Simply, there is no legal basis to make a distinction between gaming and non-gaming parcels.

The Indian Gaming Regulatory Act already prohibits, generally, off-reservation gaming on lands acquired after 1988. There are limited exceptions to this rule but nothing in IGRA gives the Secretary authority to treat gaming acquisitions differently. In fact, the IGRA expressly provides that nothing in IGRA will affect or diminish the authority and responsibility of the Secretary to take land into trust.

Finally, the fee-to-trust process is already a lengthy and time-consuming. To create a whole separate track for gaming acquisitions is simply adding additional bureaucracy to the fee-to-trust process. This will undoubtedly act to further delay agency action.

3. Two-step process.

Interior proposes a two-step application process that creates an initial review where the Secretary can effectively reject applications before reaching the environmental and legal review standards. Interior has touted this two-step process as one to benefit tribes because it allows tribes to save resources by submitting a streamlined application in the first instance.

³ Comments of Congressman Howard, 78 Cong. Rec. 11727-11728 (1934).

Only if the application meets threshold criteria, will the tribe be required to provide environmental and legal analysis.

The addition of new evaluation criteria coupled with an opportunity to reject an application at the preliminary stage, appears to be an attempt for Interior to weed out controversial projects at the early stages. And while subject to judicial review, the agency would be entitled to deference in its decision. The process appears to envision political decisions made on less than a fully developed Agency record, on its face appearing contrary with the APA and the federal trust responsibility.

4. New off-reservation application requirements.

The proposed regulations add several significant new requirements to applications for off-reservation acquisitions.

151.11(a)(1)(i) & 151.11(a)(2)(i) Information on the tribe's connection to the land.

This is a new requirement, again, without legal authority. Interior has never before demanded that tribes show a historic or modern connection to proposed off-reservation acquisitions. This creates an additional tool for Interior to determine whether a tribe has a strong enough connection—subverting a tribe's own thoughts on the matter—to warrant the trust acquisition. This is particularly problematic for tribes that faced removal. At what point does a historical connection become too tenuous or far removed? This criterion adds such a nebulous and ill-defined requirement as to guarantee an easy method for Interior to routinely deny off-reservation fee-to-trust acquisitions.

151.11(a)(1)(vi) & 151.11(a)(2)(vi) Whether the Tribe can effectively exercise governmental and regulatory jurisdiction over the land.

Again, this criterion places Interior in a position to determine whether a tribe's exercise of its inherent jurisdiction is sufficient. By making Interior the ultimate decider of appropriate exercise of governmental and regulatory jurisdiction, these regulations actually act to diminish tribal sovereignty. It certainly does not further the government-to-government relationship or the United States' trust responsibility.

151.11(a)(1)(viii) & 151(a)(2)(vii) Economic benefits to the local community.

The existing regulations already require the disclosure of economic benefits if the land will be used for business purposes. Because business purposes naturally include gaming, there is no reason to make separate and distinct provisions differentiating between gaming and other business purposes.

151.11(a)(1)(xi) Evidence of Cooperative Efforts to Mitigate Impacts.

The Proposed Regulations would require the production of evidence of efforts to mitigate impacts on local communities, including copies of inter-governmental agreements or an explanation of why no such agreements exist. This elevates the interests of third parties and gives them unjustified leverage over trust acquisitions. The Indian Reorganization Act does not authorize the acquisition of tribal trust property only where non-Indian interests have

been adequately addressed. Service to non-Indian interests for centuries led directly to the need for the IRA and its focus on restoring tribal land bases. This provision further has the potential to make the trust transfer process more challenging for Tribes with fewer financial assets. Local communities rarely agree to intergovernmental agreements with Tribes without demanding some financial concession, which will be significantly less of an obstacle for tribes with considerable assets than with those with few, frustrating the restorative purpose of the IRA. There is simply no basis for investing non-Indian communities and individuals with interests in the trust acquisition process.

4. Reinstatement of 30-day Waiting Period.

Another problematic change would reinstate the 30-day waiting period for taking land into trust. Under this policy, after the Secretary decided to take the land into trust, the agency would wait 30 days to allow interested parties to file a lawsuit challenging the acquisition. Once the lawsuit is filed, the Department would wait until the lawsuit was finished before taking the land into trust.

The Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209 (2012) held that parties aggrieved by a final determination by Interior to accept land into trust status may bring a suit under the Administrative Procedures Act within the applicable 6-year statute. This decision ended any practical need for a thirty-day waiting period following a decision by Interior to accept land in trust and Interior abandoned that practice. 78 Fed. Reg. 32214 (May 29, 2013); 78 Fed. Reg. 67928 (Nov. 13, 2013). The 2013 final rule was a positive step for land-into-trust decisions and should not be changed. While *Patchak* has resulted in exposure of Interior's final decision to challenge for 6 years, the abandonment of the 30-day waiting period allowed for Tribes to benefit more promptly from the trust transfer and ultimately during any challenge to Interior's decision. In short, tribes would not have to wait years to have land taken into trust once they had already won approval.

Inexplicably, the Proposed Rule seeks to revert to the 30-day waiting period approach. There is, again, simply no legal or policy basis for this change. The practical outcome of this proposed change is to make tribes wait longer, in some cases years, before having their land placed into trust. This would apply even in instances where any legal challenge to the trust acquisition was frivolous or baseless.

Shortcomings in the Fee to Trust Process Not Addressed In Proposed Rule.

While the current Part 151 regulations should not be amended in the manner envisioned by the Proposed Rule, changes to the current fee to trust process are needed. Despite introducing several new provisions that seem to create additional hurdles to the trust acquisition process, the Proposed Rule does nothing to address the shortcomings and inefficiencies that are clear to those with experience with the process. In addition, what is also needed is the commitment of appropriate human resources and a fundamental recommitment to the intent and purpose of Congress in enacting the Indian Reorganization Act and the land restoration process for tribes.

1. Stove Piping.

Fee to trust work has been most effective when proper discretion and authority rests in the field, and has been least effective when authority has been centralized in Washington DC.

This Administration has begun the process of centralizing authority by stove-piping decisional authority over applications. The effect has been to slow the process of on and off regulations to a crawl. It has also derailed applications that were on the threshold of approval and have now been idle for nearly a year.

Fee to trust work is most efficient and effective when the ability to act rests with the Department official who know their tribal counterparts, have on-going intergovernmental relationships, and know the land. A revised proposed rule should focus authority in the field to the greatest extent possible.

2. Inadequate Staffing.

The single greatest improvement to the fee to trust process would likely be achieved by providing adequate realty staff to the Regions and Agencies. In the Band's experience, which is almost certainly the same as other tribes, the realty staff of the Agency of jurisdiction is not sufficient to process the sheer volume of work that is produced by one active tribe, much less the work of all of the Bands of the Minnesota Chippewa Tribe for which it is responsible. If the Department wants to improve the fee to trust process, it could do just that, without amending the regulations, by training and deploying additional realty staff.

3. Extra-Regulatory Application Requirements & Timely Issuance of Notice of Application aka Notice to Taxing Authorities.

The practice has arising throughout Indian Country of Agencies and Regions imposing extra-regulatory burdens on trust applications. From requiring surveys, to prohibiting the inclusion of multiple parcels if they are not contiguous; From requiring legal description review to precluding tribal officials from certifying certain title matters through the CIP process, to requiring the completion of phase 1 review, the BIA has allowed its Regions and Agencies to impose burdens on the trust application process that are not authorized by the plain language of the statute. Moreover, these additional burdens are often different from Region to Region.

The Statute and Regulations provide that upon receipt of an application supported by evidence of title and authorizing from the Tribe, the Secretary shall issue the notice of application. The addition of extra-regulatory requirements impose not only additional costs to the Tribe but can significantly delay the issuance of the notice of application and the overall timeline from application to trust acquisition. A revised proposed rule should make clear that the application requirements cannot be amended and expanded by the Regions and Agencies processing the applications

4. Phase I ESA practices.

As noted above, several Regions and Agencies have taken the position that Phase I Environmental Site Assessments are a required piece of a complete fee to trust application. The imposition of this extra-regulatory application requirement causes the Band and other tribes to incur significant additional expense and the application stage and before the Department has determined that the applicant's title is such that it will acquire the property. This unnecessary cost is compounded by the fact that Phase I ESA's currently are valid only for 180-days and must be reissued if they expire before a final determination to accept land

into trust has been issued by the Secretary's authorized representative. And decisions to except land into trust are very rarely, if ever, issued within 180 days from the date of the filing of an application. As a result tribes bear the unnecessary cost of recertifying Phase I reports simply because they are made to submit those reports as part of their initial application. A revised proposed rule should make clear that Phase I reports must be filed only after title review is complete, and the validity of such reports should be restored to 1 year.

