LYTTON RANCHERIA • Lytton Band of Pomo Indians

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May 22, 2018

Via Email to consultation@bia.gov

Attn: Fee-To-Trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C St. NW
Mailstop #4660-MIB
Washington, DC 20240

RE: Comments on draft revisions to 25 C.F.R. Part 151.11 and Part 151.12

Dear Acting Assistant Secretary Tahsuda:

On behalf of the Lytton Rancheria (the "Tribe" or "Lytton"), we offer the following comments in response to the October 4, 2017 draft revisions to 25 C.F.R. Part 151.11 and Part 151.12 ("October Letter") and December 6, 2017 Dear Tribal Leader letter ("December Letter"). The Tribe does not believe that any of the revisions proposed are currently necessary for the fee-to-trust process, and that further, the revisions proposed in the October Letter would make the fee-to-trust process more costly and burdensome to tribes. For these reasons, , and as discussed further *infra*, the Department of Interior ("Department") should officially withdraw the revisions to the regulations proposed in the October Letter, and instead focus its efforts on bettering the process for tribes.

A. History

Lytton's history demonstrates the unique nature of land tenure for California tribes and why off-reservation fee-to-trust acquisition for tribes is often the only option. Based upon a rough population count taken in 1770, the Pomo people numbered upwards of 8000. By 1910, that number had been reduced to around 1200. The Pomo people historically occupied lands that stretched from the Pacific Coast, through the Russian River Valley to the Lake District. Like everywhere else in California, Pomo villages were fiercely independent and governed internally. The abundant food supply allowed for the establishment of villages of up to 1000 individuals, including craft specialists who produced specific objects and goods for a living. In the smaller communities common to California, each family group or band produced all that was necessary for survival. Further, California tribes maintained different community and governmental structures than say, the tribes in the Great Plains, which the

Federal government had previously dealt with. This was a contributing factor to much of the early land loss by California tribes.

The Pomo tribes, like many other tribes in California, were devastated by the Gold Rush and hostile State and Federal policies to Indians. This includes the failure to ratify 18 treaties negotiated with California tribes in the 1850s, which were secreted for over 50 years. It should also be noted that there were significantly more than 18 tribes/bands in California at the time – many of which were never contacted by the treaty parties. Having been denied the promised reservation lands from the unratified treaties, by the early 1900's most Indians and tribes from the central and northern California area were landless and homeless. Congress therefore enacted appropriation legislation to help purchase reservation lands for many of these Indians and tribes. The Lytton Rancheria is one such tribe that benefited from these land purchases. The Lytton Rancheria was purchased in 1926 over protests of the local white community, who did not want their children living near Indians. The Tribe's forbearers built housing and worked that land to provide for its members. Unfortunately, the hostile attitude toward tribes returned with the Rancheria Act of 1958 (and remains today to some extent). On August 1, 1961, the Lytton Rancheria was terminated.

Over thirty years later, a Federal Court determined that the termination was illegal and the Lytton Rancheria's tribal status was reinstated. Unfortunately, its land base was not restored. Even more devastating for the Tribe, the County and a local community group intervened in the litigation and required language in the settlement agreement denying the Tribe the right to return to its original Rancheria lands to recreate its community. Now, over twenty years after being restored from the illegal termination, the Tribe still remains without a homeland for its people.

B. Self-Determination policies and principles and prior attempts to revise the fee-to-trust regulations

i. Purposes of the IRA

Federal policies toward Indian tribes, while ever changing, were most often detrimental to tribes; resulting in loss of lands, culture, tribal governance, and the means for providing for their membership. The intent of the Indian Reorganization Act of 1934 ("IRA") was to address the devastation to tribes resulting from prior federal policies by providing support for tribal governments, tribal economic development, and the acquisition of lands for Indians.[1] The IRA

[1] [IRA cite]; See also Felix S. Cohen's Handbook of Federal Indian Law , Sec 1.05 (2005 ed.); *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."); *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.").

therefore reflected a radical change from a policy of divesting tribal lands under the Indian General Allotment Act of 1887, to a policy of halting the losses and restoring tribal ownership of land as was noted in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) ("Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment.") As the Supreme Court in *Mescalero Apache* discussed:

> The intent and purpose of the Reorganization Act was "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." H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934). See also S.Rep.No.1080, 73d Cong., 2d Sess., 1 (1934).

