MENOMINEE INDIAN TRIBE OF WISCONSIN

P.O. Box 910
Keshena, WI 54135-0910

February 28, 2018

VIA ELECTRONIC MAIL: consultation@bia.gov

John Tahsuda
Principal Deputy Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Comments on Potential Revisions to Trust Acquisition Regulations

Dear Mr. Tahsuda:

Your December 6, 2017 letter requested comments on potential changes to 25 CFR §§ 151.11 – 151.12 as well as comments addressing a list of ten specific questions contained in that letter. The first questions posed in the letter is "What should the objective of the land into trust program be?" The objective of the land into trust program as stated in federal law is "providing lands for Indians."[1] This directive from Congress to the Secretary of Interior to provide lands for Indians was part of the Indian Reorganization Act, the purpose of which is "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[2]

Therefore, the objective of any regulation intended to implement acquisition of lands for Tribes must be based on the following principles:

- All regulation must facilitate the goal of acquisition, not enact barriers to acquisition.
- All regulation must facilitate the goal of developing Tribal initiative by giving deference to the Tribe's goals and interests in acquiring the land.

We do not believe that the Department's draft changes to 25 CFR §§ 151.11 – 151.12 further the principles stated above, and therefore we object to these changes for the following reasons:

1. Separate Requirements for Gaming Applications. There is no statutory basis for treating off-reservation acquisition of land for the purpose of gaming differently than acquisition for any other purpose. Adding regulatory requirements based on criteria not supported in statute acts as a barrier to acquisition. This is particularly true here where Congress and the Department have

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[1] 25 U.S.C. § 5108

[2] *Mescalero Apache Tribe v. Jones*, 411 U.S. 149, 152 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934)

already addressed special issues related to off-reservation gaming in the Indian Gaming Regulatory Act and 25 CFR Part 292.

Within the separate requirement for gaming applications is a requirement for the Tribe to provide an analysis of the effect of the gaming project on the unemployment rate on the reservation. (25 CFR § 151.11(a)(1)(ix)). In addition to there being no statutory basis for this provision, the regulation acts to impose the Department's goals over the Tribe's goals in regard to the acquisition. The Tribe's goal in regard to the acquisition may not be on reservation employment, and if it is, then this information can be provided as it relates to the Tribe's purpose and need for the acquisition.

2. Requirements for all Applications

a. Historical and Modern Connection to the Land. § 151.11(a)(2)(i) requires the Tribe to show its historic and modern connection to the land to be acquired. There is no statutory basis for utilizing historical or modern connection to the land on its own as a factor in land acquisition. Adding regulatory requirements based on criteria not supported in statute act as a barrier to acquisition. Any relevance of a Tribe's historic or modern connection to the land to be acquired should only be necessary as it relates to the purpose or need for the acquisition.

b. Consolidation of Lands. § 151.11(a)(2)(v) requires the Tribe to provide an analysis whether the acquisition will facilitate the consolidation of the Tribe's land holdings and reduce checkerboard patterns of jurisdiction. There is no statutory basis for this provision and the regulation acts to impose the Department's goals over the Tribe's goals in regard to the acquisition. The Tribe's goal in regard to the acquisition may not be related to consolidation of land holdings, and if it is, then this information can be provided as it relates to the Tribe's purpose and need for the acquisition.

3. Initial Secretarial Review. § 151.11(c) allows the Secretary to deny a land acquisition prior to any effort to comply with NEPA. Acquisition of off-reservation land into trust is already an extremely time consuming project. This provision would extend that process as NEPA compliance and review of the Tribe's application for land acquisition could not be processed simultaneously. Further, this conflicts with the purpose of NEPA, which is to help inform the government's decision-making process.

This provision also again conflicts with the purpose of the regulation which should be to acquire land for Indians. It provides an added opportunity for the Department to reject an application.

4. Thirty Day Waiting Period. § 151.12(c)(2)(iii) reinstates the thirty-day waiting period for implementing decisions to take land into trust for Tribes. This regulation places a significant barrier to the acquisition of land for Indians. Its practical effect is to allow third parties to file lawsuits seeking to prohibit Tribes from acquiring land after the decision has been made that Tribes are entitled to acquire that land. This will frustrate the entire purpose of the land acquisition. There is no legitimate reason for imposing this barrier, as the Supreme Court in *Patchak* determined that third parties are able to challenge the land acquisition after the land has been taken in to trust.

The provision that the Secretary will acquire the land in trust upon the fulfillment of the requirement of "any other Departmental requirements" makes this provision even more problematic. If a third-party plaintiff were required to obtain an actual injunction against the Department forbidding them from taking the land into trust, and the Department vigorously defended against that injunction, damage to the Tribe from this provision may be mitigated. As an example, the standard for issuing an injunction is high and includes the requirement that the person seeking the injunction provide a bond. However, if the Department is able to create other requirements that may be fulfilled prior to taking the land into trust, then there is the possibility that the Department could stipulate to not taking the land into trust until litigation is completed. In that case a third party would not need to meet the high standard of obtaining an injunction. In effect the Department would be able to overturn the land acquisition they just made.

Ultimately every regulation created by the Department becomes potential grounds for rejection of a proposed land acquisition. Regulations such as those discussed above are problematic even if the Department officials applying them have the best intentions in regard to acquiring lands for Indians. In the hands of officials that might be generally opposed to such acquisitions, they become deadly weapons to be used against Tribes.

In drafting regulations regarding land acquisition it is important that the regulations do not conflict with the statutory authority for such acquisition found in 25 U.S.C. § 5108 and are aimed at facilitating acquisition of land for Indians in a manner that is driven by Tribal, and not federal interests. The Department should start from a presumption that the land should be acquired, and focus on the issue of the Tribe's need for the land and whether the acquisition would address such need.

I would be happy to meet and discuss Menominee concerns regarding land acquisition issues at your convenience.

Sincerely,

Douglas Cox
Chairman
Menominee Indian Tribe of Wisconsin