In the alternative, the Department should simply reiterate with the Regions and Agencies the process under the current regulations, which makes an initial determination after review of a Phase I ESA, and then undertakes title review. Either approach would conserve Band resources and would be preferable to the current practice of front end loading the application with time-sensitive materials that are certain to become stale during the application process.

5. Title practices.

A revised proposed rule should also make clear whether applicants can rely on the DOJ title standards for resolving title issues and, if so, what deference those Standards will be given and any limitations that the Department considers with respect to the authoritativeness of those Standards. A revised proposed rule should also provide guidance on what title standards apply if not the DOJ Title Standards. In addition, a revised proposed rule should provide clear guidance on the meaning of the United States taking title subject to easements and rights of way of record, since the Band has encountered title objections that are based on the language of easements of record and requiring that they be amended before title will be cleared. This is yet another burden imposed by interpretations in the field that are inconsistent with the Statute and Regulations.

Responses to Questions Posed in "Dear Tribal Leader" Letter dated December 6, 2017

The Band reiterates its position that the Proposed Rule should be withdrawn and reconsidered for the reasons noted above, among other reasons, including those described in testimony provided at the BIA's tribal consultation meetings at Shakopee on January 18, 2018 and elsewhere. Further the Band notes that any new proposed draft rule should only be issued after consultation with Indian Country about the practical ways to improve the process. Finally, the Band is attaching hereto as Exhibit A answers to questions posed by the Department in its December 6, 2018 Dear Tribal Leaders letter. While many of the questions are either answered by the language of the IRA or the Regulations or have been addressed elsewhere herein or at the Tribal Consultation sessions, the Band provides the attached written responses in the interest of providing the fullest possible response and at the risk of redundancy.

Sincerely,



Kevin Dupuis
Chairman

Exhibit A to Fond du Lac Band's Comments on Proposed Amendments to Fee to Trust Application Processes:

Answers to Questions Posed in Department's December 6, 2018 "Dear Tribal Leaders" Letter

1. What should the objective of the land-into-trust program be? What should the Department be working to accomplish?

The Department already recognizes that the land-into-trust program is critical to fostering greater tribal self-sufficiency and stronger tribal government. The Bureau of Indian Affairs ("BIA") describes its trust acquisition function as "one of the most important functions Interior undertakes on behalf of the tribes" and that the "[a]cquisition of land in trust is essential to tribal self-determination." <https://www.bia.gov/bia/ots/fee-to-trust> (last accessed Feb. 21, 2018). Given this understanding, the Department should not propose changes that would actively work against this goal.

The Department's objective for the land into trust function is described by the Indian Reorganization Act, the legislative history to the IRA and the existing 151 regulations. They are clear and do not need further clarification: to restore land to tribal ownership. Congress consistently recognized that the restoration of tribal land bases by taking land into trust was essential to tribal self-determination. The IRA halted allotment, 25 U.S.C. § 5101, extended indefinitely the trust status of tribal and Indian land, 25 U.S.C. § 5102, and vested the Secretary of the Interior with broad authority to acquire lands and any interests in lands in trust for tribes and Indians, "within or without existing reservations," *id.* § 5108, as well as authority "to proclaim new Indian reservations." *Id.* § 5110.

Indian tribes continue to rebuild and restore lands lost due to allotment and other failed federal policies. And many tribes continue to have no tribal land base that is held in trust for

their benefit. There simply cannot be any doubt that the policies and goals of the IRA have not been fully realized today—more than eighty years after its enactment. There continues to be a need for the Department to support and actively implement the land-into-trust program in a manner that is consistent with the IRA and *for the benefit of Indian tribes*. The Department should be working to accomplish this goal, rather than seeking to undermine the land-into-trust program.

