



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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June 18, 2018

Honorable John Tahsuda
Acting Assistant Secretary – Indian Affairs
1849 C Street, NW
Washington, DC 20240

Sent Via E-mail to consultation@bia.gov

RE: Comments on the Proposal to Revise the Fee to Trust Regulations, 25 C.F.R. Part 151

Dear Acting Assistant Secretary Tahsuda,

These comments are being submitted on behalf of the Pechanga Band of Luiseño Indians (“Pechanga Band” or “Band”) regarding the announced intent of the Department of the Interior (“Department”) to amend the Fee to Trust Regulations, 25 C.F.R. Part 151.

As an initial matter, the Pechanga Band is opposed to the draft changes to 25 C.F.R. Part 151 that were circulated in October 2017, particularly as the revisions were contemplated absent tribal consultation. Specifically, the Band is opposed to the substantive changes that were proposed in the draft: 1) changes that remove the “Patchak Patch” and reinstate the 30-day waiting period on taking land into trust; and 2) references that would appear to require mitigation agreements with state and local governments. The reinstatement of the 30-day stay on taking land into trust after a positive decision is an invitation for litigation, and creates unnecessary delays for a tribe seeking to take land into trust. Further, requiring mitigation agreements with local governments will have detrimental effects for all tribes seeking to place land into trust, regardless of the basis for such acquisitions, providing local governments with possible “veto power” over a tribe’s fee to trust application. While the Band understands that the draft revisions have been placed on hold pending the process initiated by your December 6, 2017, Dear Tribal Leader Letter (“Letter”), the Department appears to continue contemplating these previously proposed changes based on the ten questions posed therein.

Finally, based on the previously proposed draft revisions and the questions in the Letter, it appears the Department is mostly concerned with regulating off-reservation gaming. To that end, proposing revisions to the Part 151 regulations for trust land acquisitions is simply the wrong vehicle to effect such regulation. The regulations at Part 292 specifically address fee to trust applications for purposes of conducting off-reservation gaming. The Band’s position is that any proposed revisions targeting off-reservation gaming must be addressed in Part 292. The considerations being posed by the Department are too far reaching for other kinds of acquisitions, such as those applications

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seeking to restore tribal homelands, protect cultural and natural resources, and provide land for tribal community uses such as government operations, housing, and similar amenities for tribal members.

Having stated the Pechanga Band's position regarding the previously proposed revisions and the Department's misguided attempt to address off-reservation gaming in Part 151, we turn now to the ten questions posed in the Letter dated December 6, 2017.

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

The objective of the fee to trust program should be to honor the explicit mandate of the Indian Reorganization Act of 1934 and the federal government's trust responsibility to tribes by facilitating the reacquisition of land lost by tribes in the most efficient and expeditious way.

In furtherance of this goal, the Department should be seeking to identify ways to make the fee to trust process more efficient, inexpensive, and expeditious for tribes, rather than imposing undue burdens and hardships that are sure to stall, if not halt, the acquisition of tribal trust lands.

As already identified, the reinsertion of a 30-day stay pending approval of a fee to trust application will only invite litigation by local governments and outside interests who are simply opposed to the addition of tribal trust lands, regardless of the intended uses for such land. Many local governments and third-party interest groups maintain hostility toward the very existence of Indian tribes and would eagerly use this waiting period to prevent tribes from acquiring lands for a variety of necessary purposes. Adding in such a requirement places the interests of these entities above those of the tribes, to whom the Department owes a fiduciary duty and trust responsibility. Further, requiring mitigation agreements with tribes and local governments will likewise serve to delay or impede trust acquisitions as these agencies can simply hold tribes hostage by refusing to negotiate fairly, or force tribes to incur additional, unreasonable costs in order to acquire necessary lands for economic development, government purposes, and protection of vital natural and cultural resources. This is the opposite of what the Department should be working to accomplish.

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

While the Pechanga Band believes the fee to trust process generally works, we feel that improvements can be made to the process to make it easier for tribes to acquire on-reservation and contiguous lands.

The biggest complaint the Band has with respect to the process for reviewing all fee to trust applications, not just those for on-reservation acquisitions, is that it takes far too long. Applications, even for non-controversial acquisitions such as lands for the protection and preservation of natural and cultural resources, can take several years from submission to approval. Further, staff at the Bureau of Indian Affairs take an inexorably long time to review submissions due to what the Band perceives as a lack of resources. The long review process is extended by a

lack of time requirements for BIA action on applications. If the regulations are intended to improve the process they should be amended to include enforceable timelines.

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

The Pechanga Band has acquired and will continue to seek acquisition of its aboriginal lands, which are now off-reservation lands to provide government services to our people and for purposes of protecting and preserving sensitive and irreplaceable cultural resources. It is the Band's position that land acquisitions within or contiguous to the Band's Reservation pose little to no impacts on local governments or communities and therefore undue weight should not be given to negative comments from surrounding non-native communities. Pechanga believes that there should be a streamlined process for acquisitions of this nature.

When reviewing off-reservation fee to trust applications, the current regulations (25 C.F.R. §151.11) consider the proximity of off-reservation lands to a tribe's reservation, and allow for less scrutiny by the Department for nearby acquisitions. The Band believes that proximity to a tribe's existing reservation is an appropriate consideration when the Department is reviewing a fee to trust application for lands that are located near, but which are considered off-reservation, and which are for non-gaming purposes.

Applications that seek off-reservation lands should be given more scrutiny than those applications within or contiguous to a tribe's existing reservation boundaries. Accordingly, we believe that a tribe acquiring off-reservation land should be subject to a more stringent standard when the intended use of those lands is for gaming purposes.

