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1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327.7500

Facsimile
916.441.5507

Attn: Fee-To-Trust Consultation
Office of Regulatory Affairs and Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street, NW, Mail Stop 4660-MIB
Washington, D.C. 20240

Dear Assistant Secretary Sweeney:

On behalf of the California State Association of Counties (CSAC), I am pleased to provide you with our association's views regarding potential revisions to the U.S. Department of the Interior's trust acquisition regulations found at 25 C.F.R. Part 151. Pursuant to the Department's "Dear Tribal Leader" letter dated December 6, 2017, we have included below answers to each of the questions posed in the correspondence concerning the scope and direction of potential updates to the current fee-to-trust regulations.

Background and Introduction

Founded in 1895, CSAC is the unified voice on behalf of all 58 of California's counties. The primary purpose of our statewide association is to represent county government before the California Legislature, administrative agencies, and the federal government.

CSAC and our policies recognize and respect American Indian tribes' rights to self-governance, to provide for the economic self-sufficiency of tribal members, and to preserve traditional tribal heritage and culture. In a similar fashion, CSAC recognizes and promotes the empowerment of county governments to provide for the health, safety, and general welfare of all residents of their communities, Indian and non-Indian alike. Our association's primary objective with respect to Indian law is to find a harmony that reflects the roles and responsibilities of each governmental entity and assures equity and fairness in federal and state law.

CSAC is pleased that the Department of the Interior is considering making a series of modifications to the Part 151 regulations. Our association's long-held view is that the current regulatory framework, along with the Department's administrative practices, have led to significant controversy, serious conflicts between tribes and local governments – including litigation costly to all parties – and broad distrust of the fairness of the fee-to-trust system. For these reasons, we would welcome a comprehensive overhaul of the regulations governing the trust-acquisition process.

At the same time, we would be remiss if we did not take this opportunity to reiterate our longstanding belief that the deficiencies in the fee-to-trust process will not be permanently resolved unless Congress acts legislatively. As we have repeatedly conveyed in congressional testimony, the fundamental problem with the trust acquisition system is that Congress has not

established objective standards under which any delegated trust-land authority is to be applied by the Bureau of Indian Affairs (BIA). Indeed, the general and undefined congressional guidance embodied in Section 5 of the *Indian Reorganization Act of 1934* (IRA) has resulted in an administratively driven trust-land process that fails to meaningfully include legitimate interests, provide adequate transparency to the public, or demonstrate fundamental balance in trust-land decisions.

Moreover, and as is evidenced by the Department's current undertaking, bureaucratically created rules, regulations, and agency guidelines – including those that are well developed and in the best interest of the public good – are subject to change based on the views and policy objectives of any given administration. This is manifestly true in the case of the fee-to-trust process, which lacks any meaningful statutory framework or substantive standards and which is governed entirely by a set of administrative rules. Again, this is precisely why CSAC believes it is essential for Congress to establish *statutorily-based* standards in the process for taking land into trust.

In the meantime, and as Congress continues to consider potential options for modifying Section 5 of the IRA – either within or outside the context of the Supreme Court's 2009 decision in *Carciari v. Salazar* – CSAC welcomes the Department's review of the current Part 151 regulations. As part of this review, we urge the Department to carefully consider the views and suggestions contained herein and to adopt as part of a subsequent rulemaking CSAC's recommended modifications to the fee-to-trust process.

Answers to Questions Enumerated in December 6, 2017 Letter

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

As indicated above, CSAC recognizes and respects American Indian tribes' rights to self-governance, to provide for the economic self-sufficiency of tribal members, and to preserve traditional tribal heritage and culture. To that end, CSAC acknowledges that the opportunity for tribes to have land held in trust by the federal government represents an important tool in helping to promote tribal rights and interests. At the same time, we do not believe that the trust acquisition process should be used as a "blank check" for removing land from state and local jurisdiction.