2. How effectively does the Department address on-reservation land-into-trust applications?

The current regulations provide sufficient standards to allow the Department to effectively and adequately balance state and local interests with the trust responsibility when evaluating land-into-trust applications (regardless of whether they are on- or off-reservation). For example, the BIA notifies state and local governments when an Indian tribe seeks to have land put into trust and provides them with the opportunity to submit comments on the tribe's land-into-trust application, including commenting on the potential impacts to state and local regulatory jurisdiction, real property taxes, and special assessments. 25 C.F.R. §§ 151.10; 151.11(d); *see also* Written Testimony of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior, before the Senate Committee on Indian Affairs, Oversight Hrg. on “Indian Gaming – The Next 25 Years” (July 23, 2014) (“state and local governments . . . have many opportunities to participate throughout the trust-acquisition process, [including] . . . during the environmental review process under the National Environmental Policy Act.”). The regulations also require BIA to consider jurisdictional issues and any potential conflicts of land use that may arise in connection with the proposed trust acquisition. 25 C.F.R. §§ 151.10(e), (f); 151.11(a). At the same time, the BIA must also consider its authority to take land-into-trust, a tribe's need for additional land, the purposes for which it will be used and the ability of the BIA

to carry out its trust responsibilities on any new trust land. *Id.* §§ 151.10(a)-(c), (g); 151.11(a). These considerations effectively allow BIA to consider concerns of state and local governments in the context of the paramount goals of the IRA (or other statutes enacted to allow tribes to acquire land in trust), which is intended to encourage the restoration of tribal homelands and secure a land base on which tribes can engage in economic development and realize self-determination.

The land-into-trust process also already takes adequate steps to provide reasonable notice to interested parties and the public of the decision to take land-into-trust. BIA provides written notice of its decision to acquire land-into-trust to all interested persons who make themselves known during the application process, as well as state and local governments. *Id.* § 151.12(d)(2)(ii). Additionally, since 2013, BIA has provided expanded notice of its decisions through newspaper publication. *Id.* at § 151.12(d)(2)(iii). This notice provides an adequate opportunity for interested parties to seek administrative or judicial review of a land-into-trust decision.

The current regulations have also been amended recently to encourage prompt review of land-into-trust decisions to avoid lengthy delays in legal challenges. Prior to 2013, the Department imposed a 30-day administrative waiting period before it would acquire title in trust for the benefit of an Indian tribe after it made a positive decision to accept land-into-trust. *See* former 25 C.F.R. § 151.12 (2012); 78 Fed. Reg. 67928 (Nov. 13, 2013). The waiting period sought to ensure the opportunity for judicial review under the Administrative Procedures Act (“APA”) of positive land into trust determinations. If a positive decision was challenged, the Department would not acquire title until all litigation and appeals were resolved. The waiting period was necessary because, at the time, prevailing Federal court decisions found that the law

precluded judicial review of the Department's decision after the United States acquired title. See, e.g., *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004); *Metro Water Dist. of S. Cal. v. United States*, 830 F.2d 139 (9th Cir. 1987); *Fla. Dep't of Bus. Reg. v. Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985). However, in 2012, in *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that neither the Quiet Title Act, 28 U.S.C. § 2409a, nor federal sovereign immunity is a bar to APA challenges to the Secretary's decision to acquire land in trust after the United States acquires title to property in trust for the benefit of an Indian tribe, unless the party challenging the decision asserts an ownership interest in the land. After the Supreme Court's decision in *Patchak*, the Department published a proposed rule seeking to remove the 30-day waiting period, engaged in tribal consultation, and issued a final rule removing the waiting period. See 78 Fed. Reg. 32214 (May 29, 2013); 78 Fed. Reg. 67928 (Nov. 13, 2013). The final rule, among other things, also made clear that parties challenging trust acquisitions must exhaust administrative remedies. 78 Fed. Reg. at 67929. The 2013 final rule was a positive step for land-into-trust decisions and should not be changed.¹

In short, the Department's current regulations should continue to be followed and fully implemented, with the understanding that the goal is to facilitate taking land into trust. Land-into-trust applications should not be delayed. Rather, the Department should actively and promptly process applications with the goal of promoting the restoration of tribal homelands.

