



Tuolumne Me-Wuk Tribal Council

Post Office Box 699
Tuolumne, California 95379

Telephone (209) 928-5300
Fax (209) 928-1677

July 2, 2018

On behalf of the Tuolumne Band of Me-Wuk Indians, we do hereby submit the following comments in response to the Department of the Interior's (Department) December 6, 2017 Dear Tribal Leader Letter (DTLL) proposing a broader discussion on the direction of updates to Part 151.

In general, the tribe opposes any changes that would:

- Increase burdens on applicants, including the increase of time it takes to process an application;
- Authorize increased deference to state and local governments during the application process;
- Invite challenges to a final determination;
- Diminish the Secretary's authority or responsibility to take land into trust for Indians; or
- Otherwise frustrate the land into trust process.

That being said, we appreciate the Department's willingness to withdraw its Consultation Draft included in its now-withdrawn October 4, 2017 Dear Tribal Leader Letter. The Tribe also appreciates the Department's broadened consultation on the off-reservation fee to trust process. However, we reiterate our strong opposition to proposed revisions to 25 C.F.R. Part 151 (Part 151) and again ask that the Department formally withdraw its efforts in this area, given the overwhelming opposition from tribes during consultations. As Secretary Zinke often states, tribal sovereignty ought to mean something. Accordingly, the Department's action on this issue must respect the sovereign tribal nations' opposition to this proposed regulatory review process.

We also note strong concern with Departmental statements at consultations that the rulemaking is warranted to make final land into trust decisions more defensible in litigation. There is no litigation justification for changes to Part 151. The Supreme Court and courts of appeal have unanimously and consistently upheld both the Department's authority to take land into trust for tribes and the particular decisions under the factors set forth in Part 151. In fact, the Department of Justice has repeatedly defended Interior's land into trust process, citing to the universal approval by the courts of both the statute and regulations. The consistent and clear weight of the case law demonstrates that there is no litigation justification for changes to Part 151. See *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005); *Confederated Tribes of Grand Ronde Community v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc) *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379, (2009); *Upstate Citizens for Equality v. U.S.*, (2nd Cir. 2016); *South Dakota v. Interior*, (8th Cir. 2007) *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, (9th Cir. 2018); *United States v. Roberts*, [185 F.3d 1125](#) (10th Cir. 1999).

If the Department pushes forward notwithstanding the overwhelming opposition expressed by tribes nationwide, we strongly suggest that this regulatory review be suspended until the Senate confirms a new Assistant Secretary-Indian Affairs (AS-IA), and the new AS-IA has had an opportunity to meet with tribes. This is particularly important since any efforts to revise such an important tool for tribal governments should be developed with full participation by the Senate confirmed AS-IA, and only after much discussion and feedback from tribes.

In response to the most recent DTLL which includes 10 questions for tribal comment. The questions are broad and intended to solicit suggestions and thoughts from across Indian Country on the Department's fee-to-trust process, in particular the Department's off-reservation acquisition process. We now address each of those 10 questions.

1. WHAT SHOULD THE OBJECTIVE OF THE LAND INTO TRUST PROGRAM BE? WHAT SHOULD THE DEPARTMENT BE WORKING TO ACCOMPLISH?

The Department's current land acquisition policy contemplates broad flexibility for acquiring land. 25 C.F.R. Part 151.3, *Land Acquisition Policy*, states land in trust applications must be approved by the Secretary and made pursuant to an authorizing act of Congress (often the act cited for acquisitions is the IRA). Further, subsection (a) of that Part addresses land acquired in trust for a tribe, and subsection (b) addresses land acquired in trust for an individual Indian.

With respect to land acquired for a tribe, the regulations list three categories of acquisitions:

- 1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
- 2) When the tribe already owns an interest in the land; or
- 3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3. In other words, off-reservation acquisitions must be made pursuant to lawful statutory authority, and where either: the tribe owns an interest in the land; or the Secretary determines the land acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." *Id.* at (a)(2)-(3). It makes sense that when a tribe acquires an interest in land the Department should move swiftly when requested to acquire that interest in trust on behalf of the tribe.

Internally, the Department should work to prioritize fee to trust applications through this Administration's policies toward Indian tribes. The Department should begin by setting a goal of restoring more than 500,000 acres during this Administration. This would include providing the necessary resources and tools to the Regions, working directly with tribal applicants, and providing proper training in trust land title review to the Solicitor's Office where needed. Often times, when tribes discuss trust acquisitions, they find that different BIA Regions and Solicitors Offices will have inconsistent approaches to the regulations and NEPA requirements for instance. The Department should strive for more uniformity, through increased staffing and training, and should also look to the Regions that process trust acquisitions most efficiently to help develop guidance and training.

