COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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Via Certified and Electronic Mail

John Tahsuda
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Department of the Interior
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Re: Comments on Potential Revisions to Part 151

Dear Assistant Secretary Tahsuda,

The Colorado River Indian Tribes ("CRIT") received your letter dated December 6, 2017 regarding potential revisions to the trust acquisition regulations at 25 C.F.R. Part 151. We appreciate the opportunity to respond to questions you posed in furtherance of consultation. Upon careful consideration, however, CRIT recommends *against* pursuing any revisions to Part 151 at this time.

In 1865, Congress set aside a reservation for the Colorado River Indian Tribes ("CRIT") to provide a permanent homeland for Indians living along the Colorado River and its tributaries. The CRIT Reservation straddles both sides of the Colorado River occupying land in both Arizona and California. Today, the Reservation is home to more than 4,400 members of the Mohave, Chemehuevi, Hopi and Navajo Tribes who are engaged in agriculture, sand and gravel operations and tourism. The Reservation encompasses the towns of Poston and Parker.

Early in the Twentieth Century, CRIT was subject to severe pressure to open its Reservation to non-Indian settlement. The Department of Interior ("Interior")—our own trustee—sold off some of the Tribe's land in Parker, Arizona to non-Indians. Interior's sale of our lands created checkerboard land ownership which complicates our law enforcement, economic development and regulatory efforts. We are mindful of this history and carefully scrutinize proposed changes to federal policy which could stymie efforts to restore and rejuvenate our tribal land base.

CRIT did not request that Interior revise 25 C.F.R. Part 151 and is concerned that revisions could undermine a duty lying at the heart of Interior's trust responsibility to tribes. To

explain CRIT's concerns in more detail, we respectfully submit these more specific comments in response to the questions posed by Interior.

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

Section 5 is a cornerstone of the United States' trust responsibility. Having lost over 80 million acres of tribal homelands cumulatively since 1881 alone, Congress enacted Section 5 of the Indian Reorganization Act (IRA)[1] to halt and reverse this devastating loss of land. Section 5 authorized the Secretary of Interior to 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."[2] Enacted over 80 years ago, Section 5 remains the federal government's primary vehicle for restoring lands belonging to tribes since time immemorial and which remain critical to our future. Trust land acquisitions are key to achieving the IRA's "overriding purpose" "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically *and economically*."[3] By restoring our tribal land base through trust acquisitions, Interior supports the continued vitality of tribal self-governance. Accordingly, the objective of the land-into-trust program should be to restore tribal land bases to the greatest extent consistent with the stated purpose of Section 5.

The intent behind Section 5 is not in question. To the contrary, Congress has revisited and amended the IRA but has never indicated any intent to change the overarching purpose of land-into-trust determinations.[4] Thus, the objective of the land-into-trust program is clear—acquire land in trust as requested by tribes to enable them to assume a greater degree of self-government according to their own objectives and priorities. As the implementing regulations for Section 5, the Part 151 regulations should not only reflect but also further this objective.

Congress has not signaled its interest in amending Section 5. Nor have tribes requested a revision to Part 151. Therefore, Interior's revision of regulations governing fee-to-trust applications is neither necessary nor desirable at this time.

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[1] 25 U.S.C. § 5103 *et seq.*

[2] 25 U.S.C. § 5108.

[3] *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (emphasis added).

[4] *See* Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, § 101,102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 et seq. (extending the reach of Section 465 to all Tribes).

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

CRIT does not have pressing concerns regarding Interior's handling of on-reservation land-into-trust applications at this time. Similar to other administrative processes that Interior undertakes, allocating sufficient funding for the BIA and the Solicitor's Office to administer the trust land acquisition program would greatly improve the pace at which Interior responds to applications. At this time, however, CRIT does not have concerns that warrant any revision to 25 C.F.R. Part 151 with respect to on-reservation acquisitions.

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

Because the devastating policies leading to the passage of the IRA deprived tribes of millions of acres and left some completely landless,[5] Section 5 clearly contemplates and authorizes the Secretary to acquire lands outside of a tribe's reservation. 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."[6] Congress's intent for Interior to acquire fee land located off-reservation on behalf of tribes under Section 5 remains unchanged today.

Despite the lack of a distinction between on- and off-reservation acquisitions in Section 5, Part 151 subsections 10 and 11 nevertheless establish different criteria for Interior's consideration of trust acquisition applications. Although the use of different criteria could be contrary to Congress' intent, the current regulations do not mandate approval or disapproval of a particular acquisition based on this on-reservation/off-reservation status—nor should they.

