PASCUA YAQUI TRIBE

OFFICE OF THE CHAIRMAN

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Via Email at consultation@bia.gov

The Pascua Yaqui Tribe thanks the Department of the Interior for this opportunity to provide responses to the ten questions set out in your Dear Tribal Leader letter dated December 6, 2017. The Fee to Trust process is very important to the Pascua Yaqui Tribe, so we hope that you will carefully consider our responses below prior to considering whether amended regulations are necessary.

Question 1

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

The Department has both a legal and moral obligation to prioritize acquiring land in trust for *all* tribes, and to do it in a way that is neither unduly burdensome or restrictive. The Department's objective should be to meet those obligations in good faith.

Legal Obligation. Through the Indian Reorganization Act (IRA) Congress instructed the Department to acquire land in trust for Indian tribes, and it did so without making a distinction between land acquired on-reservation and land acquired off-reservation. Further, Congress explicitly made clear that the purposes of the IRA include the promotion of economic development for Indians. The Department's proposals (as circulated on October 4, 2017) aimed at making acquiring off-reservation land ever more difficult, and to impose artificial distinctions between land acquired for economic development as opposed to land acquired for other purposes, are entirely unsupported by the plain language of the statute or its legislative history.

The IRA was enacted to address the disastrous consequences earlier federal policies designed open Indian lands to non-Indian settlement by providing support for tribal governments, tribal economic development, and the acquisition of land for Indians. *See* Cohen, Sec 1.05 (2005 ed.); *see also Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 75 F.Supp.3d 387, 392 (D.D.C. 2014), *aff'd,* 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied,* No. 16-572, 2017 WL 1199528 (U.S. Apr. 3, 2017) (citing *Morton v. Mancari,* 417 U.S.

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535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)) ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Michigan Gambling Opposition v. Kempthorne*, 525 F. 3d 23, 31 (D.C. Cir. 2008) (under the IRA, "the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes.").

Moral Obligation. The Department's recent proposals relating to off-reservation acquisitions ignore the factual reality that most tribes in the United States do not possess reservations within which there is available fee land to be acquired through the on-reservation acquisition process. This is true for the Pascua Yaqui Tribe. After decades of hardship, the Pascua Yaqui Tribe was finally recognized by the federal government as a Tribe in 1978 and 202 acres of land were put into trust. (Pub. L. 95-375). At the time of recognition, this small reservation was inadequate and the problem has only grown exponentially over the years. The Tribe did not historically have a connection to what is now called the Pascua Yaqui Reservation. While portions of the Tribe have made their home on the Reservation (known among Tribal members as New Pascua), the Tribe has continued to maintain its seven traditional communities throughout Southern Arizona. Those communities are: Penjamo (Scottsdale), High Town (Chandler), Coolidge, Guadalupe (Tempe), Old Pascua (Tucson), Barrio Libre (South Tucson). These communities continue to engage in Yaqui cultural ceremonies and are considered a part of the Tribe, though not on tribal lands. The Department owes a duty to land-poor tribes, like Pascua Yaqui, to ensure an adequate land base.

The IRA was enacted to benefit land-poor tribes, as the sponsors made clear. *See* 78 Cong. Rec. 11,123 (June 12, 1934) (IRA is to provide land for Indians who are anxious to make a living on such land; "there are many Indians who have no lands whatsoever, and are unable to make a living.") (Rep. Wheeler, IRA co-sponsor); 78 Cong. Rec. 11,727 (June 15, 1934) (IRA intended "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it.") (Rep. Howard, IRA co-sponsor); S. Rep. No. 1080, at 1-2 (1934) (one of the purposes of the IRA is to provide for the acquisition of land for Indians, now landless, who are eager to make a living on such land). The Department's proposals risk the creation of "second class" tribes -- something certainly not supported by the IRA's language or contemplated by its framers.

The Department's recent proposals also seem to ignore the fact that most federal programs designed to assist Indian tribes are tied to trust and reservation lands -- without an adequate land base, tribes are also hindered from benefitting from federal programs designed to help tribes improve their economic and social well-being.

In sum, the objective of the land land-into-trust program should be to facilitate the timely acquisition of land in trust to promote tribal self-determination and self-sufficiency, both on- and off-reservation, without the imposition of unnecessary and expensive regulatory burdens that

serve no reasonable purpose other than to create a chilling effect on tribal efforts to rebuild their land bases.

