



Rincon Band of Luiseño Indians

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VIA E-MAIL ONLY
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Mr. John Tahsuda III
Principal Deputy Assistant Secretary
Office of the Assistant Secretary – Indian Affairs
United States Department of the Interior
1849 C Street, NW
Washington, DC 20240

June 22, 2018

RE: COMMENTS OF THE RINCON BAND OF LUISEÑO INDIANS ON PROPOSED UPDATES TO PART 151

Dear Mr. Tahsuda:

This letter is submitted on behalf of the Rincon Band of Luiseño Indians (Tribe), a federally-recognized, sovereign tribal government, in response to your December 6, 2017 request for consultation on the proposed list of questions for updates to Part 151.

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

We believe that the Department's objectives and actions should be informed by applicable Federal law and the federal-trust relationship owed to Indian tribes. The Indian Reorganization Act (IRA) authorizes the Secretary to restore tribal lands, specifically, Section 5 of the IRA provides:

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, *within or without existing reservations*, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing lands for Indians. (emphasis added).

Bo Mazzetti
Tribal Chairman

Tishmall Turner
Vice-Chairwoman

Steve Stallings
Council Member

Laurie E. Gonzalez
Council Member

Alfonso Kolb Sr.
Council Member

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 2 of 8

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

In the IRA, Congress specified no restrictions to restoring the tribal land base. We question the need and BIA's rationale to add new criteria to off-reservation applications. Why is it necessary to fashion a new rule to distinguish between gaming and non-gaming proposals when gaming applications only comprise 1% of all fee-to-trust applications? The consultation record substantiating the basis for these changes is devoid of any information that the BIA has engaged in any informal or formal analysis of the efficiencies to be gained from these changes. There is no evidence, empirical or anecdotal data, that supports the need for these changes. The transcripts of BIA's consultation meetings show that many Tribal Leaders are confused on the scope of the proposed changes. If adopted, the new proposed requirements, e.g., historic and modern connection to the land, information on land consolidation, checker-boarding and jurisdictional issues, and a business plan, will make the off-reservation application process more difficult and costly. The objectives of the land-to-trust program should be consistent with the IRA: to restore tribal land holdings within and without existing reservations for the purpose of providing lands for Indians. The Department should be proposing criteria that makes it easier for Tribes to acquire trust land by eliminating unnecessary barriers that delay or complicate the Department's approval.

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

We can only speak to our experience in California. The California FTT Consortium members pool each participating tribes' PL 93-638 funds for fee-to-trust to pay dedicated BIA staff to focus on processing FTT applications. Even with this arrangement in place, it takes approximately 4 – 5 years for the United States to acquire title for the benefit of a Tribe. This is hardly streamlined or expedited.

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

The Department should approve an off-reservation trust application where acquisition of property will not impose significant additional responsibilities or burdens on the Department beyond those already inherent in the federal trust relationship with the Department over the Reservation. When the applicant tribe can ensure that essential services – security, fire protection, natural resources protections, etc. – are or will be provided to the property using existing federal allocations and/or revenue from tribal economic enterprises, the application should be approved. Where there are no state jurisdictional conflicts, the application should be approved. In a PL 280 state like California all criminal and some civil state jurisdiction over the property remains the same despite the acquisition of the property in trust. Pursuant to Public Law 280, the State

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 3 of 8

maintains criminal jurisdiction over Indian lands in California and maintains jurisdiction over civil causes of action between Indians or to which Indians are parties. [18 U.S.C. § 1162; 25 U.S.C. § 1360]. Acceptance of the land in trust will not affect the State's PL 280 jurisdiction.

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

The Department is authorized under the IRA to approve off-reservation fee-to-trust applications. SCOTUS modified that authority in 2005 with the *Carcieri* decision (holding that tribes must have been federally recognized in 1934 to be eligible for IRA's Section 5 benefits) but did not strike down Section 5 of the IRA. The Department should exempt any pending applications from any retroactive requirements of the proposed changes that will increase the economic burdens on tribal governments and/or diminish tribal sovereignty by mandating negotiation with local governments. The proposal to add Memorandums of Understanding (MOU) with counties and cities gives local governments a bargaining chip to use against tribes attempting to restore their land base. San Diego County, for example, has adopted a standing policy of absolute opposition to any fee-to-trust application, on- or off-reservation throughout the county. If adopted, a preference for an MOU would give San Diego County leverage to exact concessions from tribes in exchange for not opposing the application. The United States should be thinking of ways to protect tribes from this type of exploitation – the Department owes a singular, fiduciary duty to Indians that should not be subordinate to entities and/or interests that are often opposed to tribal interests.