The myriad circumstances in which a tribe requests acquisition require a fact-specific approach to applications and belie a one-size-fits-all approach. Indeed, some tribes are landless, and some "off-reservation" acquisitions could be 25 feet from a reservation boundary. Further, for a variety of reasons, off-reservation land may more effectively achieve the objectives of the applicant tribes' governmental activity or economic development. For example, off-reservation land may encompass a sacred site excluded from the original reservation, may be located close to a tribal community in need of services, may offer natural resources necessary for economic development, or may offer a better opportunity for financing. Although Part 151 approaches the criteria slightly differently for on-reservation and off-reservation acquisitions, it still allows for a case-by-case approach that carefully balances the criteria in light of a particular tribe's circumstances and application.

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[5] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); 25 U.S.C. § 5110 ("Unquestionably, the [IRA] . . . aimed to put a halt to the loss of tribal lands through allotment . . . and tribes were encouraged to revitalize their self-government".).

[6] *Id.* § 5108 (emphasis added).

Section 5 does not require tribes or Interior to define specific instances in which Interior should approve or deny a proposed off-reservation acquisition, nor is further restriction required to fulfill Interior's trust responsibility. No revisions or additional criteria are needed at this time.

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

Please see response to Question 3. No revisions or additional criteria are needed at this time.

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)?

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

c. Whether the application involves no change in use?

No, Interior should not use different criteria and/or procedures in processing off-reservation applications based on the purpose of the application or a change in use. In enacting Section 5 of the IRA, Congress did not suggest that the Secretary should favor or discriminate against any particular land use in its determination of an application; the application need only "provid[e] land for Indians." Yet Section 151.11 already requires the Secretary to scrutinize a tribe's application for off-reservation acquisition to a greater degree than applications for on-reservation acquisition.[7] Thus, no further differentiation of off-reservation applications is necessary.

Moreover, the nexus between a tribe's economic and its non-economic goals is often a close one. Tribes request trust land for different purposes, for different uses, and under different circumstances. Vibrant tribal economies—driven by tribal business on or off the reservation—enable tribes to provide and improve the quality of basic housing, heating, nutrition, health, elder care, child care, education, foster care, fire suppression, law enforcement and the other myriad services tribal governments are responsible for providing to their members. This strong link between tribally-owned business, tribal governmental services, and tribal government's direct accountability to its membership distinguishes tribally-owned business from for-profit enterprise. The more that Interior discourages or prioritizes certain land uses over others, the less that tribes

[7] *See* § 151.11(c),(d),(e).

determine for themselves the land uses needed most, contrary to basic notions of self-determination.

In short, Section 5 does not indicate that Interior should discriminate between land uses in its consideration of off-reservation applications and doing so would be contrary to tribal self-determination.

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

The question itself seems to forget that tribes are sovereign governments, not corporations.[8] Tribes' inherent sovereignty as governmental, nor corporate, entities supports their right to exercise sovereignty over their members and their territory.[9] While trust land is not necessary to the exercise of jurisdiction over a tribe's members, trust land is fundamental to the exercise of the territorial component of both tribal and federal jurisdiction. Territorial sovereignty enables CRIT to carry out governmental priorities ranging widely from, for example: preserving land sacred to the tribe; preserving medicinal plants, traditional foods and animal habitat central to the Tribe's culture and spirituality; stewarding the health of the Colorado River; implementing hunting and fishing regulations; building tribal facilities using tax exempt debt; developing tribal business in underserved areas free from state and local taxation; delivering governmental services such as higher education scholarships and job training, transportation, child welfare, health care and elder care; regulating water use and natural resource development; and asserting civil and criminal jurisdiction.[10] Moreover, for over a century, the United States' jurisdiction over trust land facilitated its direct provision of services to tribes and has enabled it to carry out its responsibilities as trustee. In short, primary jurisdiction over trust land "rests with the Federal Government and the Indian tribe inhabiting it, not with the States."[11] Thus, trust land is fundamental to tribes as sovereign nations and their exercise of authority.