2. HOW EFFECTIVELY DOES THE DEPARTMENT ADDRESS ON-RESERVATION LAND-INTO-TRUST APPLICATIONS?

The Department's on-reservation trust acquisition process is sufficient. Tribes appreciate the consideration of contiguous lands as on-reservation acquisitions and encourage the Department to continue treating contiguous lands in that manner.

In addition, former treaty lands, as well as ancestral and traditional homelands should be treated as on-reservation acquisitions as well. Some tribes do not have a reservation because a treaty was abrogated or never ratified by the Senate. Acquisitions for those tribes should be treated as on-reservation so long as they are within that treaty area. Tribes in each region have been devastated by past federal land policies that displaced them from their ancestral homelands in favor of non-Indian settlement. While these policies cannot be reversed and tribes made whole, the fee-to-trust process functions as a tool for tribes to rebuild their homelands and recover from land policies that failed American Indians and Alaska Natives.

The review under the National Environmental Policy Act (NEPA) is perhaps one of the most costly and time-consuming facets of on-reservation acquisitions and the Department should explore ways to streamline this process, including categorical exclusions if possible. Based on the Department's long history of processing trust acquisitions, the Department should categorically exclude all on-reservation applications from NEPA. Also, where the Tribe is already approving its own leases under the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act, or otherwise under Title II of the Indian Trust Asset Reform Act (ITARA), it should be able to use its Department-approved environmental review process in lieu of federal environmental review for on-reservation trust applications as well.

Further, there should be an automatic presumption favoring acquisition of on-reservation lands, rather than a tribe needing to prove a need and purpose for the land as with respect to off-reservation acquisitions. This would rightfully favor tribal civil regulatory jurisdiction and help streamline on-reservation acquisitions.

3. UNDER WHAT CIRCUMSTANCES SHOULD THE DEPARTMENT APPROVE OR DISAPPROVE AN OFF-RESERVATION TRUST APPLICATION?

Many tribes had great suggestions with respect to this question in the consultations. For example, the Pala Band of Mission Indians stated that when a tribe purchases lands in their ancestral territory the application should be fast tracked for approval. This is consistent with the current regulations, as discussed above, which state that land should be acquired in trust where: (a) there is statutory authority to do so; and (b) if off-reservation, where either the tribe owns an interest in the land; or the Secretary determines the land acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3 (a)(2)-(3).

In addition, if the applicant tribe presents a well-supported economic development plan that details how revenue generated from that plan will help supplement dwindling federal resources, the Department should act expeditiously to approve such acquisitions even if the distance of the acquisition is far from the tribe's reservation or homelands. This approach is already codified in the regulations but warrants mention here. We suggest that training and additional guidance in the BIA's Fee to Trust Handbook could address this suggestion. Further, it goes without saying that where the Tribe and the state and local governments collectively support the acquisition, it should be fast tracked for approval.

4. WHAT CRITERIA SHOULD THE DEPARTMENT CONSIDER WHEN APPROVING OR DISAPPROVING AN OFF-RESERVATION TRUST APPLICATION?

The Department should continue to use the same criteria for consistency purposes. The existing regulations have been in place for some time now, they work, and the Regions and tribes have grown comfortable with their processes and requirements.

In short, tribes do not need additional changes to an already complicated system unless those changes are truly going to advance trust acquisitions quickly and more efficiently

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 healthcare, 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. The criteria for off-reservation applications should not be changed. With respect to 3 (a), (b), and (c) we submit that these questions are largely NEPA questions. The NEPA analysis must analyze the proposed use and determine whether there are any significant effects to the human environment which would affect Interior's decision to acquire the land in trust status. That being said, the NEPA analysis for (a) and (b) are sometimes time-consuming and inject uncertainty that discourages investment in Indian country.. However, depending on the land use at the time of the request for trust status, (c) could often qualify for categorical exclusions thereby reducing the costs associated with NEPA compliance and significantly speeding up the acquisition process.

