



# Inter Tribal Association of Arizona

## 21 TRIBAL NATIONS

June 29, 2018

**Via Email ([consultation@bia.gov](mailto:consultation@bia.gov))**

Attn: 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  
Email: [consultation@bia.gov](mailto:consultation@bia.gov)

**Re: *Inter Tribal Association of Arizona, Comments on Proposed Revisions to the U.S. Department of the Interior, Bureau of Indian Affairs Trust Acquisition Regulations at 25 C.F.R. Part 151***

To Whom It May Concern:

These comments are submitted to you on behalf of the 21 Member Tribes of the Inter Tribal Association of Arizona, (ITAA), regarding the proposed revisions to the Tribal Fee-To-Trust Land Acquisition Regulations at 25 C.F.R., Part 151.

ITAA is an inter-tribal consortium whose Member Tribes have been working together since 1952 to provide a united voice for Tribal governments located in the State of Arizona on common issues and concerns. ITAA is governed by the highest elected Tribal officials from each Tribe, including Tribal chairpersons, presidents and governors.

The comments submitted here are intended to expand upon the comments provided by ITAA during the Tribal consultation held in Phoenix, Arizona on February 20, 2018. These comments are not intended to speak on behalf of any one Member Tribe or to provide specifics regarding the concerns that any one of our Member Tribes may have on this topic but rather, they are written to discuss certain cross-cutting topics that generally affect all of our Member Tribes.

ITAA Member Tribes overwhelmingly oppose any changes to Part 151 by the Department of the Interior (Department) that would increase burdens on applicants, elevate the interests of state and local governments over the trust responsibility and treaty obligations of the United States, invite challenges and litigation, and unlawfully diminish the authority and duty of the Secretary of the Interior (Secretary) to take lands into trust under applicable law and policy and as recognized by Congress in the Indian Reorganization Act of 1934 (IRA). To date the Department has not clearly identified a

Ak-Chin Indian  
Community  
Cocopah Tribe  
Colorado River  
Indian Tribes  
Fort McDowell  
Yavapai Nation  
Fort Mojave  
Indian Tribe  
Gila River Indian  
Community  
Havasupai Tribe  
Hopi Tribe  
Hualapai Tribe  
Kaibab Band of Paiute  
Indians  
Pascua Yaqui Tribe  
Pueblo of Zuni  
Quechan Tribe  
Salt River Pima-  
Maricopa Indian  
Community  
San Carlos  
Apache Tribe  
San Juan  
Southern Paiute Tribe  
Tohono O'odham  
Nation  
Tonto Apache Tribe  
White Mountain  
Apache Tribe  
Yavapai-Apache  
Nation  
Yavapai-Prescott  
Indian Tribe

single material reason for revising these regulations in the manner proposed, other than perhaps to satisfy the interests of a very small minority of opponents to Tribal land acquisitions and the Part 151 fee-to-trust process.

Absent a decision to truly streamline the provisions of Part 151 for the benefit of Tribes, ITAA respectfully submits that the Department should abandon its efforts to revise the fee-to-trust acquisition process. At the very minimum, the Department should place this process on hold since the Senate (through advise and consent) has just recently confirmed the nomination of Tara Sweeney as the new Assistant Secretary of Indian Affairs (AS-IA) and the AS-IA should have a full opportunity to get up to speed on this matter and engage directly with Tribes on this crucial tool for the restoration of Tribal lands.

## **I. General Comments**

ITAA's 21 Member Tribes, like Tribes across the United States, had their lands taken from them without consent, at first by force and later, as the result of policies maintained by the United States during the "Allotment Era." Many Tribes in Arizona lost their most productive grazing, hunting and agricultural lands, as well as lands rich with water resources, timber and minerals – all despite the promises of the United States and the protections that treaties and federal law were supposed to provide.

Today, Tribes in Arizona still suffer from the devastating effects of these actions and policies, which have, in many instances, left tribal lands in a discontinuous, fractionated and difficult to use state, undermining Tribal sovereignty and self-determination. Some Tribes in Arizona, having lost all but a fraction of their aboriginal land base, have relied on their own resources to acquire fee lands from willing sellers over the years. These Tribes have been able to place these lands into trust for housing, economic development, administrative, cultural resources, and other purposes pursuant to the Indian Reorganization Act and the process prescribed by Part 151. However, this process is nowhere near complete. Tribes continue to face political and legal challenges in accomplishing the fee-to-trust process, despite the fact that it has been over 80 years since Congress gave the Secretary both the authority and the responsibility to place lands into trust for Tribes under the IRA.