Question 2

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

The Tribe's experience with on-reservation land-into-trust applications is that local staff try to be helpful, but the process is very slow.

Questions 3 and 4

Under what circumstances should the Department approve or disapprove an off-reservation trust application?
What criteria should the Department consider when approving or disapproving an off-reservation trust application?

The Department should preserve regulatory certainty by continuing to use the existing criteria already enumerated in 25 C.F.R. § 151.11 to determine whether to approve or disapprove off-reservation trust applications. Under the current regulations, pursuing an off-reservation trust application already is costly and extremely time consuming, generally taking many years to complete. These regulations have been honed over three decades, and now provide a functional and knowable framework on which reasonable decisions may be made. Repeated efforts to keep modifying the regulations -- to keep changing the rules -- causes significant hardship for applicant tribes, and is inconsistent with this Administration's pledge to *reduce* regulatory burdens.

The Department has expressed concern about the adequacy of the current criteria in addressing the concerns of local communities. Yet the current criteria already provide a strenuous process for considering the concerns of local communities regarding a tribe's trust application -- even though there is nothing in the plain language of the IRA that requires such consideration. Pursuant to 25 C.F.R. §151.11(b), as the distance between the tribe's current reservation and the parcel to be acquired increases, the Secretary already gives greater weight to the concerns identified by local communities. Additionally, 25 C.F. R. §151.11(d) provides that upon receipt of a tribe's application, the Secretary must notify state and local governments with regulatory jurisdiction over the land to be acquired, and the state and local governments then have 30 days in which to provide written comments. These requirements already provide a reasonable mechanism to address the concerns of local communities.

We do believe it is important, where possible, for tribes and local governments to work together in pursuit of the common goal of improving our shared communities. Many tribes and local communities already enter into memoranda of understanding regarding off-reservation trust acquisitions. But in some situations those cooperative agreements are not possible, and the Department's primary responsibility is the trust responsibility it owes to the tribes. There is no

reasonable legal or policy justification for essentially providing local governments with a veto over off-reservation land acquisitions. *See also* Response to Question 9 below.

Further, in its proposed draft revision of Section 151.11 from late 2017, the Department suggested adding an analysis of "whether the acquisition will facilitate the consolidation of the Tribe's land holdings and reduce checkerboard patterns of jurisdiction." If this consideration is elevated to a "criterion" for off-reservation acquisitions, it will undermine the ability of tribes with large populations located at some distance from any existing trust land from being able to acquire land from which to provide services to those members. Many tribes have no land base or do not have an adequate land base to meet the basic needs of tribal members, such as housing or healthcare. The legislative history of the Indian Reorganization Act (IRA) makes clear that one of the primary purposes of the IRA was to obtain land for landless Indians. Both the House and Senate Reports on the IRA emphasize this purpose. S. Rep. No. 1080, at 1 (1934) (declaring that one of the "purposes of this bill" was to "provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land"); H.R. Rep. No. 1804, at 6 (1934) (noting that the IRA would help to "make many of the now pauperized, landless Indians self-supporting"); see also, Felix S. Cohen, Handbook of Federal Indian Law, 84 (1942). In line with the purposes of the IRA, it is vital that the Department give great weight to considering a tribe's need for off-reservation land, particularly when on-reservation acquisitions are simply not an option.

As such, if you are inclined to amend the off-reservation acquisition process, the bar should be lowered for those cases where tribes are acquiring lands within or adjacent to traditional communities. As noted above, Pascua Yaqui has seven traditional tribal communities in which it has no trust land. Tribal members continue to reside in these communities, interact with the local communities, and conduct traditional ceremonies in these communities. These types of acquisitions should not have to go through the type of rigorous process set out in 25 C.F.R. § 151.11.

In sum, the Tribe opposes the addition of any further criteria, as they serve no reasonable policy function and appear intended to have a chilling effect on the acquisitions of more off-reservation land into trust. The current criteria provide a more than adequate basis for the Department to make a decision on whether to approve or disapprove an off-reservation application. Further, if changes are made, the criteria should be reduced for those acquisitions that are within or adjacent to traditional tribal communities.

Question 5 a, b, and c

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)?

