



Tolowa Dee-ni' Nation

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June 28, 2018

Fee-To-Trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary - Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240

Re: RIN: 1076-AF36: Off-Reservation Trust Acquisitions and Action on Trust
Acquisition Requests

Dv-laa-ha~ Mr. Tahsuda:

On behalf of the Tolowa Dee-ni' Nation, a federally recognized Indian Tribe located in the Pacific Northwest, with aboriginal lands and territory in Northern California and Southern Oregon, and organized pursuant to the duly adopted Constitution of the Tolowa Dee-ni' Nation, submits 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 fee-to-trust 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That being said, we appreciate the Department's willingness to withdraw its Consultation Draft included in its now-withdrawn October 4, 2017 Dear Tribal Leader Letter. We also appreciate the Department's efforts to increase the opportunities for tribal leaders to meet with you to discuss the proposed changes to the off-reservation fee to trust process.

**Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
Our Heritage Is Why We Are Strong**

OFF-RESERVATION ACQUISITIONS AND THE INDIAN REORGANIZATION ACT OF 1934

The Indian Reorganization Act of 1934 (IRA) was enacted to halt and reverse the federal policies of allotment and sale of reservation lands that resulted in the decline of economic, cultural, governmental, and social well-being of Indian tribes. As part of the IRA's purpose to reestablish tribal government institutions on tribal lands, section 5 of the IRA provides for the acquisitions of tribal 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."¹

Section 5 indicates that Congress intended tribal land acquisitions, on and off-reservation, to promote tribal self-determination and self-sufficiency. Currently, there are still many tribes that have not established a land base, and many tribes that still have insufficient lands to support housing and self-government, establishing an on-going need for the Secretary of the Interior to continue to take land into trust, including off-reservation lands, for the benefit of tribes.

Although the Tolowa Dee-ni' Nation once resided on the much larger 1862 Smith River Reservation the current Tolowa Dee-ni' Nation Reservation consists of 164 acres in Smith River, California. The Tribe currently operates tribal programs and services for the Tribe's 1700+ Tribal Citizens within the original Smith River Reservation but outside of the current Tolowa Dee-ni' Nation Reservation boundaries. Continued off-reservation land acquisitions are absolutely critical for the Tribe to meet our needs for self-support and self-determination.

overview of the Contemporary Implementation of the Fee to Trust Regulations

Most land to trust transactions are not controversial. While some controversies exist, the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is necessary for consolidation of allotted lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health clinics, and land for Indian schools or other governance needs.

The land acquisition regulations at 25 C.F.R. Part 151 provide a role for state and local government participation. The regulations provide opportunities for all concerned parties to be heard and place an enormous burden on tribes to justify the trust land acquisition. Particularly in the off-reservation context, the regulations require a tribe to provide documentation on a wide range of matters. Although only a small percentage of acquisitions are litigated, some counties regularly challenge tribal land acquisition. This litigation increases costs and delays for tribal applicants.

The regulations provide fairness for all parties. The Congressional purpose of the IRA is to restore tribal lands, and for the Secretary to balance this against any costs to local governments and communities. The requirements for off-reservation acquisitions are much tougher than the on-reservation standards. As the distance between the tribe's reservation and the land to be acquired increases, the Secretary gives greater scrutiny to the tribe's justification of anticipated benefits, and greater weight to state and local concerns on regulatory jurisdiction and property taxes.

¹ 25 U.S.C. § 5108.

The Secretary of the Interior retains the authority to reject any trust land acquisition that would harm a local government or local community. Land acquisition decisions require balancing of the benefits and costs unique to a particular location. Because of this, the regulations list general factors that the Secretary must weigh, and leave the Secretary ample discretion to reject any transaction where there are significant harmful effects.

The regulations provide opportunity for states and tribes to engage in productive, mutually agreeable approaches to land use planning. State and local governments have an opportunity to engage in constructive dialogue with tribes, taking into account the tribes' history of land loss and the most sensible and mutually agreeable options for restoring tribal lands. In most cases, a very small "tax loss" is a minimal tradeoff for the development of schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe.