One such standard should require tribes seeking to acquire lands for off-reservation gaming purposes to prove a direct, aboriginal tie to the lands subject to the application. In proving an aboriginal connection to a particular parcel of after acquired land, applicants should be required to show that it exercised sovereign government authority over the land through historical documentation. Subsistence use in the vicinity of the land or traversing through an area for trade or economic use should not be considered sufficient in demonstrating such a connection for gaming purposes.

With these comments, Pechanga reiterates that any proposed revisions to the fee to trust regulations that are specific to addressing off-reservation gaming acquisitions should be addressed in the Part 292, rather than the Part 151 regulations.

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

Our comments under question 3, above, are reiterated for this question.

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)?

Pechanga believes all applications should be expedited through the fee to trust process except those that seek to take land into trust for off-reservation gaming purposes. We do believe the Department needs to address the issue of off-reservation gaming applications in a meaningful manner. Again, we emphasize, the proper vehicle for such change is in Part 292, rather than the Part 151 regulations.

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

It is Pechanga's position that gaming acquisitions are appropriately given an additional level of review pursuant to the regulations at 25 C.F.R. Part 292. 25 C.F.R. Part 151 does not need to be amended to address gaming issues. However, we do believe that 25 C.F.R. Part 292 should be amended to require that tribes seeking off-reservation gaming be mandated to demonstrate in their application a direct, aboriginal tie to the land.

c. Whether the application involves no change in use?

Pechanga believes that the process should be made easier for applications that involve no proposed change in use of the property, or that are located within, or contiguous to, existing reservation land. As stated above, Pechanga has and will continue to acquire lands in order to provide services to our people, and for the protection and preservation of cultural resources, which purposes should not face additional scrutiny as there are little to no impacts on local governments or communities. Further, the acquisition of lands contiguous to (and those considered off-reservation but within our aboriginal territory) the Reservation are part of our traditional homelands and restoring those lands to our tribal trust holdings should likewise be streamlined.

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

One of the most significant advantages is the Band's ability to utilize the lands according to the needs of our community and pursuant to our own customs, traditions, and laws without being subjugated to the bureaucracy of foreign and often hostile local governments. Further, tribes should not be subject to state or local regulation as we are sovereign nations.

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

Yes, but only those applications involving off-reservation gaming applications. The Pechanga

Band believes that the current off-reservation gaming regulations inadequately address the problem of off-reservation gaming and such applications should be held to the strictest standard possible.

However, pending applications for purposes such as the preservation of natural or cultural resources, tribal government services and operations, and other non-gaming purposes should be processed expeditiously.

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

Limited weight. As an initial note, the Department owes a trust responsibility to federally-recognized Indian tribes, not state or local governments. The interests that the Department needs to consider are those of the tribes to whom they owe this unique duty, not to local jurisdictions who may be hostile to tribal interests. Tribes across the country are fighting to reacquire land that was lost through no fault of their own, and deal with state and local governments who are antagonistic to them. Tribal efforts to reclaim lands should not be hampered by undue weight third parties.

The Pechanga Band has been fortunate in recent years to be able to work cooperatively with our state and the local governments surrounding us to address concerns they may have about our fee to trust acquisitions, and all of the Band's endeavors. It is important to understand that it has not always been that way and the Band endured decades of hostility even in modern times from the surrounding community due to no fault of the Band's.

With respect to public comments, these too are often submitted by individuals and special interest groups who are hostile not just to fee to trust applications, but also the very existence of tribes. In our state, these special interest groups frequently challenge fee to trust acquisitions, as well as other tribal endeavors, often leading to substantial and unwarranted delays for tribes. The Department owes no duty to these individuals and groups and to give credence to their often racist and prejudiced positions would not only violate the express terms of the Indian Reorganization Act, but also the Department's trust responsibility owed to all tribes.

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?

Cooperative agreements between governmental entities may represent best governance practices for difficult relationships. However, these agreements should be negotiated freely by tribes and not mandated under federal regulation.

First, it is important to understand that local governments are not sovereigns on par with tribal governments and to allow local governments to have superior leverage in any matter regarding the sovereign nation of a tribe would serve as a great injustice to tribes and their great histories.

Second, mandating mitigation agreements with local governments has proven to operate at the significant detriment of tribes by providing local governments with a powerful role in the approval or disapproval of a tribe's fee to trust application. Such mandated requirements hardly seem appropriate given that local governments rarely consult with tribes before taking actions that could negatively impact the tribe.

For these reasons, we do not believe such agreements should ever be required in the fee to trust process. The Department should trust tribes will take all actions necessary depending on their particular situation with their local governments and to seek cooperative agreements when it makes sense to do so.

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

As stated at question #2, we believe BIA review of fee to trust applications should have enforceable timelines whereby lands contiguous to or within tribal reservations have a predetermined deadline for completion. Our biggest complaint regarding the current process is the long wait time even for non-controversial applications. We also believe the BIA should increase staffing for this fundamental service.

Further, we believe that requirements for on-reservation and contiguous lands should be easier, as should those applications seeking to acquire lands for natural and cultural resource protection. Applications for off-reservation gaming should be met with greater scrutiny regarding location and whether the off-reservation acquisition is within the applicant tribe's proven aboriginal lands.

Should you have any questions regarding these comments, please contact Steve Bodmer, General Counsel at (951) 770-6171.

Sincerely,



Mark Macarro
Tribal Chairman

cc: Pechanga Tribal Council
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