Although our association does not have specific policy regarding the overall objective of the land-into-trust program, we believe that the BIA must evaluate and consider the interests of *all* affected parties and impacted stakeholders when determining whether or not to take a parcel of land into trust. Unfortunately, the Department of the Interior has not crafted regulations that strike a reasonable balance between tribes seeking new trust lands and states and local governments experiencing unacceptable impacts as a result of trust-land decisions.

In considering potential changes to the Part 151 regulations, the Department should be working to develop a fee-to-trust process that helps advance tribal sovereignty and self-sufficiency while at the same time ensuring that states and local governments do not suffer harm due to unmitigated impacts. Tribes deserve an efficient and predictable trust acquisition system that is not continually bogged down by controversy and legal action; likewise, states and localities deserve a process that takes their legitimate governmental interests into consideration.

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

Our association will withhold specific comment on the Department's effectiveness as it pertains to processing on-reservation land-into-trust applications. We would note, however, our belief that the Department has an obligation to ensure that the process for acquiring trust land – whether on- or off-reservation – is predictable, efficient, and balances the interests of all impacted parties.

Additionally, CSAC believes that land that is *contiguous* to an Indian reservation should be subjected to the same review procedures as *off-reservation* land (under the current regulations (25 CFR 151.10), contiguous lands are treated in the same manner as if they were *within* (or "on") an Indian reservation). We hold this view because tribal development projects on contiguous lands can produce the same detrimental impacts to the surrounding community as projects that are off-reservation. Again, for this reason, contiguous land applications must be carefully reviewed and subjected to a regulatory requirement that all impacts be sufficiently mitigated.

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

At the outset, we believe it is important to point out that there may be unique circumstances related to each and every off-reservation trust application, the existence of which could ultimately impact the Department's decision whether to approve or disapprove a particular application. Notwithstanding the presence of such circumstances, CSAC believes that the Department should be allowed to approve a trust acquisition *only* if all significant off-reservation impacts associated with the proposed project or development have been mitigated to the maximum extent practicable. This can be accomplished in two ways:

- Through a comprehensive, judicially enforceable agreement (i.e., MOU) between the tribe and the affected local government(s); or,
- In cases in which the tribe and affected local government(s) have failed to reach a comprehensive agreement, through a determination by the Secretary of the Interior – after consulting with appropriate state and local officials – that the acquisition would not be detrimental to the surrounding community and that all significant jurisdictional conflicts and impacts, including increased costs of services, lost revenues, and environmental impacts, have been mitigated to the extent practicable.

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

INTERGOVERNMENTAL AGREEMENTS

As stated above, an essential criterion for the Department to consider when approving or disapproving an off-reservation trust application is the existence of a comprehensive mitigation agreement. In the absence of such an agreement, and as a condition of any final trust acquisition approval, the regulatory framework should require a Secretarial determination that all off-reservation impacts have been sufficiently mitigated.

CSAC also believes that tribes that reach intergovernmental agreements to address jurisdiction and environmental impacts should be able to take advantage of a streamlined fee-to-trust process. The BIA could accomplish this objective by reducing the threshold for demonstrating tribal need and purpose (discussed in more detail below) in cases in which tribes have entered into comprehensive MOUs. By instituting such a change, BIA would be creating a system that encourages upfront cooperation and communication between neighboring governments and, we believe, would result in a far less costly and more efficient fee-to-trust process.

It should be noted that an approach that encourages intergovernmental cooperation between tribes and local governments is required and working well under recent California State gaming compacts. Not only does such an approach offer the opportunity to streamline the application process, it can help to ensure the success of the tribal project within the local community. The establishment of a trust-land system that incentivizes intergovernmental agreements between tribes and local governments is at the heart of CSAC's own fee-to-trust reform proposal and, likewise, should be a top priority for the Department of the Interior.