3. Under what circumstances should the Department approve or disapprove an off-reservation trust application?

¹ Reinstatement of the 30-day waiting period before taking land-into-trust was proposed in the October 2017 Consultation Draft § 151.12(c)(iii), available at <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Consultation%20Draft%20-%20Trust%20Acquisition%20Revisions.pdf>.

The IRA gives the Secretary authority to acquire land in trust “within or without existing reservations.” 25 U.S.C. § 5108. Federal courts have concluded that the text, structure, and purpose of the IRA, as well as its legislative history, already sufficiently guide the discretion of the Secretary when deciding to take land-into-trust. *See, e.g., Mich. Gaming Opposition v. Kempthorne*, 525 F.3d 23, 33 (D.C. Cir. 2008), *cert. denied* 555 U.S. 1137 (2009); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 973-74 (10th Cir. 2005), *cert. denied* 549 U.S. 809 (2006).

The Secretary’s authority to act is discretionary in most circumstances, and is guided by the factors identified in the 151 regulations. The regulations do not require the Secretary (or the Secretary’s authorized representative at the Bureau of Indian Affairs (“BIA”)) to reach any particular conclusion with respect to any of the criteria in Section 151.10, do not specify the weight to be given to any of the criteria, and do not require any particular balancing of interests. *See, e.g., Ziebach County, South Dakota v. Acting Great Plains Regional Director*, 38 IBIA 227, 228-29 (2002). But proof of consideration of the factors that the BIA relies on must appear in the administrative record. *See, e.g., McAlpine v. Muskogee Area Director*, 19 IBIA 2, 3 (1990), *citing City of Eagle Butte, South Dakota v. Aberdeen Area Dir.*, 17 IBIA 192, 196-97 (1989).

So, the Secretary should approve or disapprove an application when in her consideration of the relevant factors approval or disapproval is warranted. To limit the Secretary’s authority in a manner that mandates a specific outcome would be contrary to the broad authority granted under the IRA and inconsistent with the goals of the IRA to restore tribal homelands. Making arbitrary standards for approving or denying an off-reservation land acquisition would completely fail to account for the varied histories of Indian tribes—histories that are directly related to federal policies that were forced onto Indian tribes and repudiated by the IRA.

4. What criteria should the Department consider when approving or disapproving an off-reservation trust application?

The existing regulations provide adequate criteria for evaluating off-reservation trust applications. *See* 25 C.F.R. § 151.11. It is unclear whether the Department is asking a different question here than Question 3 above or is seeking to create criteria, as requested in Question 5 below, which would result in the denial of an off-reservation land-into-trust application. The questions appear to be similar and seek to limit the authority of the Secretary to approve off-reservation land-into-trust applications. For the reasons stated in response to Questions 3 and 5, no changes should be made to the existing regulations.

5. Should different criteria and/or procedures be used in processing off-reservation applications based on:

- a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings or Tribal health care, or Tribal housing)?**
- b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?**
- c. Whether the application involves no change in use?**

The current regulations already subject off-reservation land-into-trust applications to different criteria than on-reservation acquisitions and no more is needed. In addition to justifying the need for the land and explaining the purposes for which the land will be used, if the off-reservation acquisition is for business purposes an Indian tribe is required to provide a “plan which specifies the anticipated economic benefits associated with the proposed use.” 25 C.F.R. § 151.11(a), (c). The regulations also subject off-reservation land-into-trust applications to greater scrutiny depending on the distance from the tribe’s existing reservation. *Id.* § 151.11(b). The Department should not create any additional criteria or procedures for evaluating land-into-trust applications based on the proposed use of the land, regardless of whether it constitutes a change in use.

Indian tribes need land for a variety of purposes and the need for the land shouldn't be subject to an arbitrary categorization—by the federal government—of what uses are more important than others. To create such a hierarchy would be contrary to the purposes and goals of the IRA. In enacting the IRA, Congress sought to revitalize and strengthen the institutions of tribal government, *see Morton*, 417 U.S. at 543, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987), *Fisher v. District Court*, 424 U.S. 382, 387 (1976), and “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism” so that a “tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (citations omitted). These are all principles which have served as the foundation for federal Indian policy in the modern era of Tribal Self-Determination. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 & n. 10 (1980).