The Supreme Court has also stated:

> The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. See 48 Stat. 984, 25 U.S.C. § 461 et seq. Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. See §§ 461, 462. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership, see § 463, and for acquiring, on behalf of the tribes, lands "within or without existing reservations." § 465.

Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255 (1992).

To date, Congress has not changed this fundamental purpose of the IRA nor has the Supreme Court held – despite numerous challenges – that land should not be placed into trust on behalf of tribes under the Secretary's authority.[2] Further, there is no statutory authority or court opinion that changes this long-standing objective of the IRA. Thus, the fundamental purpose of furthering self-sufficiency for tribes remains intact and unchanged. Therefore, the Administration should not tamper with the regulations designed to effect this purpose.

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[2] *See generally, Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433, 197 L. Ed. 2d 660 (2017); *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Dir., Bureau of Indian Affairs,* 32 IBIA 309, 312 (1998); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016) *aff'd sub nom. Stand Up for California! v. United States Dep't of Interior*, No. 16-5327, 2018 U.S. Dist. LEXIS 32701 (D.C. Cir. Jan. 12, 2018); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. V. Zinke*, 2018 App. LEXIS 11297 (9th Cir. Cal. May 2, 2018).

ii. The IRA makes no distinction between on and off-reservation acquisitions

To this day, there are many land poor tribes that have small or no reservations, diminished reservations, or insufficient land base. Section 5 of the IRA was designed as broad legislation to assist tribes in building/rebuilding tribal homelands. This objective cannot be accomplished unless the land is sufficient to support tribal housing, tribal government, and economic activity promoting self-determination. Section 5 clearly imposes a continuing duty on the federal government as trustee for Indian tribes, through the Secretary of the Interior, 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 land for Indians.

25 U.S.C. § 5108.

Nothing in the IRA itself or the legislative history supports distinguishing between on- and off-reservation acquisitions. The legislative history of the IRA makes clear that one of the primary purposes of the IRA was to obtain land for landless Indians.[3] In fact, the text of the IRA and associated Congressional reports indicate that the IRA "seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands ... of an Indian council . . . ." 78 Cong.Rec. 11125. The presumption that an "on-reservation" acquisition is somehow the "preferred" acquisition is the very type of bureaucratic control and paternalism that Congress was directing the Department to move away from when it passed the IRA. The IRA was specifically intended to put tribal decisions, including decisions about trust land acquisitions, into the hands of tribes without second-guessing by the Department. *Id.* Today, tribes are more capable than ever of making those types of informed decisions and the Department should defer to tribal expertise and process all applications in the same manner regardless of location or purpose.

Indeed, the notion that "economic development" applications should be cordoned off from "non-economic development applications directly conflicts with the purpose of the IRA. "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life . . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152, *citing* H.R.Rep.No.1804. Congress *intended* the land acquisitions to facilitate all types of tribal economic development. The erosion

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[3] 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).

of this fundamental purpose through revisions to Part 151 is outside Congressional intent. The Department should not engage in the politics and rhetoric around fee-to-trust applications, but should simply process them in a uniform and efficient manner that meets the statutory requirements of the IRA (or other authorizing statute) and complies with other applicable federal law, as intended by Congress. If there is no proposed change in use of the property, then the Department should ensure that a Categorical Exclusion to NEPA requirements is adopted and efficiently applied.

iii. The "Off-Reservation" distinction was created by the Department

Until 1980, there were no federal regulations governing the land into trust process. In developing the original regulations, the Department acknowledged that some tribes did not have reservations and were thus forced to request "off-reservation" acquisitions. In fact, those original regulations did not make a distinction in criteria for on- or off-reservation acquisitions.