In short, we should not be making this process more burdensome or doing anything to undermine the existing authority of the Secretary to fulfill his obligations under the IRA. Furthermore there is no directive under the IRA that requires a distinction between "on-reservation" versus "off-reservation" land acquisitions. The Department should not perpetuate this distinction any further through changes in the Part 151 process. Rather, if there is to be any action taken to change the fee-to-trust regulations, these actions should be devoted to removing barriers and streamlining the process in order to finally fulfill the promises of the IRA for all Indian Tribes in Arizona and across the United States.

## **II. The Flawed Assumptions Inherent in the Current Regulatory Review**

There are several flawed assumptions that seem to be driving the current Part 151 regulatory review process. One of the most significant is the flawed assumption that fee-to-trust acquisitions, and particularly off-reservation acquisitions, are almost always fraught with controversy and not well received by their local communities. In fact, while there have been some notable exceptions, the vast majority of Part 151 fee-to-trust acquisitions are noncontroversial or any initial controversies or

misunderstandings are resolved between the Tribe and local interests at a very early stage of the process.

Nevertheless, it appears that the Department's current line of thinking may stem from the idea that Tribes and their neighboring non-Indian communities often have an adversarial relationship with each other that makes land acquisitions inherently contentious. This is not the typical situation experienced in Arizona today. For example, Tribes in Arizona work in close coordination with their neighboring jurisdictions on a myriad of issues including economic development, law enforcement, transit and regional planning, and other things. Because Arizona has 22 federally recognized Tribes with lands located in some of the most scenic or tourist friendly areas across the state, Tribes in Arizona and the amenities they offer – draw tourists from around the world. Tourists' spending benefits the local communities as well as the Tribes. Tribes are often one of the largest (if not the largest) employers in rural areas throughout the state. This provides a critical source of jobs and revenue that circulates many times over in their local community, benefitting the local sales tax base and supporting the local economy. The above-described factors generally help to avoid or ameliorate controversies of the type that the Department's initial proposed changes to Part 151 assume exist.

For much the same reason, the assumption that changes to the off-reservation land acquisition process are needed in order to provide a much greater role or "say" for state and local jurisdictions is similarly flawed. First and foremost, the Congressional purpose of the IRA is to restore Tribal lands. Therefore, the touchstone for any revision to these regulations must be whether the revisions benefit the IRA's goal of encouraging land restoration for Tribes. And indeed, existing regulations already require the Secretary to balance this directive against any costs to local governments and communities. This includes providing opportunities for all concerned parties to be heard and further, allowing for the potential to appeal and litigate any determination made by the Secretary – despite the enormous additional burden this places on Tribes.

It is also noteworthy that the existing requirements for off-reservation acquisitions are already much more burdensome than the on-reservation standards. Certainly, they should not be made more burdensome. For example, under 25 C.R.R. § 151.11(b) 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. Either way, if the Secretary determines that a proposed land acquisition is simply too burdensome on the surrounding community, the Secretary already has authority under the IRA and regulations to reject the Tribe's application. No additional authority is required.

## **II. Responses to the Department's 10 Questions**

As part of the Department's review, it has requested that Indian Country provide responses to 10 different questions generally related to the land acquisition process, and in particular off-reservation acquisitions. Given the breadth of responses already received by the Department to its questions, in particular by the National Congress of American Indians (NCAI), ITAA has limited its responses below accordingly.

**Question 1: What Should The Objective Of The Land Into Trust Program Be? What Should The Department Be Working To Accomplish?**

**Answer:** The objective of the land into trust program should be to restore lands to Indian Tribes in furtherance of the purpose of the Indian Reorganization Act and the United States' trust responsibility to Tribes. This is what the Department should be working to accomplish.

For many Tribes in Arizona who had the vast majority of their Tribal homelands taken by the actions or policies of the United States, the need to see the promises of the IRA fulfilled is current and very real. For example, for many of the smaller Tribes in Arizona, Tribal members have no choice but to live off the Reservation, with the "wait list" for Tribal housing running into the hundreds of families. For other Tribes, who see a very young and growing population, the need to acquire lands for economic development is crucially important in order to keep tribal youth from having to leave their community and head to Phoenix or other large metropolitan areas to find employment. Thus, where a Tribe acquires an interest in land (on or off the reservation) and seeks to have that land taken into trust, the Department should prioritize the request and move swiftly to acquire the interest for the benefit of the Tribe. This is what the IRA calls for and this is what existing regulations permit. Tribes should not be subject to new hurdles or any unexplained delays in this process, political influence, or arbitrary decision-making on a region-by-region basis.