Gaming Considerations. The proposed changes specifically intertwine gaming considerations into the off-reservation land acquisition fee-to-trust process. Gaming considerations do not belong within the fee to trust regulations. The Indian Gaming Regulatory Act² clearly defines Indian lands eligible for gaming purposes under the IGRA. The Indian Gaming Regulatory Act explicitly states that "Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust."³ Any addition of gaming considerations into the fee to trust regulations at Part 151 would amount to a violation of this provision of IGRA.

The inclusion of section 151.11(a)(1) of the proposed changes applies to acquisitions "if the acquisition is for gaming purposes" outside the statutory scope of authority of the Department of the Interior. This addition is not only repetitive and burdensome but it contradicts existing statutory law. The implications of this addition to the proposed changes would "effect and diminish the authority and **responsibility** of the Secretary to take land into trust" (bold added for emphasis) contrary to the Indian Gaming Regulatory Act.

Although the Department exercises certain powers of regulation in the case of Indian gaming, it is clear that Congress delegated a specific responsibility for the Department to take land into trust for the benefit of Indians regardless of gaming eligibility.

Prolonged Delay – 30-day stay period. The institution of a 30-day stay period in the proposed changes is unnecessary based on the 2012 Supreme Court decision in *Match-E-Be-Nash-She-Wish v. Patchak*, 567 U.S. 209 (2012) which held that the Quiet Title Act does not bar judicial review of trust land acquisitions. Due to the CFR regulations that allow a party to appeal a land acquisition at the administrative level, a 30-day stay unnecessarily delays fee-to-trust acquisitions that can be taken out of trust within the statute of limitations if an appeal or judicial review finds error. The 30-day stay further opens tribes up to the opportunity of baseless and frivolous litigation and administrative appeals while tribes must maintain their land holdings in fee status and paying taxes on lands that are likely to end up in trust status.

Fast Track for Denials. The proposed changes create a two-step review process that potentially sets tribes up for fast track denials for off-reservation fee-to-trust acquisitions. Initial first step denials allow the Secretary to promptly deny applications that fail to address all of the required application

² Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

³ 25 U.S.C. § 2719(c).

requirements or that do not adequately address the application contents. The current process allows for tribes to work together with the BIA to complete and review application contents. The proposed changes would negatively affect the working relationship that tribes have with regional BIA offices for completing fee-to-trust applications.

The proposed changes additionally ask for tribes to answer “whether the acquisition will facilitate the consolidation of tribal land holdings and reduce checkerboard patterns of jurisdiction,” which within the context of off-reservation land holdings, will provide the Secretary an extremely broad discretion to deny fee-to-trust applications. Off-reservation land acquisitions by their nature may contribute to checkerboarding of tribal lands and may not act to consolidate tribal land holdings. These criteria for assessing off-reservation fee-to-trust applications is arbitrary and contextually confusing.

DETAILED RESPONSES TO THE 10 QUESTIONS PRESENTED

The most recent DTLI 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).

The Tolowa Dee-ni’ Nation supports this approach. 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.

The Department should adopt a policy of making fee to trust acquisitions a priority. 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, 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. We 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. In the case of the Tolowa Dee-ni' Nation and many of the Tribes in California, we were devastated by past federal land policies that displaced us from our 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 environmental review required pursuant to 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. Also, where a 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?

During the Listening Sessions held throughout the country, many tribes had great suggestions with respect to this question. 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 an 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. However, we do not believe it necessary to amend existing regulations to include more detailed requirements for tribal economic development plans. Instead, the BIA's Fee to Trust Handbook could be amended to provide sufficient guidance to the BIA Regions to 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 Tribe supports the current criteria that are assessed in off-reservation applications. The Department should continue to use the same criteria for consistency purposes. The existing regulations have been in place for some time, and the Regions and tribes have grown comfortable with their processes and requirements. The Tribe does not support any new and/or additional criteria which would further reduce the opportunity for tribes to take off-reservation lands into trust.