However, the lack of distinction of the original regulations did not last long and the Department began reviewing requests for off-reservation acquisitions in the Office of the Assistant Secretary – Indian Affairs. In 1986 and 1987, the Department attempted, unsuccessfully, to promulgate regulations which would "prohibit the acquisition in trust status of lands located outside the boundaries of Indian reservations … if the purpose of the acquisition is to establish a bingo or other gaming establishment." 120 Fed. Reg. 23560. The proposed rule was withdrawn in 1988 as a "direct contravention of the Federal policy of self-determination and self-sufficiency"… and "**overregulation.**"[4] (emphasis added) 14 Fed. Reg. 1797.

While there were guidance and policy memorandums which internally revised the fee-to-trust process and criteria, the current version of the regulations, which distinguishes off-reservation acquisitions, was not adopted until 1995. In these regulations, we see the emergence of local community concerns being given more weight in acquisition decisions. Since 1995, various Administrations have, at various times, attempted to amend the regulations and include stricter criteria (despite again having a winning record in court), none of these revisions to the regulations have been enacted. Despite the Department's efforts at adding requirements into the implementing regulations, , Congress has never amended Section 5 of the IRA to require a distinction between the processing of on- and off-reservation acquisitions nor to give any particular weight to local concerns.

C. Comments to December Letter/Questions

The Tribe does not believe that most of the questions posed in the December Letter lend themselves to developing a good consultation strategy for bettering the fee-to-trust process. Nevertheless, the Tribe has endeavored to respond with relevant information.

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[4] Despite the concerns of local governments, Federal courts continued to uphold Departmental fee-to-trust acquisitions. *See, e.g.., City of Yreka v. Salazar,* 2011 U.S. Dist. LEXIS 62818 (E.D. Cal. June 13, 2011).

i. Why trust land?

The importance of trust land for tribes cannot be overstated. Perhaps most importantly, trust land provides the tribal government the ability to exercise its territorial jurisdiction without interference from state or local jurisdictions. Tribes can then decide for themselves whether to develop the land for economic development or governmental purposes, such as housing, health care, or tribal administration. Trust land also insulates tribes from state and local taxation, can provide tribes with a limited tax base, and gives tribes the ability to protect land with historical and cultural significance. The Supreme Court has recognized that "there is a significant territorial component to tribal power."[5] In addition, many federal programs designed to assist Indian tribes are tied to trust and reservation lands – thus without an adequate land base, tribes cannot benefit from such programs.

ii. The objective of the land-into-trust program should be to efficiently facilitate the acquisition of tribal homelands, as intended by Congress when enacting the Indian Reorganization Act

The Part 151 process is used by the Department to process tribal requests for the Secretary to place land-into-trust on behalf of a particular tribe under authority delegated by a given statute. Generally, the majority of trust land applications cite to the Secretary's authority under Section 5 of the IRA. However, the Part 151 process is also used by the Department to process trust land applications under other statutory authority, such as mandatory acquisitions and discretionary tribal settlement or restoration act acquisitions.

It is concerning to the Tribe that the Department feels the need to ask about the advantages of operating on land that is in trust given the success of the IRA, the success of the Indian Self-Determination, Education and Assistance Act, and the wide range of stories from across the Country of tribal strength and recovery. Of course, Indian Country still suffers and includes some of the most impoverished, remote, and underserved populations in the country; which is why the fee-to-trust process is so crucial.

iii. Generally, the land-into-trust process could be made more efficient and timely

Generally, all aspects of the land-into-trust process could be made more efficient. Often the staffing limitations (both realty and Solicitor staff) at the Regional level or transfer of an application to the Central Office, result in unnecessary delays. One resolution to this problem is to adequately fund and train staff in all offices. The Department could also develop and follow reasonable internal timeframes for completing any bureaucratic functions necessary to making the final decision. Further, the Department should establish a timeframe for reaching a final

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[5] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

decision. These defined timeframes will provide guidance to the Department staff and certainty for the tribal applicant, while not necessitating any revisions to the regulations.

