



# POARCH BAND OF CREEK INDIANS

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The Honorable John Tahsuda  
Principal Deputy Assistant Secretary – Indian Affairs  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, D.C. 20240  
E-mail: [consultation@bia.gov](mailto:consultation@bia.gov)

Re: Potential Revisions to Part 151 Trust Acquisition Regulations

Principal Deputy Tahsuda:

I write on behalf of the Poarch Band of Creek Indians to submit the attached comment in response to the Department's initial draft revisions and posted questions about the direction of updates to the 25 C.F.R. Part 151 Land Acquisition regulations.

As you know, the Poarch Band of Creek Indians is the only federally recognized Indian tribe in the State of Alabama. Former Interior Secretary, William Clark, utilizing authority of the Indian Reorganization Act of 1934 (IRA), restored a small portion of the Poarch Band's homelands by placing approximately 230 acres of land into trust for the benefit of the Tribe in 1984. The Tribe also owns approximately 16,000 acres of land in fee simple in the State of Alabama.

The Tribe provides a wide variety of government services to our tribal members and other Alabamians and we operate dozens of economic enterprises both on and off our federal trust lands. In addition to our Wind Creek gaming operations, the Tribe manages the Magnolia Branch Wildlife Preserve, Muskogee Metal Works manufacturing, several hotels and convenience stores, a helicopter maintenance operation, and the recently opened OWA theme park and resort in Foley, Alabama. Through these enterprises, the Tribe generates jobs for more than 3,000 American families.

The restoration of tribal government homelands to trust status is critical to the future of Indian Country. Our trust land parcels are the anchor for exercise of the Poarch Band's tribal sovereignty, culture, and economy. We truly appreciate the Department's consideration of the attached comments to improve the Part 151 land to trust process.

Sincerely,

Stephanie A. Bryan  
Chairwoman

## **COMMENT OF THE POARCH BAND OF CREEK INDIANS ON THE PART 151 FEE TO TRUST PROCESS**

The Poarch Band of Creek Indians (“PBCI” or the “Tribe”) submits this comment in response to both the Department’s October 4, 2017 “Dear Tribal Leader Letter” (DTTL) with proposed draft revisions to the 25 C.F.R. Part 151 process and the Department’s December 6, 2017 DTTL requesting comment on “a broader discussion about the direction of updates to Part 151”.

While Native Nations ceded vast areas of tribal government homelands through consensual treaty making, many more Indian lands were systematically taken without compensation through federal policies aimed at destroying tribal governing systems. The federal policies of Removal, Allotment and Assimilation, and Termination resulted in the uncompensated taking of hundreds of millions of acres of tribal government homelands.

Through the Indian Reorganization Act (IRA), Congress sought to right the wrongs inflicted by these past misguided policies. The IRA provides an essential mechanism to restore Indian lands to tribal government control and provide a small measure of justice to Indian tribes. The Interior Department has worked to implement the goals of the IRA through its Part 151 regulations, among other policy goals and initiatives.

The Part 151 process has slowly worked to restore approximately 5 million acres of former tribal homelands to trust status: a fraction of tribal homelands taken.

The Department holds approximately 390 acres of lands in trust for the benefit of the PBCI. The Tribe uses these trust lands for basic governmental services, including housing, education, health care, public safety, and our government administration—as well as for economic development purposes, including gaming, manufacturing, service industry, among many others.

The Tribe owns 16,000 acres of land in fee simple. In the future, we plan to work to restore these portions of our homelands to trust status to further strengthen our culture, government services, agriculture, and natural resource preservation.

### ***Brief Comments on Interior’s Initial Draft Revisions to Part 151***

The current 151 process is costly, cumbersome, and time consuming. It can take years, and in some cases more than a decade, to restore even a small parcel of land into trust. Indian Country stands uniformly opposed to proposals that undermine the IRA or impose added burdens on tribal governments, but we welcome this opportunity to suggest improvements to the process.

The Department’s initial draft revisions to Part 151.12 would undo a rule change that Indian Country uniformly supported after the U.S. Supreme Court’s 2012 ruling in *Patchak*. The draft revision proposed restoring a 30-day waiting period for taking land into trust after the Department’s final decision. We believe that restoring the 30-day wait period would create delays, spur new litigation, and generate additional costs for tribal governments.