Moreover, while Indian tribes need land and resources to build sustainable tribal housing and run tribal government programs, land is also often need economic development before tribes can successfully achieve these goals. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (“[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases ‘may be the only means by which a tribe can raise revenues.’”) (internal quotation marks and citation omitted). Land for economic development can therefore sometimes be more important to tribal self-sufficiency and self-determination. Prioritizing land-into-trust applications based on the use of the land ignores the reality that all Indian tribes are different and seek to acquire land in trust for a variety of reasons depending on the needs of the tribe and its community.

Tribal needs also change over time. Question 5(c) implies that the land-into-trust regulations should include a mechanism for taking land out of trust if a tribe seeks to change the use of its trust land—something the law does not permit. The Department should not, and cannot, create a land-into-trust system in which applications are weighed and differentiated based on uses deemed more or less important by the federal government.² As stated by Associate Deputy Secretary Cason, “Interior generally lacks the authority to restrict the use of trust lands as this would be an infringement upon tribal sovereignty and self-government.” Cason Testimony (July 13, 2017). Such system would also violate the Privileges and Immunities Act passed by Congress in 1994, which provides:

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) 1 as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities

² To the extent the Department is seeking to draw a distinction between land-into-trust applications for gaming and those for other purposes, whether an Indian tribe can acquire land in trust and whether an Indian tribe can engage in gaming on the land are two distinct legal inquiries. The Indian Gaming Regulatory Act (“IGRA”) controls issues related to Indian gaming, including whether land is eligible for gaming, and the IRA only address whether land can be taken into trust under Section 5. Congress made clear that nothing in the IGRA process could impact a tribe’s ability to take land into trust. *See* 25 U.S.C. § 2719(c) (“Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.”). The statutory and regulatory requirements related to gaming have no applicability and should not be added or collapsed into the land-into-trust process. Concerns regarding the expansiveness of Indian gaming as it relates to the land-into-trust process are also unfounded. As Associate Deputy Secretary Cason recently acknowledged, “the Department receives only a minor percentage of applications for gaming versus other applications.” Cason Testimony (July 13, 2017); *see also* Written Testimony of Kevin K. Washburn, Assistant Secretary for Indian Affairs, Department of the Interior, before the Senate Committee on Indian Affairs, Oversight Hrg. on “Indian Gaming – The Next 25 Years” (July 23, 2014) (“Of the over 1,700 successful trust acquisitions . . . since . . . 2009, fewer than 15 were for gaming purposes and fewer were for off-reservation gaming purposes.”).

available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. §§ 5123(f)-(g). The Department should have one goal—supporting tribes and their ability to become self-sufficient.

6. What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?

Without trust lands or the ability to restore tribal homelands that have been decimated by past failed federal policies, tribes cannot fully realize self-determination or self-governance. When an Indian tribe operates governmental programs and services or economic development enterprises necessary to support its citizens on fee lands, it does not have the same governmental autonomy and authority over its land base and members that it would have on trust lands. When tribes hold land in trust, state law is generally not applicable to Indian affairs, absent the consent of Congress. Rather, land held in trust for the benefit of Indian tribes is generally only subject to tribal and applicable federal laws. Tribal laws vary from one tribe to another and allow Indian tribes to balance traditional and customary laws with modern laws in a manner that is best suited to a particular tribe.

In addition, lands held in trust are not subject to state and local taxation and cannot be lost due to foreclosure. *See, e.g., Cass County*, 524 U.S. at 114 (explaining that Section 5 of the IRA, which grants the Secretary authority to take land into trust, also exempts the land from state and local taxation); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (concluding that “presumption against tax taxing authority applied to all Indian country, and not just formal reservations”).

Even today, most tribes lack an adequate tax base to generate government revenues and others have few opportunities for economic development. Trust acquisitions are critical to

providing tribes with an additional land base to support economic development, including energy and natural resources development. *See e.g.*, Statement of James Cason, Acting Deputy Secretary, Department of the Interior, Before the House of Representatives Subcommittee on Indian, Insular and Alaska Native Affairs, “Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the IRA” (July 13, 2017) (“From energy development to agriculture, trust acquisitions provide tribes the flexibility to negotiate leases, create business opportunities, and identify the best possible means to use and sell available natural resources”) (“Cason Testimony”).