**Question 2: How Effectively Does The Department Address On-Reservation Land-Into-Trust Applications?**

**Answer:** For the most part, the existing process for on-reservation acquisitions, while burdensome and time consuming, has worked. Tribes in Arizona have been able to successfully navigate these requirements, placing additional lands into trust for housing, economic development and many other purposes. For certain smaller Tribes, while the total acreage taken into trust over the years is relatively small, the benefits to the Tribe and Tribal members have been substantial. However, more is needed.

The Department should look to provide more resources and tools to the regions, be willing to work directly with Tribal applicants, and provide proper training 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 applicable NEPA requirements. The Department should strive for more uniformity, and should engage the BIA regions that process trust acquisitions most efficiently to help develop guidance and training. It should be noted that Tribes look to their regions and local agencies to provide guidance on the Part 151 land acquisition process. Where these agencies or their personnel lack sufficient training, advice given to Tribal applicants at the front end of the application process can result in insufficiencies under Part 151 and/or the National Environmental Policy Act (NEPA) that can make any subsequent decision to take land in trust vulnerable and ripe for litigation. This should not occur.

**Question 3: Under What Circumstances Should The Department Approve Or Disapprove An Off-Reservation Trust Application?**

**Answer:** Off-reservation trust acquisitions that meet the criteria found in 25 C.F.R. § 151.3 should not be disapproved absent a clear showing of harm to the Tribe or the local community or environment.

**Question 4: What criteria should the department consider when approving or disapproving an off-reservation trust application?**

**Answer:** As an initial matter, absent a meaningful effort by the Department to streamline the process, the existing regulations for off-reservation trust acquisitions should remain unaltered. Furthermore, any decision by the Department to apply future changes in the fee-to-trust regulations to applications already pending before the Department is unlawful.

ITAA further joins in and incorporates here by reference those comments submitted by NCAI in response to this Question 4. As noted by NCAI and as discussed briefly below, the Department should consider the unique circumstance of each applicant Tribe, such as their historical circumstances, the difficulties faced by landlocked Tribes and Tribes with no formal reservations, as well as challenges associated with unique geographical and economic development needs.

NCAI correctly describes in its comments the historical circumstances of ITAA Member Tribe, the Yavapai-Apache Nation, who originally had a large reservation proclaimed along the verdant Verde River in 1871, only to have it rescinded just a few short years later whereupon virtually all the Yavapai and Apache people on the reservation were force marched to and imprisoned at San Carlos. When the Yavapai Apache People were eventually able to return to their homeland in the Verde Valley, all of their lands had been taken. Since this time, the Nation has used fee-to-trust process found in Part 151 to restore some of its ancestral lands, though its current Reservation is a mere fraction of the original Reservation. The experience of the Yavapai-Apache Nation is not unique in Arizona. Other Tribes in Arizona have a similar history and like the Nation, these Tribes should not be precluded or deterred from placing critically needed lands into trust under the IRA and the Part 151 process.

There are many other good reasons why the Department should not make off-reservation acquisitions any more difficult than they already are. For example, Tribes may wish to acquire lands from willing sellers off-reservation that contain important landscapes features, water resources, sacred sites or Tribally sensitive species. There is no reason why these lands should not be expeditiously placed into trust and preserved for the future of the Tribe. Furthermore, many of Tribes in Arizona are located in rural or even very remote areas, including at the very bottom of the Grand Canyon, far from hubs of economic activity. In other instances, Tribes are landlocked or limited by surrounding US Forest Service lands or, in the case of the Hopi Tribe and the San Juan Southern Paiute Tribe, they are entirely surrounded by the Navajo Nation. These circumstances make it a virtual necessity for Tribes to consider off-reservation acquisitions in order to provide economic development opportunities for their people and to support Tribal self-determination goals.

Finally, Tribes in Arizona face unique challenges associated with being in the desert southwest. These include the risk of massive wildfire and the threat of protracted drought and dwindling water supplies – threats that have only been exacerbated by changing climate patterns. Tribes should not face additional hurdles erected by the Department to the extent they need to acquire off-reservation lands in order to mitigate the impacts of drought, climate change, and other such catastrophes to support the homeland needs of their people.