The initial draft also proposed a preference for tribal 151 applications that included cooperative agreements with states or local governments. The lack of an MOU or cooperative agreement should not give state or local governments veto authority over a trust acquisition request or otherwise discourage acquisition of the parcel.

The IRA remains as critical to Indian tribes today as when it was enacted in 1934. After more than a century of systematic uncompensated takings of tribal government homelands prior to its enactment, the IRA—through the Department’s Part 151 process—is slowly working to bring a small sense of justice and some homelands back to Indian Country. Despite the measured progress, far too many tribal governments continue to lack an adequate land base.

The remainder of our comment will focus on the 10 consultation questions posed by the Department to improve the Part 151 fee to trust process.

### *Part 151 Consultation Questions*

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

The Secretary’s ability to acquire land in trust for all federally recognized Indian tribes is critical to strengthening tribal governments and improving opportunity for Indian Country residents. As noted above, the federal policies of removal, allotment and assimilation, caused the uncompensated taking of more than 100 million acres of tribal homelands. The IRA’s land to trust authority has worked to restore a small fraction of those lands to tribal government control.

Prioritizing fee-to-trust acquisitions is consistent with the federal government’s treaty and trust obligations to Tribal Nations. Our land base is a core aspect of tribal sovereignty, cultural identity, and is the foundation of our economies. Fee-to-trust acquisitions have enabled tribes to provide essential governmental services through the construction of schools, health clinics, elder centers, veteran centers, housing, and other tribal community facilities. Tribal trust acquisitions have also been instrumental in helping tribes protect and preserve Native culture and tradition. Equally important, tribal trust lands have helped spur economic development throughout Indian Country, generating American jobs for Native Americans and our non-Indian neighbors.

In enacting the IRA, Congress formally ended the devastating policies of forced Allotment and Assimilation—with the desired intent to restore Indian lands and promote tribal governments and culture. The IRA provides the Secretary broad authority to transfer fee land to trust for tribal governments. Successfully fulfilling the IRA’s promise requires the Department to favorably view land acquisition requests from Tribal Nations and individual Indians, and promote tribal self-determination and economic development. The restoration of tribal homelands through trust land acquisitions should be considered part of the Department’s core responsibilities in its government-to-government relationship with federally recognized Indian tribes. To ensure the Department can reach these goals, presumptions throughout the 151 process should favor tribal government applicants.

All Tribal Nations deserve a stable, sufficient land base to support self-government, cultural preservation and economic development. The Department should ensure that every federally recognized Indian tribe has the opportunity to restore its homelands.

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

As noted above, the current 151 land acquisition process is cumbersome and can take years for a tribal government to navigate. Part 151.10 provides comprehensive and rigorous criteria under which the Department evaluates on-reservation applications. The current requirements consider the need for land, proposed land use, as well as potential impacts on state and local governments,

among other criteria. These thorough standards are more than adequate to weigh the interests of all parties.

Given the importance of tribal trust acquisitions, the Department's lack of efficiency in reviewing and approving trust applications frustrates many tribal governments. Many simple, on-reservation trust applications for tribal government purposes often linger for months and years. The Department rarely provides an explanation for the delays in processing applications. These delays create significant harm for tribes seeking trust acquisitions for critical governmental and economic development purposes.

We urge the Department to adopt policy measures to streamline the trust acquisition process through a variety of approaches, such as:

- Follow the model set forth in the Indian leasing and right-of-way regulations (25 C.F.R. Parts 162 and 169) that allows applicants to appeal to higher levels of Department supervision when BIA fails to act on a pending application within a set time period.
- Issuing internal guidance to prioritize processing fee-to-trust applications. Prioritization of such work should not force Department employees to disregard other critical services provided to tribal communities.
- Request increased funding to prioritize fee-to-trust initiatives, including hiring additional BIA and Solicitor's Office personnel to work exclusively or primarily on trust land acquisition applications.
- Where possible, eliminate or combine some of the 16 steps for processing trust applications that the Department has identified in its Fee-to-Trust handbook. A number of tasks in the 16-step process could be conducted simultaneously.
- Broaden the use of categorical exclusions in the Department's NEPA review process for fee-to-trust acquisitions. Eliminate the requirement that all off-reservation applications obtain approval at Department headquarters in Washington, D.C.
- Establish a Tribal-Interior Department taskforce of tribal leaders/staff and key Department employees from BIA, the Solicitor's Office, and Departmental leadership to jointly identify increased efficiencies and make policy recommendations.