Holding land in fee offers few, if any, advantages to tribes. As an initial matter, fee land does not enable tribes to enjoy Congress's explicit exemption of trust land from state and local taxation under § 5108. More broadly, while tribes may lawfully own fee land, their ownership is more (though not entirely) akin to other non-governmental land owners if they are not entitled to exercise the full panoply of sovereign rights over fee land. In particular, unlike federal, state and local governments, a tribe could not raise revenues by taxing any activities on the land if it were

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[8] As a sovereign government, a tribe may not be "operating" anything on trust land, as land taken into trust may serve myriad purposes, some of which do not include a commercial operation, such as preservation of a sacred site.

[9] *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[10] In places where tribal land has fallen out of trust, checkerboard jurisdiction poses extreme challenges to consistent and effective service delivery, particularly law enforcement, environmental regulation and land use management.

[11] *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (1998).

not taken into trust.[12] Moreover, where state and local governments retain territorial jurisdiction and civil regulatory or criminal jurisdiction over the fee land, tribal governments would also lack the authority and ability to govern or directly respond to the needs of their tribal members or employees who are living or working on that land. In short, a tribe's decision whether to apply for a trust acquisition is not subject to the same cost-benefit analysis that a corporation might employ.

Regardless, tribes are not—and should not be—required to justify why land should be held in trust, as opposed to fee status.[13] Neither Section 5 nor the current regulations require an applicant tribe to "demonstrate the need for additional property to be held in trust – just the need for additional property."[14] In short, if a tribe has decided that it wishes to place initial or additional land into trust, the federal government should under no circumstances require a tribe to explain why it does not wish to leave it in fee status.

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

Tribes with pending applications should have the option to decide whether the existing regulations or revised regulations will apply to their application. The majority of tribes have limited capacity and resources with which to develop applications for land-into-trust. Imposing revised regulations on pending applications will cause tribes affected by the revisions to go back to the drawing board and may delay tribal projects slated for newly acquired trust land through no fault of the tribe. Tribes will be forced to spend additional time and resources to amend their applications, diverting funds from other pressing governmental priorities. Such a retroactive application may also further exacerbate the current backlog of applications at Interior. If Part 151 is revised, Interior should permit a tribe to decide which regulations should apply to its pending land-into-trust application.

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

Question 8 reflects Interior's intent to balance these interests, however, the text of Section 5 does not mention the concerns of state and local governments or any need for Interior

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[12] *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) ("the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management").

[13] *See Pres. of Los Olivos and Pres. of Santa Ynez v. Pacific Reg'l Dir.*, BIA, 58 IBIA 278, 314 (2014)).

[14] *Pe'Sla Property* at 12. *See S. Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005) (finding that it "would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in a particular circumstance.").

to "balance" the interests of tribes with those concerns. To the contrary, Chapter 45 is entitled "Protection of Indians and Conservation of Resources." The chapter's provisions do just that: prohibit allotment (§ 5101), restore tribal ownership of surplus lands on Indian reservations (§ 5103), authorize Interior to acquire interests in lands and water rights (§ 5108) and proclaim new reservations (§ 5110). Section 5 does not assign states or local governments any rights or interests in a trust land determination. To the extent that any balancing occurs, courts have found that an economic benefit to a tribe arising from a trust acquisition outweighs impacts on state or local governments.[15]

Indeed, any revision to Part 151 that gives greater influence to states and local governments risks departure from the United States' fiduciary duty to tribes and Congress' intent in Section 5.[16] Prior to the IRA's enactment, Congress' prioritization of the interests of non-Indian settlers, local governments and states over the wellbeing of Indian tribes motivated the sale of "surplus" land on Indian reservations and the General Allotment Act.[17] The devastating loss of tribal lands resulting from these policies led to their demise[18] and prompted Congress to enact Section 5.[19] Thus, Congress was acting in its fiduciary capacity as trustee when it enacted Section 5. The United States also assumed the solemn fiduciary obligations not only "to ensure the tribes' continuing integrity as self-governing entities within certain territory" but also to "insulate[] it from state interference."[20] This trust relationship between tribes and the United States is unique, and these responsibilities are not owed to states or local governments.

Still, Part 151 already recognizes state and local governments' concerns and ensures that they are heard. In particular, § 151.10 requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" for on-reservation acquisitions. Section 151.11 requires consideration of the location of the land relative to state boundaries and the relative distance between the tribe's reservation and the land to be acquired for off-reservation acquisitions. Subsection (d) further requires the BIA to notify the state and local governments having regulatory jurisdiction over the land to be acquired and invites their comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. Interior is then required to give "due consideration . . . to timely submitted comments by interested parties."[21] Ultimately, however, "[S]tate or local governments do not define the Tribe's need, or lack therefore, for land."[22] Thus, Part 151 already adequately accounts for non-tribal interests. No further consideration or weight is necessary.