Trust acquisitions also provide tribes the ability to enhance housing opportunities for their citizens. This is particularly necessary where many reservation economies require support from tribal government to bolster local housing markets and provide job opportunities in order to offset high rates of unemployment. Additionally, trust lands provide the greatest protections for many tribal communities who rely on subsistence activities, like hunting, fishing and gathering. *See id.* (“restoration of tribal land bases reconnects fractionated interests and provides protections for important tribal cultures, traditions, and histories”).

7. Should pending applications be subject to new revisions if/when they are finalized?

There is no need to change to the current land-into-trust regulations. However, if the Department decides to make changes despite strong tribal opposition, pending applications should not be subject to new revisions. All pending applications were submitted under the assumption that the current regulations would apply, and information was submitted based the requirements of the existing regulations. Subjecting pending applications to any new or different requirements would require tribes to expend additional resources to meet new requirements or amend pending applications. This would also result in additional processing delays.

8. How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?

The current regulations already provide an adequate opportunity for state and local jurisdictions, as well the public to weigh in on land-into-trust decisions. The Department must not confuse the procedural opportunity for state and local governments to be heard with respect to trust land decisions, with some broader, but wholly unfounded, notion that these third parties have a substantive right to prevail on the merits or to veto a land-into-trust decision.

The Department must recognize that the land-into-trust acquisition process is an important aspect of federal Indian policy and keep in mind that Section 5 of the IRA is intended to reverse the wrongs of prior federal policies and to help revitalize tribal self-government by taking land into trust for tribes. Indeed, it is not disputed that the Department should be informed regarding the concerns of state and local governments and others who may be affected by trust land decisions. But as discussed above, the current regulations already provide a process to take these concerns into account. The United States is duty bound to make its decisions based on the law, consistent with its trust responsibility to Indian tribes. State and local government concerns cannot change the law or the government's obligations as trustee.

The IRA does not say that the Secretary may take land into trust for the tribes only if no one objects or only if there is a consensus on all issues. Rather, the IRA provides a clear policy in favor of taking land-into-trust as a mechanism for achieving the self-determination goals of the Act and ameliorating the harm done by the federal government in taking so much from the tribes throughout the history of the United States. The policy of Congress in the IRA – not the current political or other interests of state and local governments – must control the land-into-trust process.

9. Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?

MOUs can, in certain circumstances, help facilitate tribal, state and local relationships. However, MOUs are not always possible or appropriate. Any decision to enter into an MOU with state or local governments should be left to discretion of each Indian tribe. A tribe applying to have land placed in trust is required to identify the land and to provide adequate information to demonstrate that the trust land acquisition will further the broad policies of the IRA. Beyond this, a tribe should not be required to anticipate or address concerns that are often not even related to its trust acquisition by state and local governments. Many issues a state or local government may want to include in an agreement will have no bearing on particular applications. For example, if a tribe is seeking to have land put into trust for a bison range, issues relating to sanitation, utility services and the like will simply not be pertinent. States and local governments could, however, refuse to enter into an MOU unless the tribe agrees to address all of these unrelated issues in an agreement for not just the land the tribe is seeking to acquire, but for all current or future trust lands – no matter what the nature of the trust land application.

Requiring these types of agreements would effectively provide state and local governments a veto power over all land-into-trust decisions. This would also allow state and local governments to improperly insist on making state and local laws applicable on trust land, absent any authorization from Congress for such an encroachment of state and local authority. Any such approach is simply inconsistent with the Constitutionally-grounded role of the federal government over Indian affairs and the specific intent of Congress in Section 5 of the IRA. Furthermore, this question implicitly assumes that most land-into-trust applications are

controversial and don't have the support of state and local governments. To the contrary, Associate Deputy Secretary Cason recently testified that "[o]verall, land into trust acquisitions are uncontested transfers that often have local support." Cason Testimony (July 13, 2017).

10. What recommendations would you make to streamline/improve the land-into-trust program?

Any improvements to the land-into-trust program can be made at the policy level and do not require regulatory changes. The Department should ensure that all agency and regional offices have enough staff that is properly trained in the land-into-trust process to ensure that applications are processed and reviewed in a timely manner. Given the Department's current reorganization and staff reduction efforts, Indian Affairs and the current land-into-trust program must be protected. The Department should make land-into-trust a priority in terms of both staffing resources and in its presidential budget requests.