However, if Interior is considering changes to this framework, it should strike the current language at 25 C.F.R. § 151.11(b) and replace it with explicit language that states that "as the intended economic benefits of the acquisition to the Tribe increase, the Secretary will give lesser weight to concerns raised pursuant to paragraph (d) of this section." This would be consistent with Interior's trust relationship to Indian tribes, BIA's policy of promoting greater economic sufficiency for Tribes, and the congressional intent of the Indian Reorganization Act. Further, as Tribes are growing their citizenry, the federal budget supporting Indian Affairs has remained relatively stagnant. For this reason, Interior should strongly support any efforts to bolster tribal economies, including championing trust acquisitions, both on-reservation and off-reservation, that help tribal economies.

Also, in consideration of Interior's trust responsibility to Tribes, and the BIA's policy toward promoting self-determination and strong tribal economies, Interior should never deter from its policy of promoting stronger economies of tribes under any circumstances. By stating that as the distance of an acquisition from a Tribe's homeland increases, its economic justification for the project will face more scrutiny and second-guessing, Interior creates a framework where tribal economic development projects become arguably less relevant as the distance increases from their homelands. Sometimes, for instance, a tribe may receive lands through gift or donation, which are

situated further from the tribe's reservation than usual off-reservation acquisitions, but still present great economic opportunities for the tribe. In these instances, the tribe's proposed land use should not be any less relevant if it helps to supplement dwindling federal resources in any way.

6. WHAT ARE THE ADVANTAGES/DISADVANTAGES OF OPERATING ON LAND THAT IS IN TRUST VERSUS LAND THAT IS OWNED IN FEE?

This question is not helpful to the Department's understanding of this issue. It seems to conflate a tribal lands issue that is outside the scope of the Part 151 process. For this reason, we do not address this question.

7. SHOULD PENDING APPLICATIONS BE SUBJECT TO NEW REVISIONS IF/WHEN THEY ARE FINALIZED?

No, but tribes should be given the option to proceed under any new revisions if they wish. In most circumstances, tribes have already placed significant effort, time, money and other contributions into existing applications submitted under the current regulations and thus should not be expected to begin anew under future revisions.

8. HOW SHOULD THE DEPARTMENT RECOGNIZE AND BALANCE THE CONCERNS OF STATE AND LOCAL JURISDICTIONS? WHAT WEIGHT SHOULD THE DEPARTMENT GIVE TO PUBLIC COMMENTS?

First, we note that the IRA does not require that the Secretary balance the concerns of state and local jurisdictions. However, with respect to this question, we feel the current regulations adequately address the concerns of state and local jurisdictions, and the concerns of the public as well. As many tribes stated, it would be a serious mistake to afford increased input to state and local jurisdictions and the public with respect to tribal trust acquisitions.

Current regulations already require Interior to actively engage with state and local governments to solicit comments on a trust acquisition's potential impact on their respective regulatory jurisdiction; real property taxes and special assessments. 25 C.F.R. § 151.11(d). This process is sufficient to address pertinent concerns by state and local governments, and also to adequately address the interests of the citizens which they represent. In addition, any necessary environmental review under NEPA is subject to public comment and such comments are subject to meaningful consideration by Interior.

Further, tribes expressed concern that state and local governments, if afforded increased input in the process, would not act in good faith. In most instances, tribes have purchased valid legal title to the land from a willing seller and should not be hamstrung from asserting full regulatory authority over the land if the applicant tribe deems it in its best interest to do so.

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?

We agree with the sentiments expressed by an overwhelming amount of tribes that MOUs are the prerogative of the sovereign entities involved, and to require a showing of an MOU would be paternalistic and potentially creates an effective veto for state and local governments over trust acquisitions.

That being said, the Department has clarified that it does not intend to create a veto situation by referencing MOUs in this process but is instead trying to pinpoint showings that would expedite applications. Even if this is the intent of this Administration, it may not be the effect. More likely, any mention of MOUs in the Part 151 regulations will be seized upon by those opposed to trust acquisitions and will lead to administrative and court challenges, which may not bode well for tribes.

10. WHAT RECOMMENDATIONS WOULD YOU MAKE TO STREAMLINE/IMPROVE THE LAND-INTO-TRUST PROGRAM?

The April 2017 Departmental memorandum removing off-reservation land acquisitions from the BIA Regions and transferring those decisions to Central Office should be rescinded. The local BIA Realty offices know their tribes the best, as well as the surrounding communities. For this reason, it makes the most sense to allow the Region to continue to process such applications. In this manner, Department headquarters can focus its efforts on the small number of acquisitions that are out of the ordinary, or otherwise controversial in nature.

The Department should refrain from making any changes to the current *Carciari* M-opinion. While the M-opinion adds an additional layer of review for certain applications, it is a necessary tool in light of the *Carciari* opinion and is a good example of how the Department can actively engage with tribes to fulfill the trust responsibility.