DEFINE TRIBAL NEED

As noted above, the BIA should define "tribal need" and require specific information from tribes regarding the need for a particular parcel of trust land. Unfortunately, the current Part 151 regulations provide inadequate guidance as to what constitutes legitimate tribal need for a trust land acquisition. There are no standards other than the stipulation that the land is necessary to facilitate tribal self-determination, economic development, or Indian housing, which can be met by virtually any trust land request.

CHANGES IN USE OF LAND

Fee-to-trust applications should require specific representations of intended uses. Moreover, material changes in the use of *existing* trust land should not be permitted without further reviews, including an analysis of potential environmental impacts, as well as application of other relevant procedures and limitations. Such further review should have the same notice, comment, and consultation as required for an initial fee-to-trust application. Additionally, the legal framework should be changed to explicitly authorize restrictions and conditions to be placed on land going into trust that further the interests of both affected tribes and local governments.

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)?

Yes, CSAC believes that there should be different criteria/procedures for processing applications based on economic development versus non-economic development purposes. In short, and building upon our answer to Question 3, we believe that applications for economic development should be subject to a thorough Secretarial evaluation of the potential off-reservation impacts associated with the proposed project. As indicated above, if all significant off-site impacts have been mitigated to the maximum extent practicable – either by virtue of an intergovernmental MOU or through a determination of mitigation by the Secretary – then the application should be allowed to move forward in the process.

Conversely, CSAC supports a lower threshold for acquisition of trust land that will be used only for non-gaming or non-intensive economic purposes, including governmental uses and housing projects.

- b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?

No. While the existence of a major gaming operation clearly presents local communities with significant challenges – including but not limited to traffic and congestion, the need for law enforcement and social services, and environmental impacts – other large-scale economic development projects can result in many of the same impacts to local communities. This would be true with respect to the operation of a major hotel or resort, entertainment venue, or other similar non-gaming complex. Accordingly, these types of facilities should be treated under the law in the same manner as a gaming facility for purposes of the Part 151 process, including subjecting such applications to a requirement that all impacts are accounted for and sufficiently mitigated.

- c. Whether the application involves no change in use?

As previously discussed, and in order to maintain a consistent application of the law, the primary consideration when it comes to a change-in-use of trust land is the existence of new or different *impacts*. If the application proposes a change in use that would *not* result in significant impacts (such as a change from a cultural facility to an administration center), then a lower threshold or criteria should be applicable.

If, however, the change in use would result in new and/or different impacts (i.e., the change from a parking lot to a gun range, airport, gaming facility, or other development), the Part 151

regulations must require a thorough Secretarial review of the proposed project and ensure that any and all off-reservation impacts are mitigated.

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

CSAC stipulates that there are clear advantages for tribes to operate on land that is held in trust. Our association's primary objective is to ensure that the process used to take land into trust balances the legitimate interests of *all* impacted parties.

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

CSAC does not have an official policy position on this matter. Nevertheless, we recognize that subjecting a pending trust application to new requirements/standards that were not in place when the original application was filed raises fundamental due process and fairness concerns. Accordingly, applying any potential new regulatory requirements retroactivity should be carefully considered.

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 Department should explicitly recognize that state and local jurisdictions have an indispensable role and interest in the fee-to-trust process. To accomplish this, trust land applications and other Indian land decisions should be governed by a process that requires the BIA to provide full disclosure and fair notice to all impacted parties, with sufficient opportunity to provide substantive input and comments.

Unfortunately, under the current process, the notice provided to local governments regarding a fee-to-trust application is not only very limited in coverage, the opportunity to comment is minimal. A new paradigm is therefore needed whereby counties are considered meaningful and constructive stakeholders in Indian land-related determinations.

The corollary is that consultation with counties and local governments must be substantive, include all affected communities, and provide an opportunity for public comment. Under Part 151, the BIA does not invite comment by third parties even though they may experience major negative impacts. Instead, the BIA accepts comments only from the affected state and the local government with legal jurisdiction over the land and, from those parties, only on the narrow question of tax revenue loss, government services currently provided to the subject parcels, and zoning conflicts. As a result, trust acquisition requests are reviewed under a very one-sided and incomplete record that does not provide real consultation or an adequate representation of the consequences of the decision. Broad notice of trust applications should be required with at least 90 days to respond and comment.