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

The Tribe believes that it is misguided and paternalistic for the Department to second-guess the judgment/decision of a sovereign tribal government's proposed future use of land that is the subject of a fee-to-trust application, particularly when it is not legally required under the IRA. While the Tribe is generally opposed to the expansion of gaming in California, we believe where no change in land use is contemplated, the Department's processing and review of an application should be a routine, administrative-staff practice at the Regional Office level. The Department's distinctions between proposed uses distracts from the BIA's stated goal of streamlining the application process.

The bifurcation of applications on gaming-purpose grounds only serves to reduce the number of applications than can be more efficiently processed by the regional offices. This change also diminishes the decision-making power of regional directors who are more familiar with the circumstances of their local tribes and better able to address their concerns. The end result of

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 4 of 8

bifurcation will be a bottleneck of applications at headquarters that will prolong an already lengthy and arduous process.

IGRA already exists and has its own regulations to govern the acquisition of land for gaming purposes. As several tribes pointed out during consultation, promulgating new regulations bifurcating applications under part 151 will create two different regulatory schemes for off-reservation gaming applications. Regardless if current applicants could ‘choose’ which regulatory track to go down, this proposed change needlessly confuses the fee-to-trust approval process for tribes. Additionally, the change requires that tribes disclose their intended use of the land in their application. Tribes may not know what they intend to do with land they wish to acquire for economic development at the time they wish to acquire it. Disclosure of intended use creates unnecessary backlash from the public and local governments and frustrates the legislative intent of tribal sovereignty.

It also is not clear how this change to the regulations would function pragmatically because once the land is in trust, the tribe could later decide to shift their plan for the land to one that includes gaming. This was raised by Ms. Hart at the Miami Consultation. [p. 17-19]. If a tribe were to pursue a non-gaming application for an off-reservation acquisition and got approval under that process, they would now have that trust land available for any use. What would prevent a tribe from developing a casino on that land once it gets into trust? Ms. Hart correctly pointed out that administrations change and plans for development change with them. This is not illegal; governors and local government officials make these types of changes all the time. Ms. Hart questioned, “Why is it like a big crime for Indian tribes to do it, when a chairman comes in and says we’re absolutely not doing gaming, a new administration comes in and they say, okay, we want to do gaming. Why is that so bad?” When she posed this question to Mr. Cason, she said that she could tell that he had never thought about it.

If this regulatory change does not actually prevent tribes from changing the intended use to gaming down the line, what is the point of the regulation? Why bifurcate the applications when that determination is temporally immaterial? If the regulatory change does prevent tribes from changing their minds, why should that be the case? Again, this would be another measure that makes it more difficult for tribes to develop economically, become self-sufficient, and have a true sense of sovereignty.

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

No comment.

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 5 of 8

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

No. Federal courts have consistently held that an agency may not promulgate retroactive rules absent express Congressional authorization.¹ The draft regulations impose a retroactive standard on all pending applications, including the two-part review and historical connection. The Department should embrace current practices which is to grandfather existing applications. For example, any leases and rights-of-way applications submitted before BIA changed those regulations were subject to the regulations in effect at the time they were submitted. [See 25 CFR § 162.008(b)(1) (reviewing lease applications “under the regulations in effect at the time of your submission”); see also, 25 CFR § 169.7(c)(2)(i) (will review ROW applications “under the regulations in effect at the time of your submission)].

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

Section 5 of the IRA contained no restrictions on the exercise of the Secretary’s authority to take land into trust for a tribe. The Secretary should respond to public comments with factual information after consultation and coordination with the tribal government requesting the trust acquisition. It is important to remember that the BIA is not in a federal-trust relationship with state and local governments, it owes a singular, fiduciary duty to Indian tribes to protect their interests in lands and resources held in trust for their benefit. In California, almost all of the Indian land base was stolen which is why the Indian land base in the state of California is less than 1% of the entire state. [See Congressional Report, January 23, 1888, Committee on Indian Affairs, 50th Congress]. In California, there is an on-going need for expansion of the tribal land base to provide essential government services for Indian people. Local government opposition over loss of property tax revenue is a red herring; in our experience, the amount of property tax loss to San Diego County has been minute at best. For example, the Rincon Band’s Lake Wohlford Property application to take into trust represents 0.0000007% of the annual County property tax revenue for 2015-2016 of over \$4.4 billion. It’s also important to emphasize that the vast majority of fee-to-trust applications occur within or contiguous to reservations, not off-reservation, so the

¹ Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); National Min. Ass’n. v. Department of Labor, 292 F3d 849, 859 (D.C. Cir. 2002). Grounded in due process considerations, a rule is considered retroactive if it “impairs rights a party possessed when he acted, increases a party’s liability for past conduct, or imposes new duties with respect to transactions already completed.” Id. (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994)). In the context of an administrative rule, a rule can be impermissibly retroactive if it “changes the legal landscape” in such a way as to “affect substantive liability determinations.” Id. Furthermore, if the new rule “changes the law in a way that adversely affects [a party’s] prospects for success on the merits of the claim” and is “substantively inconsistent with a prior regulation, prior agency practice . . . it is retroactive as applied to pending claims.” Id., at 860.

