

**Written Comments
of the
Picayune Rancheria of Chukchansi Indians

Fee-to-Trust Regulations at 25 C.F.R. Part 151**

The Picayune Rancheria of Chukchansi Indians thanks the Department of the Interior (DOI) for holding several consultation sessions on the proposed revisions to DOI's existing fee-to-trust regulations. We also appreciate this opportunity to provide written comments.

The Picayune Rancheria of the Chukchansi Indians (PRCI) speaks as one of dozens of California tribes who have very small reservations, due in large measure to the state's historical campaign to completely eliminate the useful land base of California tribes, efforts the federal government has frequently not resisted. As a consequence of decades of detrimental policies, PRCI and many other California tribes now struggle with a dire need for trust land for every function of tribal government - to provide housing for tribal families, space to build schools, facilities to serve meals to our elders, space to build government services buildings, and parcels that can be utilized for non-gaming economic development projects.

At PRCI, we experience another unique and compelling need for trust land. The Tribe is sometimes asked to accept possession of our ancestor's remains from non-tribal individuals in our region who have acquired the remains in a variety of ways, frequently by inheriting the remains from a relative who was a "collector." This is difficult work for tribal leaders. We receive the remains under unpleasant circumstances and feel a spiritual obligation to take care of these ancestors. At PRCI, the pain is exacerbated by our current lack of an established location, on trust land, where these remains can be properly buried and remain forever undisturbed. PRCI needs trust land to provide our Tribe with the peace of knowing we have done our best to properly care for these returning ancestors.

In the context of the significant unmet needs of PRCI and other California tribes, the Federal government, in the exercise of its trustee relationship, should establish a fee to trust process that is as efficient, transparent, fast and inexpensive as possible. At the same time, because we have seen the significant detrimental impact that off-reservation gaming acquisitions under the two-part determination process can bring, it is the position of PRCI that a separate Part 151 review process for those acquisitions is necessary.

Non-Gaming Fee To Trust Applications:

The BIA has consistently experienced severe backlogs in its review, processing and approval of fee-to-trust applications. In the opinion of PRCI, this is a consequence of inadequate staffing; the staff shortage in turn reflects the reality that federal budgets routinely ignore the needs and priorities of Indian Country. Another factor contributing to the backlog is the cumbersome NEPA process.

In our experience, the underfunding and understaffing at DOI and BIA in California has caused a frustrating backlog in the review of fee to trust applications pending before the Pacific Regional Office. Although this problem has been obvious for years, we are not aware of any current plan for addressing the backlog. Equally troubling, the backlog appears to be linked to the GIS and the Solicitor's work, both of which are performed by DOI divisions outside of the Pacific Regional Office. Thus, the Pacific Regional Office has no real leverage to address delays.

The BIA has long failed to budget and staff its field offices in a manner sufficient to manage the volume of work required. Instead, BIA has budgeted and staffed based upon little more than historic funding levels. Until this underlying problem is addressed, any proposals intended to speed up review of non-controversial fee-to-trust applications under Part 151 are not likely to accomplish the goal.

BIA could begin to address this by assigning a specific group of BIA staff to work exclusively on off-reservation gaming proposals. This would free up existing Regional staff to address less complicated and less controversial fee to trust applications. Additionally, we see no reason why non-Sacramento GIS specialists and Solicitors cannot perform the required work to assist the Pacific Regional Office when the Pacific Region experiences a backlog.

PRCI believes that giving state and local governments an expanded role in fee to trust approvals is unwarranted and is not consistent with the federal government's trustee relationship with tribes. Enhancing the power of non-tribal governments will not only increase the cost of all fee to trust applications, but will also increase the frequency of anti-tribal, anti-BIA litigation. For example, the plan to require a tribe seeking an off-reservation acquisition to enter into an agreement with local government, or explain why it has not reached such an agreement, adds a significant hurdle for tribes seeking to acquire off-reservation land for non-gaming purposes. Worse yet, the proposed thirty (30) day delay between BIA approval and the recording of trust title gives opponents more time to file litigation intended to block the acquisition.