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. If so, the Tribe offers the following suggestions for the Department to consider – and again, as stated above, we recommend that such changes could be accomplished through amendments to the BIA's Fee to Trust Handbook and not through regulatory changes.

a. The Department Should Take into Consideration Historical Circumstances of Applicant Tribes

The history of Indian removal and relocation are critical to understanding the importance of off-reservation applications. Many tribes have reservations which have been allotted, diminished, or removed from their ancestral territories.

The Department should consider the historical circumstances of the applicant tribe. For instance, as noted in the Sacramento consultation, California Indian tribes have spent most of the last century recovering from unfortunate federal land policies that devastated their land bases, severely affected their communities, and in turn significantly limited their economic opportunities. A representative from the California Fee to Trust Consortium noted how in California there are 110 tribes with a cumulative land base of 531,000 acres of trust land, but that 95 of those tribes have very small land bases collectively making up 200 acres of trust land. In addition, much tribal land in California is located in remote locations not conducive to economic development.

These facts underscore the unique land needs of California Indian tribes with respect to their current land bases and their ancestral homelands. To this point, the Pala Band stated that if a tribe purchases land within its ancestral homelands, the application should receive little scrutiny from the Department. Tribes in other regions have similar stories and needs, and expressed similar sentiments. The Department should be well aware of these histories and circumstances when processing trust applications.

To cite another example, during the Phoenix Listening Session, the Chairman of the Yavapai Apache Nation detailed federal policies that first removed the Tribe from its ancestral homeland on 16,000 square miles in central Arizona's Verde Valley to a 575,000 acres reservation, then shortly thereafter (5 years later) completely rescinded their reservation and marched the Tribe, by foot, to the San Carlos Apache reservation. Since then, the Tribe slowly migrated back to their ancestral homelands only to find it completely inhabited by non-Indians. Currently, the Tribe has 1,830 acres, or 3 square miles, of reservation land and is working to acquire additional land to slowly rebuild its community.

Tribes from the Great Plains mentioned that they have former treaty lands, where they have many sites of cultural and religious significance. Further, many non-Indian land owners are gifting or selling their land back to the tribes to relocate near family members outside of the Great Plains region. In these instances, the tribes have a paramount priority to reacquire lands that were withdrawn or removed illegally from their former treaty lands. The Department should expedite such acquisitions.

The Tolowa Dee-ni' Nation occupied the original Smith River Reservation established in 1862 for the permanent establishment of the Smith River Indians. The Reservation was later discontinued by an Act of Congress in 1868. Congress later set aside 160 acres for the Tribe, making the Tribe the largest Rancheria in California, but termination left the Tribe with but a few acres of land, consisting of an offshore rock, a cemetery, and a church. However, California tribes litigated and Tolowa Dee-ni' Nation was eventually restored in 1984 as part of the Tillie Hardwick litigation. As part of that process, the US was to reacquire lands and make them mandatory trust acquisitions, but this hasn't occurred. The Tribe has over 1700 members and approximately 75 acres in trust; with Tribal lands and service areas in both Oregon and California. For this reason, the Tribe must look to non-contiguous lands, which is entirely within their ancestral lands, but subject to "off-reservation" acquisition burdens.

Our history is but one example of the numerous failed federal land policies which still have recurring contemporary impacts to tribal nations. The Department cannot reverse time and prevent the Rancheria Termination Act from passage, for instance, but it can use its authority under the IRA to actively help redress these past wrongs. The notion that such occurrences occurred long ago and are somehow less relevant respectfully lacks merit. We urge the Department to develop its land acquisition policies with these failed federal land policies in mind.

b. The Department Should Consider the Unique Issues Facing Land-Locked Tribes with Little or No Options for On-Reservation or Contiguous Land Acquisitions, and Tribes with No Formal Reservation

During the Listening Sessions held throughout the country, Tribes discussed being land locked and unable to acquire contiguous or otherwise on-reservation lands. During the Phoenix Listening Session, the Hopi Tribe noted that it sits on a 2,000 acre reservation which is completely surrounded by the Navajo Nation, requiring the Tribe to look for off-reservation acquisitions to meet its economic development and growing housing needs.