iv. Memoranda of Understanding and/or Cooperative Agreements should not be required in a land-into-trust application

The IRA does not require consideration of state and local government concerns nor does it allow the Department to deny an application because of state and local concerns. This criteria was added through the administrative rulemaking process. The Tribe strongly believes that requiring cooperative agreements outside of the NEPA process creates a "pay-to-play" scenario whereby tribes simply seeking to increase their land base are forced into unfavorable agreements with state or local jurisdictions in exchange for their support or neutrality on a land-into-trust application. Given the checker-boarding effect of the Dawes Act, many reservations have non-tribal fee land within their borders and it is simply good governance for the governments with jurisdiction over, or around those parcels, to work together for the provision of public health and safety services such as water, fire, emergency services, and law enforcement. Tribes often reach such agreements with their surrounding state and local jurisdictions over tribal land held both in trust and in fee or restricted status. While these agreements are often done outside of the land-into-trust application process, sometimes they are also reached during the NEPA review portion of the land-into-trust process to mitigate traffic or other concerns.[6] Importantly, however, these are agreements appropriately reached by contracting parties on equal footing to obtain a certain desired result in the interest of both parties. To require these types of agreements to be included in the land-into-trust process would place a tribe on unequal footing and thus subject it to either acquiescing to the demands of the other jurisdiction or foregoing the growth of their land base.

v. The United States trust responsibility and fiduciary duty flows only to tribes – not to public citizens, state or local governments

Again, the IRA does not require the Department to consider public citizens or state and local concerns when evaluating a land-into-trust application. In fact, the IRA was passed to *protect* tribes from those very interests who – much like today – sought to keep land out of tribal ownership. The only possible place to consider citizen, state, or local concerns is strictly within the NEPA review process, and even in this instance, once the environmental concerns are adequately mitigated, the citizen, state, or local jurisdiction concerns should not interfere with the fiduciary duty of the Secretary to acquire land-into-trust on behalf of the applicant tribe.

vi. Criteria already required under 25 C.F.R. Part 292 (for gaming acquisitions) should not be imported into 25 C.F.R. Part 151

When a tribe is looking to have the federal government acquire land in trust for gaming purposes, it is already subject to the Indian Gaming Regulatory Act ("IGRA") and the

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[6] *See* https://www.walkingoncommonground.org/ for many examples of intergovernmental agreements between tribes and state and local governments.

regulations which implement IGRA. Requiring tribes to provide the same information twice certainly does not serve to streamline the system. Further, much of the information required by Part 292 is not relevant to non-gaming fee-to-trust applications and adding such additional criteria only serves to further burden tribes for little or no gain.

vii. Trust land acquisitions for tribes meeting the half-blood definition should be permitted

The Department should create policies and guidelines to allow for the acquisition of trust land on behalf of Indians meeting the IRA's half-blood Indian definition where the tribe is a currently recognized tribe. This would merely be utilizing one of the definitions of Indian provided in the IRA at Section 19. The Tribe is willing to provide more input and discussion should the Department be interested.

vii. In certain circumstances, trust land acquisitions for individual Indians who are members of currently recognized tribes and meet the half-blood definition should be permitted

The Department has wrongly restricted its own statutory authority, creating a regulatory structure that prevents it from acquiring off-reservation trust land for individual Indians without a regulatory waiver. The limitation on acquisition of off-reservation trust land for individual Indians currently found in Part 151 is a matter of policy. The Department has restricted its own discretion through regulations. The Department has consistently acknowledged that "trust land acquisitions occur [under the IRA] whether or not such regulations are promulgated" and asserted that "[t]he main purposes of these regulations are to enunciate land acquisition policy and to bring uniformity into the application of that policy." 45 Fed. Reg. 62034, 62035 (Sept. 18, 1980); *see also* 66 Fed. Reg. 3452, 3453 (Jan. 16, 2001); 60 Fed. Reg. 32874 (June 23, 1995). Before promulgation of Part 151, the Department had a flexible policy in place discouraging off-reservation trust land acquisitions, but this policy could be "relatively easily altered by the deciding official when it was deemed appropriate." *Kautz v. Portland Area Director, Bureau of Indian Affairs*, 19 I.B.I.A. 305, 309 (1991). Thus, the Department may, as a matter of policy, remove its restrictions on off-reservation trust land. The specifics of such a process should be developed through an open consultation with Indian Country.