History demonstrates that when a non-Indian government gains an expanded role in an Indian land decision, they also gain power they should not have, thereby jeopardizing the interests of the tribe. The BIA is familiar with the demands that local governments have imposed on tribes in past fee to trust land acquisition and land exchange situations. The BIA is also well aware that Tribes, BIA, DOI and even the United States, have been subjected to costly litigation filed by local governments seeking to gain concessions from tribes. We are therefore opposed to any proposal that would enhance the ability of state and local governments to challenge tribal fee-to-trust applications.

Additionally, DOI's proposal lacks uniform standards for determining when a tribe's explanation of its inability to reach agreement with a local government is sufficient. Will this merely depend on who reads the specific tribal response, or on how vigorously a particular local government complains? The expanded role granted to local governments will tip the scale against tribal applicants, even in those instances where the tribe is willing to address legitimate local concerns. The proposal enhances the ability of local governments to squeeze money and other concessions from tribes, and should be revised to eliminate that disadvantage.

We also recommend that language be included to allow the Secretary and BIA staff to rely on the work of tribally funded experts who meet certain qualifications. Currently, too much time is spent by BIA staff who duplicate the work performed by qualified title companies, environmental specialists, historians and anthropologists. Unless the work of those experts is challenged, the BIA staff should, absent good cause, be allowed to accept those findings as complying with the requirements of Part 151.

Protracted delays in the processing and approval of non-controversial trust acquisitions have a significant cost. Tribes frequently lose out on business opportunities and federal funding for important government services and programs. For example, a tribe cannot build HUD homes unless it has an adequate parcel of trust land, and the tribe similarly cannot wait two years or more for a trust land approval to take advantage of a business opportunity or expend a federal grant. Thus, any proposed changes in Part 151 should be directed toward speeding up the process for non-gaming acquisitions and lowering the cost of acquisitions for both the Tribe and the BIA.

Additional NEPA Burdens:

The BIA's current and proposed 151 regulations have no clear explanation of the applicable NEPA requirements. In California, the BIA's NEPA interpretations have become far too stringent and far too costly, in what appears to be an effort to mirror the inapplicable California standards. Currently, the Part 151 NEPA requirements are interpreted differently from one BIA Region to another. It would be more equitable to establish a uniform, pro-tribal interpretation of NEPA requirements for all BIA regulations and across all BIA regions.

NEPA studies for non-controversial, non-gaming fee-to-trust applications are now costing the tribes as much as the land itself in some cases, creating a disincentive to important community development in Indian Country. While PRCI feels strongly about the need to protect the environment, that does not change the fact that NEPA has become far too political. DOI should address this problem, both within the Department and where necessary with the Congress. Additionally, the ambiguity in the NEPA requirements has allowed virtually any NEPA-related action or approval by BIA to be challenged in court.

PRCI recommends that NEPA approvals for non-controversial projects like historic and wilderness sites, housing developments, governmental buildings and small businesses should be straightforward and more cost-effective. Cumbersome NEPA requirements are an unnecessary impediment to progress in building a tribe's community and its economy. States and local governments already use BIA's unclear, inconsistent and unnecessary NEPA requirements to carve out more influence for themselves, and to extract concessions. Unfortunately, the DOI proposal does nothing to reverse this trend.

Off- Reservation Gaming Land Applications:

PRCI agrees with the position that off-reservation gaming proposals should be assessed differently from off-reservation acquisitions for non-gaming purposes, as off-reservation gaming triggers a completely separate set of issues, impacts and trust responsibilities. Additionally, in the opinion of PRCI, off-reservation gaming under the two-part determination process should not be considered a right, but rather should be viewed as a conditional opportunity.

The Congress had the political support to enact IGRA because its proponents could show that on-reservation Indian gaming, and Indian gaming on contiguous lands, would increase opportunities for achieving tribal self-sufficiency. Congress added the post-1988 Indian land limitation to IGRA, and carved out limited exceptions for post-1988 lands for newly recognized tribes and lands acquired as a result of an Indian land claim.

The inclusion of a post-1988 land limitation and the establishment of the two-part determination process as a conditional exception, demonstrates how Tribes, Congress and DOI were thinking about off-reservation gaming when IGRA was passed. The history of the Act reflects a recognition that decisions about the scope of permitted gaming, the role that various state officials would have in compacting, and the question of whether off-reservation gaming would be allowed, would vary from one state to another.