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

The location of land – on or off-reservation – must not categorically disqualify the parcel from being taken into trust. Nor should the activity proposed for the parcel to be acquired categorically disqualify the parcel from acquisition if the proposed activity is otherwise permissible under applicable law. Indeed, Section 5 of the IRA expressly authorizes the Secretary to acquire lands outside reservations: the Secretary may acquire “any interest in lands, water rights, or surface rights to lands, within *or without* existing reservations, for the purpose of providing land for Indians.” *Id.* § 5108 (emphasis added). Yet, while Congress treated on- and off-reservation acquisitions the same and this directive remains unchanged today, the Department, through sections 151.10 and 151.11, established different criteria for Interior's consideration of trust applications.

PBCI acknowledges that a range of considerations and interests can come into play when an application for an off-reservation acquisition is reviewed, including potential economic and other benefits to the applicant, impacts to Indian tribes located near the land to be acquired, or even

whether the activity proposed for the land to be acquired in trust is permitted under applicable law (e.g. Indian gaming on lands acquired in trust after 1988).

The current rules for processing off-reservation land to trust applications more than adequately considers the distance between a tribe's current land base and the land sought, the tribe's ability to govern the lands sought, economic impacts to the tribe and nearby governments, among other factors.

The vast majority of fee-to-trust applications are not controversial. Most applications seek land for agriculture, governmental purposes, conservation, or to protect cultural and natural resources. In planning to revise Part 151, the Department should not unnecessarily disrupt tribal homeland restoration efforts for these non-controversial applications.

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

As noted above, the off-reservation application criteria (25 C.F.R. §§151.10-11) sets forth a rigorous process that includes consideration of the off-reservation distance, economic impacts, and ability to govern, among many other factors. The Department must evaluate off-reservation requests through the lens provided by the IRA, i.e. with a view towards securing land bases for all tribes and encouraging self-determination and economic development opportunities in tribal communities.

#### **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?**

Our economic development is an essential governmental function just like the efforts of our government to provide housing and health care or expand other governmental services. With this in mind, there should be no distinction for the purposes of trust land acquisition whether the acquisition is for economic development or other purposes.

The PBCI plays a critical role in providing jobs and economic opportunities on tribal trust land for our members (and non-members who live in the surrounding communities) as well as providing essential governmental services such as health care, education and housing. New tribal business enterprises and other economic development activities that occur on our trust lands generate revenues that allow our government to undertake and expand essential services for our community. Without a tax base, economic enterprises are only source of revenue that supports government services and provides the only source job opportunities for our people. Accordingly, tribal trust applications – whether or not for economic development-related activities – should always be considered as intended to support an important tribal government function.

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

PBCI stresses caution to the extent the Department intends to propose changes to the regulations that further distinguish treatment of gaming-related applications from other economic development-related applications. In the Indian Gaming Regulatory Act (IGRA), Congress generally prohibited gaming on land acquired in trust after 1988, leaving room for only a handful

of exceptions. IGRA Section 20, which sets out the exceptions for gaming on land acquired in trust after 1988, states “Noting in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.” 25 U.S.C. §2719(c). Interior’s regulations at 25 C.F.R. Part 292 already lay out regulatory requirements that govern whether gaming may occur on off-reservation lands acquired in trust after 1988.

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

For applications that propose no change in use, and presumably create little or no controversy, the Department’s view – as with all trust applications – should be guided by Congress’ intent in the IRA to promote Tribal self-determination and ensure that Tribal nations such as PBCI can build and restore our homelands that were lost through failed federal policies of assimilation and allotment.