D. October Letter Draft Revisions Should Be Formally Withdrawn

While the Tribe appreciates the Department's response to the concerns raised by tribes regarding the draft revisions contained in the October Letter, the Tribe has tracked tribal rulemaking processes by the federal government for many years. The informal and somewhat unstructured offering of draft revisions to 25 CFR Part 151 contained in the October Letter is not in line with previous rulemaking procedures used by the Department. Over the past 25 years, the Department has made strong efforts to make tribal consultation meaningful and timely. Generally, the Department has engaged in a tribal input process prior to issuing draft regulatory revisions. In this case, the Department simply attached them to a letter and sent it out. The

realities of Indian Country vary from tribe-to-tribe, region-to-region. The Tribe appreciates that the Department has made efforts to conduct consultations regionally, but having read the transcripts of those consultations, and after hearing from other tribes commenting on this process, we are concerned that the Department does not truly understand the negative impact its proposed actions would have on Indian Country. As noted in the December Letter, it is more appropriate to begin this process with a broader discussion of 25 C.F.R. Part 151 ("Part 151") and the land-into-trust process rather than a truncated approach. Therefore, the Tribe requests the Department formally withdraw the draft revisions contained in the October Letter.

E. Comments to Draft Revisions in October Letter

i. The October Letter's proposed two-tier review and approval process does not respect tribal self-determination and sovereignty

Of considerable concern to the Tribe is the addition of a two-tier review and approval process in the Draft Revisions. Unilateral denial without conducting a complete review of the application will result in additional costs for the tribe – not less. A tribe whose application is denied in the first review will have to expend valuable resources to appeal the decision, which – if they succeed in overturning the initial decision – will require them to continue proceeding through the remainder of the process. Many tribes may not have the resources to sustain the application through such delay and cost and would thus be deprived of their right to homelands. Furthermore, delay is a common tactic utilized by well-funded tribal land acquisition opponents and the proposed two-tier review and approval process would provide such opponents with additional leverage, at the expense of the tribes.

Congress has recognized many times the right of a tribe to make its own decisions in the exercise of its sovereignty. If a tribe determines that placing a parcel of land into trust – no matter where located or whether that land is a "commutable" distance in the opinion of an unnamed bureaucrat – then the Department should respect that tribe's decision and process the application with all due deliberation.

ii. Reinstatement of 30-day stay before placing land into trust will increase cost for tribes requiring them to use their "limited resources" – precisely what these revisions purport to avoid

The repeal of the so-called "Patchek Patch" is contrary to the stated goal of the revisions – preservation of tribal resources. In 2012, the Supreme Court of the United States held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 567 U.S. 209 (2012) that the law does not bar Administrative Procedure Act challenges to the Department of the Interior's determination to take land in trust even after the United States acquires title to the property. Acquiring the land-into-trust immediately allows a tribe to proceed with its development plans without undue delay. It does *not* prejudice a potential challenger from filing a lawsuit challenging the Secretary's decision as that challenge can be brought for 6 years after the decision has been made. Alternatively, reinstating the 30-day period before placing the land-

into-trust *does* prejudice a tribe, which may be faced with a lawsuit brought within the 30-day period and an injunction prohibiting it from proceeding with that economic development opportunity while the challenge is litigated.

Conclusion

On behalf of the Tribe, we appreciate the opportunity to comment on the Department's draft revisions and strongly urge you to carefully consider the Tribe's concerns and Congress' intent when passing legislation to return land to tribal ownership in light of your federal fiduciary responsibilities.

Sincerely,

Margie Mejia, Chairperson
Lytton Rancheria of California