In another Listening Sessions, the Prairie Island Indian Community stated the Tribe is located in a flood plain, adjacent to where the Army Corp of Engineers situated Lock Dam 3. Also, the federal government located a nuclear facility near the Tribe's reservation as well. Since these features surround the Tribe's reservation homeland, and since increased rail traffic blocks ingress and egress to the Reservation for inconvenient portions of time, the Tribe must look for off-reservation lands to meet their governance needs.

During the Sacramento Listening Session, Big Lagoon Rancheria noted how past land cessions and histories led to the Tribe owning land adjacent to its original ancestral site, which is currently under County ownership. For this reason, the Tribe can only buy adjacent properties outside of that area. In addition, non-Indian landowners have acquired all contiguous lands, making it imperative that the Tribe acquire off-reservation lands to meet its governance needs. Also, the Tribe noted how surrounding community values sometimes interfere with tribal self-governance. For example, the Tribe said it planned new community housing with a septic tank for each house. However, the neighboring non-

Indian community would not approve of the Tribe's plan unless it was amended to only allow one house for every 12 acres.

The Department should support tribal self-governance, and push back against non-tribal entities asserting indirect regulatory control over tribes through the fee to trust process.

c. The Department Should Consider Tribal Economic Development & Geographical Challenges

During the Listening Session held in Sacramento, the Pala Band of Mission Indians, located in San Diego County, noted that it sits on 12,000 acres of trust and fee lands, much of which is insufficient for development, or in the ownership of non-Indians. For this reason, the Band's land policy is to seek contiguous lands and lands within its ancestral territory to promote economic development uses.

The San Manuel Band of Mission Indians indicated that it currently has 966 acres of land, but has consistently dealt with natural disasters, such as fault lines, fires and mudslides. The Tribe noted that it is one of the top 10 employers in its region, but have a geographically-challenged land base, and consistently has a waiting list for tribal housing, since their current lands are only a fragment of their ancestral lands.

During the Listening Session in Washington, D.C., the Tulalip Tribes stated the Tribe's reservation consists of 22,000 acres. However, it said it used to own less than 5,000 acres because of past land loss due to the federal government's failed allotment policies. Because of this, along the Tribe's entire historical western boundary is prime property it lost long ago. Also, the Tribe noted that land within the reservation is limited with respect to where and what it can build, and in regards to climate change. The Tribe must look for land that is not situated in a flood plain, or other similar danger zone, and those lands are predominantly off-reservation.

The Department's earlier approach to this effort (*See* DTLL from 10.4.2017) seemed based on an assumption that current on-reservation lands are enough for tribes, and the need for off-reservation land is limited. However, there are numerous examples like the ones highlighted above that prove that off-reservation land acquisitions are a bona fide necessity in Indian Country.

The Tolowa Dee-ni' Nation believes the Department has a trust responsibility to assist tribes in meeting their governance needs, which includes addressing current on- *and* off-reservation land acquisitions in order for the Tribe to adequately address the needs of its Citizens.

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)?

The Indian Reorganization Act purposefully created policy and procedure to return land to Indian tribes and to improve the economic, cultural, governmental, and social well-being of Indian tribes. In order to achieve tribal self-sufficiency and self-governance, the Secretary should consider all applications regardless of economic development purposes.

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

The Secretary should honor their responsibility to take land into trust for the benefit of Indians, regardless of gaming purposes or other economic development opportunities. The Indian Gaming Regulatory Act has established criteria, with exceptions, for gaming eligibility on Indian lands that is assessed separately from the Secretary's responsibility to take land into trust for tribes.

c. Whether the application involves no change in use?