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 6 of 8

Department's focus on off-reservation applications appears misguided. If no change in land use is contemplated in an application, then placing property into trust should not present jurisdictional conflicts with local regulations or provision of public safety services. California is a PL 280 state, all criminal and some civil state jurisdiction over the property remains the same regardless of whether the property is acquired in trust. Pursuant to Public Law 280, the State maintains criminal jurisdiction over Indian lands in California and maintains jurisdiction over civil causes of action between Indians or to which Indians are parties. [18 U.S.C. § 1162; 25 U.S.C. § 1360]. Acceptance of the land in trust does not impact the State's Public Law 280 jurisdiction.

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?

Here, in San Diego County, there is a standing policy of absolute opposition to any fee-to-trust application, on- or off-reservation. The Department's proposed requirement for an MOU tips the balance in favor of counties allowing them to extract unfair concessions from tribes. This MOU proposal should be abandoned. It turns the trust relationship on its head for the trustee to elevate counties, governments with considerable financial and political resources, to negotiate on equal footing with a federally-recognized sovereign before the trustee can agree to acquire additional land for a tribe.

If imposed, we believe it is important to carefully consider what criteria would be used to limit the permissible scope of the MOU negotiations? Would it be limited to off-setting loss of property tax revenue and would there be any weight given to existing mutual-aid agreements negotiated between the tribe and various county agencies? Rincon has seven mutual aid agreements with government service providers throughout San Diego County for fire safety. The vast majority of 9-1-1 calls responded to by the Rincon Fire Department are for off-reservation emergencies. Rincon also has an MOU with the County Sheriff to pay for dedicated deputies and vehicles assigned to the Rincon Reservation on a 24/7 basis. All of these costs are paid for by the Tribe without reimbursement from the County. We do not believe the Department should disrupt or complicate these arrangements by inserting federal preference or influence into these types of local affairs. The tribes and county governments are perfectly capable of facilitating their own government-to-government relationships.

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 7 of 8

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

Eliminate criteria that increases costs incurred to tribal governments by environmental studies and economic analysis to justify the need for the acquisition. We strongly encourage the Department to use categorical exclusions to exempt what should be routine administrative functions from substantive NEPA review as a streamlining measure for trust acquisitions, particularly where the application proposes no change in use for the land. As you are well aware, an environmental assessment under NEPA is a very costly and time-consuming process for tribes. The average time for an environmental assessment is six months and an environmental impact statement (EIS) can take up to 24 months. For example, the Graton Rancheria EIS took 24 months from the time the Draft EIS was published in March 9, 2007 until issuance of the Final EIS on February 27, 2009. The National Indian Gaming Commission recently reformed its protocols to narrow NEPA review to approval of management contracts and trust acquisitions where construction or expansion of existing facilities is contemplated by the tribe.

During the Department's nationwide consultation process, representatives of many tribes advocated for reform to the NEPA process. At the February 22, 2018 consultation in Miami, Florida, you openly acknowledged that there are 25 existing categorical exclusions from NEPA that the BIA "rarely uses." [Miami Transcript, p. 88, lns. 16-18]. Whether this statement was in reference to the fee-to-trust process or any land acquisition process, generally, cannot be determined from the record. Nevertheless, Section 5 of the IRA is silent with respect to the application of NEPA. For that reason, it would be a reasonable and permissible interpretation of the statute to categorically exclude the Department's approval of trust acquisitions from NEPA review with exceptions for applications that contemplate changes in future use (construction or intensity of use). *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

We appreciate the opportunity to submit this response to your questions and request that the Department postpone any decision on proposed regulatory changes until it clearly articulates the need for any proposed changes, substantiates its proposals for change with data and engages in formal consultation with the Tribe and all other similarly situated tribes who would be affected. Asking the Tribe to provide written comments to a series of broad questions without further meetings and dialogue on what the Department does with the information Rincon and other tribes submit cannot replace meaningful consultation.

Executive Order 13175 mandates meaningful consultation of proposed regulations "that have substantial direct effects on one or more tribes, on the relationship between the United States and Indian tribes, or on the distribution of power and responsibilities between the United States and Indian tribes." Implementation of this proposal without further consultation implicates all three concerns of the Executive Order. Without an opportunity for further consultation, the off-

COMMENTS ON FEE-TO-TRUST/BIA NOTICE OF CONSULTATION

June 22, 2018

Page 8 of 8

reservation fee-to-trust proposal could be viewed as a unilateral decision that redistributes the balance of power between tribes and the United States through the diminishment of federal protections previously afforded to tribes.

We look forward to hearing from the Department to schedule our consultation.

Respectfully submitted,

RINCON BAND OF LUISEÑO INDIANS



Bo Mazzetti
Tribal Chairman