Today, the approval of an off-reservation gaming trust land acquisition under the two-part determination process requires, at a minimum, three separate procedures: the Part 151 process, the Part 292 exceptions, and NEPA compliance. Each has different standards and sub-standards that (under BIA's existing regulations) often overlap and sometimes conflict.

BIA's application of the inconsistent processes frequently results in the separate rules being blurred into a single decision: a final EIS or a final two-part determination. For this reason, it is somewhat disingenuous for BIA to propose amending the gaming language of the Part 151 regulations, without also examining and revising its existing Part 292 regulations and NEPA requirements. Since the three processes are so frequently overlapped, DOI would be wise to consider streamlining the Part 151, Part 292 and NEPA regulations and policies.

As a practical matter, under the three sets of regulations that factor into a two-part determination, it is often the case that other Tribes who can demonstrate a direct and detrimental economic, social, legal or political impact from another tribe's two-part decision, are afforded only a limited and conditional role in the two-part determination process. They have only limited input under the NEPA process, and virtually no role at all under the Part 151 process.

This remains true even though the creation of an off-reservation gaming right can, and often does, upset the balance of state/tribal gaming relationships across the entire state, with consequences that can include: (1) impacting future tribal agreements with local governments; (2) leading to future off-reservation gaming proposals at undefined locations; (3) adversely impacting existing tribal on-reservation operations and investments; and (4) reducing tribal gaming revenue contributions to various state and local accounts. The federal government should exercise a higher degree of stewardship in carrying out its trust responsibility to those tribes who will be impacted by an off-reservation gaming project. In the view of PRCI, the trust relationship will not be improved under the proposed amendments.

For example, BIA has defined "nearby tribes" that it will consult with under its Part 292 regulations, as those tribes located within a 25-mile radius of the proposed site. But by overlapping its Part 151, Part 292 and NEPA processes, the BIA overlooks the federal government's trust responsibility to any other tribe who will feel one or more of the impacts referenced. The "25-mile radius" that BIA currently uses in various parts of the Part 292 regulations originated as an attempt by the Agency to limit the non-Indian governments that could exercise "interested party" status in a Part 292 decision. It was not intended to replace or avoid the careful balancing of the trust responsibilities that the BIA has to multiple tribes impacted by an off-reservation gaming decision.

BIA has improperly defined the term "impacted tribes" in its Part 292 process, and has failed to consider the impacts to tribes in its Part 151 process. It has also failed to establish uniform and predictable standards that DOI will use to decide when a two-part determination creates conflicting trust responsibilities, or explain the steps DOI will take when conflicting tribal interests exist. The current consultation process presents an opportunity to address those policy gaps.

Finally, when DOI takes land into trust for off-reservation gaming purposes or makes a two-part decision, it must, per the Supreme Court: "... cogently explain why it has exercised its discretion in a given manner." This requires that the "... agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" The explanations currently provided fall short of satisfying the Court's requirement.

In the recent experience of PRCI, the tribe we did not receive the required explanation from the agency representing our federal trustee. Instead, we received a scant two paragraphs indicating that the BIA had, without examining our existing gaming operation or our existing financial obligations, concluded that our on-reservation facility could withstand the competition of a North Fork Band's off-reservation casino. BIA reached this decision even though the proposed off-reservation casino will make it impossible for PRCI to service our existing debt, force us to lay off hundreds of employees, many of whom are

members of this tribe, leave us with no revenue whatsoever to fund even basic tribal programs and services, and force us to again be dependent on federal funding.

The BIA's North Fork off-reservation gaming decision has also encouraged a number of other tribes in our state to propose additional off-reservation sites, encouraged local governments to demand the concessions that North Fork has agreed to, and forced non-Indian owned gaming interests to file suit against Indian gaming interests. Each of these outcomes represents an "impact" that has not been adequately addressed.

Finally, approval of a 151 off-reservation gaming fee to trust application before the two-part determination process is completed, and before the state has an opportunity to determine if it is willing to allow gaming on the site in the first place, also places unfair and inadvisable pressure on everyone participating in the two-part determination process at the state, federal and tribal level. This is clearly evidenced in the cases of the North Fork's and Enterprise's off-reservation acquisitions. In both of those instances, the land was taken into trust before the two-part determination was made, and before the state had the ability to reject the use of the site for gaming under the applicable state law. This is not the way this process was intended to work, and this approach needs to be rejected as a matter of federal policy.