Applications involving no change in use should be evaluated in the same manner as any other off-reservation application. The requirements for off-reservation applications found at 25 CFR 151(10)(a-c)(e-h) presently over-burden tribes seeking off-reservation acquisitions, and any further addition to these regulations will be critically detrimental to the Secretary's responsibility to take land into trust on the behalf of federally recognized Indian tribes.

With respect to questions 3 (a), (b), and (c) above, 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 rightfully so depending on the multiple factors involved in those types of uses. 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 supports tribal economies.

If Interior is unwilling to remove distance as a criterion, it should at least consider amending 25 C.F.R. § 151.11(b) to remove the language stating the "Secretary shall give greater scrutiny to the tribe's justification" as distance increases, as follows:

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

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. Additionally, consideration should be given to Tribes with land holdings that cross state lines. The Tolowa Dee-ni' Nation has current fee-to-trust applications in both Oregon and California which include separate BIA regions. Tribal populations, service areas, and services are likely to cross state lines and the fee-to-trust application process must provide opportunity for such tribes with lands crossing state and region boundaries.

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?

Pending applications should be subject to the regulatory requirements present at the time of submission. Any proposed changes should apply to applications only if/after approved.

However, 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 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. *See 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?

MOUs may facilitate improved relationships between tribes and state or local governments, for economic and non-economic developments, and should certainly be viewed as a positive contribution to an off-reservation application.

However, MOUs should not be necessary or strongly recommended for off-reservation applications. The ability for tribes to enter into MOUs with state or local governments vary greatly by location, and should not be a requirement for off-reservation fee-to-trust applications.

The Tribe agrees with the sentiments expressed by an overwhelming number of tribes during the Listening Sessions 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.

During the Sacramento Listening Session, Principal Deputy Assistant Secretary – Indian Affairs John Tahsuda expressed his belief that an MOU could serve as “prima facie proof of mitigation,” and as such, the NEPA process could be streamlined, and thus no need for a mitigation analysis. However, as many tribes indicated during the Listening Session, many tribes go through the long process of executing an MOU, only to get sued on their projects anyway. Furthermore, many times after an MOU is executed, state or local leadership changes, and the MOU is no longer the prerogative of the newly seated leadership, placing the tribe back at square one.

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. This sentiment is appreciated, however, 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.

If the Department is still considering this idea, despite the overwhelming opposition from tribes, it should be placed in internal guidance, such as the existing BIA Fee to Trust Handbook, and not in amendments to the regulations. This approach would address the Department’s intent without creating additional fodder for legal challenges from entities opposed to tribal trust acquisitions.

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. It makes sense to allow the Region to continue to process such applications, since the local BIA Realty offices know best the tribes and the surrounding communities in their Region. Department headquarters can then 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 *Carvieri* M-opinion. While the M-opinion adds an additional layer of review for certain applications, it is a necessary tool in light of the *Carvieri* 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. In 1972, the Tribe proposed the idea of developing a marina. 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, the Tribe supports a new CATEX for land conveyances where the land would be used for conservation purposes, including sacred sites protection.

Also, BIA may consider adding a CATEX for acquisitions where a tribe’s development plan has been approved by local zoning jurisdictions as being 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, such land use should meet the criteria for a CATEX.

Finally, with respect to CATEXs, BIA should consider a CATEX for situations where the tribe acquires land for consolidation purposes 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, Congress has spoken to the problem - by and through section 5 of the IRA – which provides a mechanism to remedy the loss of tribal loss of lands, to rebuild tribal economic life. Section 5 provides a guiding policy principle to inform this Administration’s 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 consolidation purposes within

reservation boundaries, and save a great deal of time, effort and money on NEPA evaluations that serve little purpose.

Conclusion

In closing, we thank you for the opportunity to submit these comments. 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.

Finally, we recommend that any suggestions herein or otherwise be developed as internal guidance – perhaps as amendments 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 our Chief Governance Officer at briannon.fraley@tolowa.com in reference to our comments.

Shu' shaa nin-la,



Denise Richards-Padgette
Chairwoman on behalf of Tribal Council

CC: BIA Pacific Region

OSG/sgl