The existing fee-to-trust regulations require Tribes seeking to acquire off-reservation land in trust for business purposes to provide a business plan that specifies the anticipated economic benefit associated with the proposed use. 25 C.F.R. § 151.11(c). There is no reason to impose additional requirements beyond what is already in the existing regulations, and nothing in the plain language of the IRA justifies distinguishing between economic development and non-economic development purposes for off-reservation trust acquisitions. The Indian Reorganization Act (IRA) was enacted to provide support for tribal governments, tribal economic development, and the acquisition of land for Indians. *See* Cohen, Sec 1.05 (2005 ed.), and the Department's implementation of the statute must be conducted within that framework. Indeed, imposition of additional or different burdens on applications for off-reservation land because the land will be used for economic development appears to be antithetical to the purpose of the statute. *See* 78 Cong. Rec. 11,123 (June 12, 1934) (IRA is to provide land for Indians who are anxious to make a living on such land) (Rep. Wheeler, IRA co-sponsor); 78 Cong. Rec. 11,727 (June 15, 1934) (same) (Rep. Howard, IRA co-sponsor); S. Rep. No. 1080, at 1-2 (1934) (same); *see also Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 75 F.Supp.3d 387, 392 (D.D.C. 2014), *aff'd,* 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied,* No. 16-572, 2017 WL 1199528 (U.S. Apr. 3, 2017) (citing *Morton v. Mancari,* 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)) ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied,* No. 16-572, 2017 WL 1199528 (U.S. Apr. 3, 2017) (citing Pub. L. No. 383, 48 Stat. 984, 984 (1934)) (Congress enacted the IRA to "conserve and develop Indian lands and resources"); *Michigan Gambling Opposition v. Kempthorne*, 525 F. 3d 23, 31 (D.C. Cir. 2008) (under the IRA, "the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes."). The regulatory goal should be to facilitate the acquisition of trust land to promote tribal self-government and economic self-sufficiency -- not to frustrate those statutory goals with additional red tape.

Furthermore, land that will be used for economic development purposes is often already subject to additional requirements related to that development (for example, Section 20 of IGRA (25 U.S.C. § 2719) and the 25 C.F.R. Part 292 regulations (for gaming), or the 25 CFR Part 162 leasing regulations, or 25 U.S.C. § 81 and the 25 C.F.R. Part 84 regulations (for contracts that encumber tribal land for more than 7 years) -- so imposing additional regulatory hurdles as part of the fee-to-trust process would only further impede Tribes from being able to acquire and use their lands for economic development purposes without undue government interference and regulation. Imposing these additional regulatory burdens would be inconsistent with the Department's stated approach to working with Tribes -- respecting Tribal sovereignty and

allowing Tribes to use their lands without the government "getting in the way." *See* Letter from James Cason, Acting Deputy Secretary of Interior to Jacqueline Pata, Executive Director, NCAI (May 5, 2017); Remarks by James Cason at NCAI, Mid Year Conference, The Federal Trust Responsibility to Tribal Lands and Resources (June 13, 2017).

For all these reasons, it is inappropriate for the Department to impose additional or different requirements or procedures for Tribal off-reservation fee-to-trust applications for economic development purposes.

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

There is no legal justification, nor any policy reason, to differentiate between off-reservation trust applications that are for gaming purposes and off-reservation trust applications that are for other forms of economic development. Here, Congress already has spoken, and has set out the rules for when newly acquired land can be used for gaming in Section 20 of the Indian Gaming Regulatory Act (IGRA). The Department already has adopted regulations to implement Section 20 of IGRA in 25 C.F.R. Part 292. Conflating the IRA's fee-to-trust process with the gaming IGRA's gaming requirements can only serve to make the regulatory process even more byzantine and complicated, more expensive, and more time consuming. Not only is this idea completely unsupported by the plain language of either the IRA or IGRA, it is antithetical to the Administration's pledge to streamline federal regulatory requirements. The Tribe strongly opposes adding additional regulatory requirements for off-reservation land into trust applications for gaming, and urge the Department to abandon this idea.

c. Whether the application involves no change in use?