To the extent the Department is considering changes to its regulatory process to account for changes in use of land at some point after land is taken into trust, Tribal Nations such as ours must have parity with federal and state governments as to how applicable law imposes additional requirements when a change in use is made for government-owned land.

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

As acknowledged by Congress in enacting the IRA, trust lands are foundational to the existence and operation of strong Tribal governments and promoting Tribal self-determination. Trust lands support the exercise of Tribal sovereignty, providing an area of land over which Tribal governments exert their jurisdiction and laws, and are generally free from state interference. The existence of trust lands also ensures a permanent Tribal land base that is not alienable. The federal government’s obligation to uphold its trust responsibility to Tribal Nations is attendant with trust land status, as the United States maintains legal title to such lands, holding them for the benefit of Tribal Nations.

Fee land operations often work to the disadvantage of Tribal governments. Although Tribal governments maintain their sovereignty, their activities on fee land are generally subject to state and local jurisdiction and taxation, which may limit the ability of Tribal Nations to maximize the benefit of such activities for their citizens and hinder Tribal self-determination efforts.

Tribal sovereignty and self-determination, and the trust relationship that exists between Tribal Nations and the United States, afford Tribal governments the choice as to whether to locate operations on trust or fee land. The IRA, which remains controlling law for this Administration, establishes policy goals of securing permanent land bases for Tribal Nations in order to strengthen Tribal governments and economies, and improving the social and economic welfare of Indian people. While these goals were set in place in 1934, they are no less valid today. The IRA envisions that Tribal Nations will exercise self-government and manage their own affairs. A policy shift away from controlling law that discourages or does not prioritize trust land acquisition forces our Tribal government to contend with the same burdens and requirements imposed through state and local law on non-sovereign entities, working counter to Tribal sovereignty and self-determination, the trust responsibility, and the promise of the IRA.

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

Should the Department modify its fee to trust requirements, applicants with pending applications at the time any new revisions are implemented should be allowed to choose whether to proceed under the new revisions or the old regulations. Applicants invest significant time, money, and other resources in preparing trust applications. To require pending applications to be resubmitted because this Administration revises the regulations would impose an unfair burden on applicants, particularly for those applications that have been in the Department's review process for some time and could be close to a final decision. If an applicant wants to resubmit its application under revised regulations or have a pending application evaluated under revised regulations, an applicant should have the option to do so.

The Department's Indian right-of-way regulations provide useful precedent for how the Department should treat pending applications. 25 C.F.R. 169.7(c), gives right of way applicants who had applications pending when the Part 169 revisions went into effect the option of withdrawing the pending application and resubmitting it for review under the revised regulations, or proceeding with review of the regulations that were in effect when the application was submitted.

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

Current regulations already fully account for the concerns of state and local governments. Such concerns must not outweigh the views of Tribal applicants, to whom the Department has a trust responsibility. When considering trust applications under Part 151, the Department should consider state and local input as but one factor to weigh in fulfilling one of the IRA's chief purposes – to restore Tribal land bases in order to encourage economic development in Tribal communities and support Tribal self-determination and cultural preservation.

Other mechanisms, including Memoranda of Understanding and gaming compacts, provide a means by which state and local jurisdictions and other stakeholders can address concerns over issues like jurisdictional conflicts as well as loss of property taxes and other revenues. An effort by this Administration to change regulations to give greater weight to the views state and local jurisdictions and the general public while diminishing the views of Indian applicants violates the trust responsibility and the intent of the IRA. State and local jurisdictions should never have veto power (explicit or implicit) over trust land acquisitions.

Public comment should not be entitled to additional weight under any changes in the application review process that the Department may consider. The Fee to Trust process is grounded in the government-to-government relationship between two sovereigns—a Tribal Nation and the U.S. government. The U.S. government does not have the same responsibilities and obligations to the general public that it has to Tribal Nations. Further, both the on reservation and off-reservation criteria in Part 151 account for impact of an acquisition on state and local governments, with the Department notifying and providing state and local governments a 30 day period to provide written comments on the impacts of a potential acquisition. The concerns of the public can be accounted for through the Department's consideration of the comments of state and local governments whose elected officials represent the public.