The Department should not reinstate the 30-day stay period between when a decision is made to acquire land in trust and when the Department actually acquires the land in trust. As stated repeatedly across Indian Country, this policy frustrates tribal interests by encouraging often frivolous challenges to trust acquisitions that take years to resolve, all the while keeping the land out of trust and subjecting the tribe to state and local taxes throughout the duration of the challenge. For example, in a Listening Session with the Department, the Swinomish Tribe detailed its failed attempt to develop a marina in Washington State. It stated that in 1972, the Tribe proposed the idea of developing a marina, but that from 1997-2007 this acquisition was in litigation, which the Tribe believed to be frivolous. The Tribe eventually won the litigation but the cost of the project ballooned from \$30 million to \$65 million during this time and Swinomish could no longer afford to do the project.

The Department should consider adding an additional CATEX to its *Land Conveyance and Other Transfers* CATEX list, which would address instances where the intended land use is for conservation purposes. In other words, the purpose would be to manage the land to preserve its historic significance, which typically includes conservation of native flora and fauna. The existing CATEX “where no change in land use is planned” may not reach far enough to address instances where tribes need to actively manage land for conservation purposes, and where they previously did not undertake such management. Such use would arguably be a “change in land use” and therefore fall outside the scope of existing CATEXs. For this reason, we support a new CATEX for land conveyances where the land would be used for conservation purposes. This could include sacred sites protection and cultural preservation as well.

Also, BIA may consider adding a CATEX for instances where the tribe's development plans have been approved by local zoning jurisdictions as consistent with surrounding land use criteria. If a tribe seeks to develop its land in a similar or like manner as surrounding businesses or landowners, federal environmental review should encourage the tribe's efforts to work with local regulatory bodies. Further, in such instances, federal environmental review should not work to frustrate tribal development plans.

In addition, the BIA may consider adding a CATEX for instances where there would be "minimal change in land use, such that the impacts on the human environment would not be significant or otherwise adverse." For instance, if a tribe acquires land which had already historically been used as a hiking trail and valued for its scenic beauty—yet poorly managed, and the tribe intends to improve trails and trail markings, increase accessibility and use, and otherwise improve the conditions of the acquisition.

Finally, with respect to CATEXs, BIA should consider a CATEX for instances where the tribe acquires land within the boundaries of the reservation. In these instances, the Department should move swiftly to acquire the land in trust for the benefit of the tribe. Most tribes have suffered devastating land loss, and the long-term adverse consequences of land loss, such as land fractionation, poor land conditions, challenging economic development opportunities, and inadequate land holdings to support a tribal homeland. This history is always a critical backdrop to land acquisitions. Moreover, the fact that Congress has spoken to the problem, and through section 5 of the IRA has provided a mechanism to remedy the tribal loss of lands and rebuild tribal economic life, provides a guiding policy principle to inform trust acquisitions decisions. Further, on-reservation acquisitions usually arise within a context where the choices are limited to continued agriculture or eventual conversion to housing. So long as the tribe holds clear title, the decisions are virtually foreordained. The BIA could provide a CATEX for land within reservation boundaries, and save a great deal of time, effort and money on NEPA evaluations that serve little purpose.

Next, gaming considerations do not belong within the fee to trust regulations. The Indian Gaming Regulatory Act, at Section 2719(c), states "Nothing in this section shall effect or diminish the authority and responsibility of the Secretary to take land into trust." Any addition of gaming considerations into the fee to trust regulations at Part 151 would amount to a violation of this provision of IGRA.

CONCLUSION

In closing, we thank you for the opportunity to submit these comments on behalf of our Tribe. We appreciate the Department's willingness to engage with tribes and we reiterate our request that this regulatory process be formally withdrawn due to the overwhelming opposition by tribes. In the alternative, we ask that the Department place this exercise on pause until the new AS-IA has been confirmed by the Senate, has had the opportunity to consult with tribes, and has developed her own initiatives for Indian Affairs. Finally, if the Department pushes forward despite the broad objections from Indian country, we request further consultation before the Department moves forward and we recommend that any suggestions herein or otherwise be developed as internal guidance – perhaps as updates to the already existing BIA Fee to Trust Handbook, instead of through regulatory revisions. We thank you again for your consideration and please feel free to contact Jon Otterson, Executive Director at (209) 928-5310 or Jon@mewuk.com with any questions or thoughts.