Additionally, the Part 151 regulations should require the BIA to ensure that tribes provide reasonably detailed information about the intended uses of proposed trust land, not unlike the public information required for planning, zoning and permitting on the local level. This assumes even greater importance since local planning, zoning and permitting are being preempted by the trust land decision; accordingly, information about intended uses is reasonable and fair to require.

Finally, while local governments should not be provided any sort of veto authority over a trust acquisition, the Department should give sufficient weight to any concerns raised by impacted localities. Similarly, and as indicated earlier, the regulations should require the Secretary to consult with the State and affected local governments when determining whether off-reservation impacts associated with the trust acquisition have been sufficiently mitigated.

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?

Yes, MOUs and similar cooperative agreements undoubtedly help facilitate improved relationships between all levels of government. As previously stated, there are dozens of examples of California tribes and counties reaching enforceable agreements for addressing specific off-reservation impacts stemming from economic development projects. The result of this cooperation has been enhanced respect and the basis for renewed government-to-government partnerships.

By way of example, Yolo County has a history of working with the Yocha Dehe Wintun Nation to ensure adequate services in the area where the tribe's casino is operating. Additionally, the County has entered into agreements with the tribe to address impacts created by other tribal projects in the county.

In Sonoma, the County recently entered into a comprehensive intergovernmental agreement to create an over 500-acre homeland for the Lytton Band of Pomo Indians. The MOU provides the framework for mutually beneficial cooperative efforts that protect both the Tribe's sovereignty and the vital interests of Sonoma County residents.

In southern California, numerous tribes in San Diego County have worked with the County sheriff's department on law enforcement-related issues in communities where tribal casinos are located. In addition, the County has entered into agreements with a number of tribes to address transportation impacts created by various casino projects.

Given the intrinsic value of intergovernmental cooperation, CSAC believes that the existence of MOUs should be formally reflected in the off-reservation application process. This can and

should be accomplished by incentivizing tribes to enter into enforceable agreements with local governments by abbreviating the application process when such agreements are in place.

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

As stated above, and as discussed in our answer to Question 4, tribes that reach comprehensive local mitigation agreements should be allowed to take advantage of a streamlined application process. For starters, such a process should reduce the threshold for demonstrating tribal need and the purpose for the trust land.

Additionally, because the existence of a comprehensive MOU ostensibly demonstrates that anticipated impacts have already been accounted for and addressed, the need for a Secretarial determination of mitigation would not be necessary. Eliminating this step from the fee-to-trust process would significantly further truncate the timeframe needed for the Department to review and process such an application.

Conclusion

CSAC believes that a new fee-to-trust process – one that encourages local governments and tribes to work together and which protects the interests of local governments while respecting tribal sovereignty – is long overdue. To achieve these principles, we strongly urge the Department to adopt our association’s proposed revisions to the Part 151 regulations. We believe the policy recommendations contained herein represent common-sense reforms that, if adopted, would eliminate some of the most controversial and problematic elements of the current trust land acquisition process. The result would help states, local governments, and non-tribal stakeholders and would assist trust land applicants by guiding their requests towards a more streamlined and collaborative process.

Thank you for your consideration of these comments and suggestions. We look forward to working with you and your staff in an effort to develop a fee-to-trust system that works for all parties. Should you have any questions or if you need any additional information, please contact Joe Krahn, CSAC Federal Representative, at (202) 898-1444.

Sincerely,



Graham Knaus
CSAC Executive Director

cc: Senator Dianne Feinstein

Senator Kamala Harris
California Congressional Delegation
Senate Committee on Indian Affairs
House Natural Resources Committee