Again, there is no reason to use different criteria or procedures for processing off-reservation applications where no change in use is involved, as the existing regulatory requirements in 25 C.F.R. Part 151 already take this into account. The Part 151 regulations require that Tribes submitting fee-to-trust applications comply with the National Environmental Policy Act (NEPA), 25 C.F.R.§ 151.10(h), 151.11(a), and the BIA's NEPA Guidebook and the Departmental Manual provide for a categorical exclusion for approvals of conveyances or transfers of interests in land where no change in land use is planned. 59 IAM 3-H, § 4; 516 DM 10.5.I. In effect, BIA has already determined (in consultation with CEQ and after public notice and comment) that on- and off-reservation trust acquisitions where no change in land use is planned will not have a significant effect on the quality of the human environment, so no analysis of such impacts in an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is required. The other components of the fee-to-trust regulations remain applicable to off-reservation applications where no change in use is planned, and there is no reason to change those requirements, as the NEPA compliance requirement is the regulatory provision that is directly relevant to whether there is a change in use of the land.

Question 6

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

Any Indian tribe can acquire off-reservation land in fee anywhere in the United States. A subsequent decision to submit an application to have the land taken into trust by the United States for its benefit is based on multiple factors depending on the intended use of the land. For instance, if a tribe intends the off-reservation land to be used to conduct gaming activities under the Indian Gaming Regulatory Act (IGRA), the land will have to qualify as "Indian lands" under IGRA over which the tribe exercises government authority. This will require the land to be held in trust status. We do not believe that a general inquiry into the advantages and disadvantages of placing land into trust is either useful or relevant. That inquiry will be made by an applicant tribe before it decides to submit a trust application for a particular parcel, and if it decides that placing that parcel of land into trust is in its best interest, that decision should not be second-guessed by other entities.

Question 7

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

It is entirely inappropriate to impose new rules on a tribe that already has relied on the existing rules in formulating its application. Applicant tribes -- particularly those whose applications are complete -- should be given the option to complete the application process under the regulations as they existed when the application was filed, or to proceed under the newly amended regulations. We encourage the Department to use the process in 25 C.F.R. 83.7 of the newly revised Part 83 regulations (Procedures for Establishing that an American Indian Group Exists as an Indian Tribe) as a model for this purpose. Better yet, we urge the Department to abandon its efforts to amend the Part 151 regulations altogether, and instead give tribes the benefit of continued regulatory stability.

Question 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 IRA does not empower the Secretary to "recognize and balance the concerns of state and local jurisdictions" in acquiring land for tribes, as Congress provided no such direction, either in the text of the statute or in the legislative history of the IRA. Nor does the IRA contemplate a role for public comments in the trust acquisition process. Rather, under the IRA, "the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes." *Michigan Gambling Opposition v. Kempthorne*, 525 F. 3d 23, 31 (D.C. Cir. 2008) (*MICHGO*).

While the Secretary may exercise discretion under IRA Section 5, this discretion is limited by the text and purposes of the statute:

> Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used....Because Congress has given guidelines to the Secretary regarding when land can be taken in trust, the primary responsibility for choosing land to be taken in trust still lies with Congress. ***The Secretary is not empowered to act outside of the guidelines expressed by Congress***.

Confederated Tribes of Siletz Indians v. U.S., 110 F.3d 688, 698 (9th Cir. 1997) (emphasis added). Unlike some other statutes that "direct agencies to act in the 'public interest,' *MICHGO*, 525 F.3d at 31, quoting *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), the IRA "authorizes the Secretary to acquire land 'for the purpose of providing land for Indians.'" *Id.*, quoting 25 U.S.C. 5108; *see also South Dakota v. Dept. of the Interior*, 423 F.3d 790, 797 (8th Cir. 2005) ("the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust").

Where Congress has intended that the Secretary "recognize and balance the concerns of state and local jurisdictions" in carrying out his responsibilities to Indians, Congress has explicitly stated as much. For example, in considering whether to permit gaming on newly acquired lands, one provision of the Indian Gaming Regulatory Act (IGRA) explicitly provides for a determination *both* as to whether such gaming "would be in the best interests of the Indian tribe and its members" *and* "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Congress also provided that such a determination must be preceded by "consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." *Id.*[1]

In contrast, nowhere does the either the text or the legislative history of the IRA even hint at such a balancing test. Instead, "the goals motivating trust acquisitions are 'rehabilitation of the Indian's economic life and development of the initiative destroyed by oppression and paternalism.'" *Carcieri v. Kempthorne*, 497 F. 3d 15, 42 (1st Cir. 2007) (*en banc*), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009)), quoting *South Dakota*, 423 F.3d. Id. at 798 (internal quotation marks and citations omitted). These goals, rather than the concerns of state and local jurisdictions, must inform the exercise of the Secretary's discretion under the IRA.