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[15] *S. Dakota*, 423 F.3d at 802 (8th Cir. 2005); *Sauk Cty. v. U.S. Dep't of Interior*, No. 07-CV-543-BBC, 2008 WL 2225680, at *3 (W.D. Wis. May 29, 2008).
[16] *Worcester v. Georgia*, 31 U.S. 515, 555 (1832).
[17] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ["COHEN'S"] §1.04 at 71-79 (Nell Jessup Newton, ed. 2012) (hereinafter COHEN'S HANDBOOK).
[18] *See* 25 U.S.C. § 5101.
[19] COHEN'S HANDBOOK at 79-82.
[20] COHEN'S HANDBOOK at 210.
[21] *See Vill. of Hobart, Wis. v. Midwest Reg'l Dir.*, 57 IBIA 4, 13 (2013).
[22] *Pe'Sla Property* at 13 (citing *Sauk Cty.*, 2008 WL 2225680, at *3.

In short, Section 5 requires the Secretary to prioritize tribes' need to restore their land base, not to "balance" tribes' needs with countervailing interests of states and local governments to whom the United States owes no special duty.

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?

Intergovernmental MOUs between tribes, states and local governments should not be added to the regulatory criteria for off-reservation trust acquisitions for several reasons. First, as Section 5 of the IRA and Part 151 currently reflect, the acquisition of off-reservation trust land should be determined by the needs of a tribe for additional land—period. Trust land acquisitions are part of the fulfillment of the United States' trust responsibility to tribes and are an entirely separate matter from a tribe's exercise of its sovereign right to enter into an intergovernmental MOU with a local government or state.

Second, MOUs develop in various contexts and at various times and can cover both fee and trust lands. They are sometimes developed to ameliorate the effects of checkerboard jurisdiction or to ensure the provision of water or emergency services to existing trust lands or tribally-owned fee land. The change in status from fee to trust land could also eliminate the need for an MOU. As a result, because it is a tribe's choice whether and when to enter into an MOU, MOUs should remain distinct from Interior's trust responsibility to acquire the land in the first place.

Third, a requirement that a tribe have an intergovernmental MOU for an off-reservation acquisition would permit states and local governments to interfere with the federal government's primary duty to provide land to tribes. Intergovernmental MOUs would enable local and state governments to influence Interior's acquisition determination and to exact compromises from a tribe contrary to its interests in order for the application to proceed. Worse yet, an MOU requirement would penalize and further delay the applications of tribes facing the most intractable issues with neighboring jurisdictions. Interior has previously cautioned that "it would be nonsensical to apply the IRA, an act designed to remedy repudiated policies aimed at destroying tribal governments, in a manner that frustrated the very purpose of restoring tribal homelands to the tribes that survived those repudiated policies."[23] Interior should not require MOUs as part of an application for off-reservation trust land.

[23] *Pe'Sla Property* at 7.

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

CRIT recommends that Interior rescind its Letter to All Regional Directors, dated April 6, 2017 delegating authority for off-reservation land-into-trust acquisitions under 25 CFR § 151.11 to the Acting Assistant Secretary – Indian Affairs and the Acting Deputy Secretary for the Department of Interior. Despite the log jam of applications that Interior's decision will cause, the letter did not provide any basis for its decision or mitigate the consequences.

Maintaining regional office's authority in the trust acquisition process ensures the most efficient use of the federal funding and human resources. Regional offices are most familiar with the unique circumstances of each tribe and are in regular contact with tribal leaders and staff. Regional offices are therefore better positioned to effectively resolve issues that arise during the land-into-trust application process. The regional offices can obtain direction and approval on complex or controversial issues that arise from the Office of the Solicitor. But not all off-reservation applications, indeed, not all off-reservation applications for gaming, are complex or controversial. Interior should avoid a one-size fits all approach to a problem which accompanies only a fraction of applications.

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Thank you for the opportunity to provide comments on this critical issue to all tribes. While CRIT appreciates Interior's intent to improve the land-into-trust process, we do not believe that any revisions are necessary at this time.

Best regards,

Acting

Keith Moses
Acting Chairman, Colorado River Indian Tribes

cc: Tribal Council