**9. Do 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?**

PBCI knows well the value of a strong relationship with neighboring governments. The Tribe has MOUs with several surrounding counties for a wide variety of purposes. Such agreements should be encouraged and the Department should assist in their development. However, MOUs / cooperative agreements should not be required, and the lack of an agreement should not delay or foreclose a tribe's trust land application. PBCI is open to consultation about providing incentives for cooperative agreements outside of the 151 process, but is strongly opposed to any change to the Part 151 process that would delay or require a tribe's land to trust application absent a cooperative agreement or provide state or local governments a veto over an Indian tribe's fee-to-trust acquisition.

PBCI also strongly opposes any provisions that would require a tax or fee be paid to state or local governments before tribal fee land can be taken into trust. Such requirement would give local governments significant leverage over Tribal applicants, allowing them to wield veto authority and have applicants at the mercy of local interests.

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

There are several measures this Administration should explore to enhance the ability of Tribal Nations to put land into trust:

- When the BIA is unable or fails to act on a pending land to trust application within a set amount of time, we recommend the Department adopt a provision that would follow the model set forth in the Indian leasing and right-of-way regulations (25 C.F.R Parts 162 and 169) that allows applicants to appeal to higher levels of Department supervision.
- We recommend increasing staff within the BIA and the Office of the Solicitor at the regional office and headquarters to ensure adequate resources are devoted to processing fee-to-trust applications, including the hiring of BIA and Solicitor's Office personnel to work exclusively or primarily on trust land acquisitions.
- Where possible, eliminating or combining some of the 16 steps for processing trust applications that the Department has identified in its Fee-to-Trust handbook. A number of tasks in the 16-step process could be conducted simultaneously.
- Broadening the use of categorical exclusions in the Department's NEPA review process for fee-to-trust acquisitions.
- Eliminating the requirement that all off-reservation applications obtain approval at Department headquarters in Washington, D.C.
- Establishing a Tribal Nations-DOI taskforce of Tribal leaders/staff and key Department employees from BIA, the Solicitor's Office, and Departmental leadership who regularly work on fee-to-trust issues to jointly identify areas where increased efficiency is possible, and make recommendations for policy improvements.
- Create a "fast pass" system for trust acquisitions that are supported by state and local governments or if a MOU/cooperative agreement for the acquisition is in place.
- As noted above, the existing Part 151 regulations are costly and cumbersome. NIGA therefore recommends that the Department work with Indian Country to expedite the land to trust process for land to trust applications that consist of parcels within existing Indian lands.



- Expand the ability of tribes to contract with the Bureau of Indian Affairs (BIA), as modeled by California Tribes and their Fee to Trust Consortium, to assist the BIA in the performance of its responsibilities. The Administration should narrowly define “inherent federal function” to expand the scope of fee-to-trust functions that tribes may contract from BIA.
- Update the use of categorical exclusions under the National Environmental Policy Act to apply to all on-reservation land acquisitions that have an acceptable contaminant survey.
- Correct the problems associated with the *Patchak* issues such that the land can again be placed in trust immediately upon favorable administrative review.
- The BIA is urged to proclaim commitment to its legal trust obligation and ensure that its actions under Section 151 could all be defined as preserving and exercising the Trust Relationship.
- Establish an expedited mechanism to transfer federal lands that encompass Native sacred places to be held in trust for tribal governments for the sole purpose of cultural and/or historic preservation.

In addition to these recommendations, PBCI urges parity for all federally recognized Tribal Nations within the land-into-trust process through a fix to the Supreme Court’s 2009 decision in *Carcieri v. Salazar*. We call upon the Department to work with Congress to draft and enact legislation that: (1) reaffirms the status of existing / current Indian trust lands; and (2) confirms the Secretary’s authority to take land into trust for all federally recognized Indian tribes. Until that occurs, DOI must follow existing authorities and guidance, including the M-Opinion issued by DOI on March 12, 2014, to continue processing Part 151 tribal land acquisition applications.

We ask that you consider the comments and proposals listed above and continue consultations with all of Indian Country to improve the Part 151 process, while protecting existing Indian trust lands and clarifying that the land to trust process is available to all federally recognized Indian tribes.