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[1] The Secretary similarly considers the concerns of state and local jurisdictions and the general public when undertaking federal actions, like certain trust acquisitions, that may implicate the National Environmental Policy Act. *See* 43 U.S.C. § 4321 *et seq*.

Question 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?

Tribes and state and local governments routinely enter into intergovernmental agreements to facilitate all manner of activity both on existing and newly acquired tribal lands. These agreements address the "complexity, uncertainty, and cost of state and tribal jurisdiction in Indian country," Cohen's Handbook of Federal Indian Law § 6.05 (2012 Ed.), and allow for the coordination of information, resources, and priorities among public health and safety departments and agencies regardless of the jurisdiction. These agreements address the economic or environmental impact regarding new development on neighboring land. Many states recognize and encourage such agreements. [2]

While these agreements often make good policy, their execution remains – by definition – the prerogative of the respective sovereign governmental signatories. As noted above, the IRA does not contemplate the participation of state and local governments in the fee-to-trust process. It would therefore be both paternalistic and contrary to the plain language and intent of the statute for the Secretary to impose such a requirement as part of the trust acquisition process.

Question 10

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

Shorten processing time. The Department should make an effort to decrease the time that it takes for review and approval of fee-to-trust applications, particularly those that are off-reservation and for economic development, including gaming. As discussed above, the Department typically takes several years to process a single off-reservation gaming application. Some of this is due to the extended time that it takes BIA to comply with NEPA, and for gaming applications, to comply with the 25 C.F.R. Part 292 regulations relating to the eligibility of land for gaming. These delays are further compounded by the lengthy amount of time it typically takes headquarters to make a final decision on off-reservation gaming applications after the application is submitted to headquarters by the Region, even though the Region has already fully reviewed the application and made a recommendation for approval. Indeed, even acquisitions *mandated* by other land acquisition statutes (such land claim settlements) routinely (and inexplicably) take years to complete.

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[2] *See, e.g.*, Cal. Health & Safety Code § 13863(a) ("A [fire protection] district may enter into mutual aid agreements with any federal or state agency, any city, county, city and county, special district, ***or federally recognized Indian tribe***." (emphasis added)).

Allow the Regional Directors to review and approve off-reservation applications. This would cut out the extended time that applications sit in headquarters before they are finally reviewed and approved. If the Department believes that off-reservation gaming acquisitions still must be reviewed in Washington, D.C., for policy and consistency reasons, we recommend that the Department make an effort to ensure that there are adequate staff and funding for the Office of Indian Gaming and the Office of the Solicitor, which would help to expedite the review of off-reservation gaming applications. At this time, it does not appear that either office is adequately staffed to cover its existing workload.

Do not reinstate the 30-day judicial review period. We oppose amending 25 C.F.R. § 151.12 to reinstate the 30-day judicial review provision, as was proposed in the October draft amendments to the regulations, as this would most assuredly result in unnecessary delays in moving land into trust. Prior to the 2013 amendment of the regulations, Section 151.12(b) provided for a 30-day period to allow an opportunity for judicial review of fee-to-trust decisions, which was thought to be necessary because prior case law had found that judicial review of such decisions was barred by the Quiet Title Act, 28 U.S.C. § 2409a. The practical effect of this provision was that once litigation was filed within the thirty-day period, Interior would impose on itself a self-stay and not acquire the land in trust while litigation was pending, which typically went on for years. In 2012, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that the Quiet Title Act does not bar judicial review of trust acquisitions; consequently, there was no longer a need for the 30-day judicial review provision, and the current regulations were amended accordingly to allow the immediate acquisition of land in trust after publication of a final agency decision in the Federal Register (decisions made pursuant to delegated authority are not final until administrative remedies are exhausted). The proposed draft amendments would reinstate the self-stay provision while litigation is pending, providing that the Department will acquire the land in trust "no sooner than" 30 days after the date the decision is issued. In effect, this would allow the Department to delay its acquisition indefinitely, even if no litigation were filed, and if litigation is filed, to again engage in the self-stay policy. Not only is this completely unnecessary, because *Patchak* allows for challenges to trust acquisitions, but it will also allow opponents to delay acquisitions for years after a decision is issued, thwarting tribal investment and development. This outcome is neither consistent with the language and purpose of the IRA, nor does it streamline or improve the land in trust process -- it does the opposite, adding unnecessary delay and cost for Tribal applicants.

Sincerely,

Robert Valencia
Chairman