**Question 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?

**Answer:** ITAA concurs with the comments of NCAI, which observe that Question 5 presents mostly a NEPA issue. In this regard, ITAA strongly urges the Department to consider providing a broader opportunity for categorical exclusions under NEPA in order to streamline the NEPA process (for both on and off-reservation acquisitions) and to reduce the overall cost associated with NEPA compliance. This is particularly appropriate with respect to Question 5(c), but it may also be applicable in a wide variety of other circumstances as well.

ITAA does not agree, however, that the Department should complicate the existing process under Part 151 by imposing additional criteria into the existing regulations which would parse the inherent value of applications for economic development versus Tribal government purpose, Tribal housing or otherwise. The Tribe, not the Department, stands in the best position to make these determinations.

Finally, with regard to Question 5(b), the idea of distinguishing applications for “gaming purposes” from other non-gaming purposes would merely confuse the process and create even more unnecessary hurdles for Tribes for reasons that are in no way apparent from the actual facts and circumstances that exist today. More importantly, perhaps, such a distinction is not supported by the Indian Gaming Regulatory Act (IGRA), which already sets forth a prohibition against gaming on off-reservation lands acquired after 1988 (subject to certain exceptions). *See* 25 U.S.C. § 2719. In fact, Congress expressly provided in IGRA that “Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take lands into trust.” *Id.* at § 2719(c). Accordingly, the Department is without legal authority to wade into these issues on its own through the Part 151 process.

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

**Answer:** The many advantages of taking lands into trust for Tribes have long been recognized by the United States through, among other things, the Indian Reorganization Act. This question goes well beyond the issue presented by the Department in relation to Part 151. We therefore do not address this question any further here.

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

**Answer:** The mandatory application of new revisions to Part 151 to pending applications is unlawful. Furthermore, because pending applications have been prepared under current Part 151 standards, applying new standards retroactively could result in unreasonable delay, additional costs, and

unnecessary litigation risk and uncertainty for Tribal applicants – uncertainty that will continue under recent court precedent potentially until the 6-year statute of limitations has run.

**Question 8: How should the department recognize and balance the concerns of state and local jurisdictions? What weight should the department give to public comments?**

**Answer:** While not specifically required by the IRA, the existing Part 151 regulations and the requirements of NEPA already require active engagement with state and local jurisdictions and the consideration of public comment. No additional weight or input should be permitted.

It should also be noted that Question 8 seems to assume that the Department is needed in order to “mediate” between Tribes and their local communities. This line of thinking misunderstands the relationship between many Indian tribes and their local communities as well as the role of the Department under the IRA.

Most Indian Tribes do not live on an island within their local communities. Tribal governments work closely with their neighboring local communities on a wide variety of matters, from law enforcement to economic development, to transit and regional planning. Tribal governments are often members of their local councils of governance (COGs) and regional planning organizations, working right along side their non-Indian counterparts on matters of regional or local concern. Tribal leaders from these Tribes also participate in a numerous civic organizations and have leadership roles off their reservations that call for civic engagement on the local, regional and state level. For these reasons, the Tribal applicant (and not the Department) is in the very best position to balance and resolve the concerns of state and local jurisdictions or to assuage public comments that may arise in the fee-to-trust process. And at the end of the day, it is the Tribe (not the Department) that will continue to co-exist and work with its neighboring communities on a daily basis long after the Tribe’s lands are taken into trust under the IRA.

Finally, the Department does not have a trust obligation to state and local jurisdictions under the IRA. Rather, in ending the Allotment Era, Congress recognized the paramount obligation on the part of the United States to place lands into trust for Indian Tribes. This has been the case since 1934. It would be a mistake and inconsistent with the purposes of the IRA to elevate local or state input any further with respect to fee-to-trust acquisitions.

**Question 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?**

**Answer:** ITAA Member Tribes often enter into MOUs with their local governmental counterparts on a wide range of mutually beneficial matters. However, requiring MOUs as a condition of taking lands into trust would essentially provide state and local governments with a “veto” power over the ability of Tribes complete the lands-to-trust process, severely undermining Tribal negotiation power and disrupting the process. Such an approach would also be in derogation of the very purpose of the IRA and the Secretary’s delegated authorities. Interior’s Fee to Trust Handbook anticipates that MOUs may be helpful for Tribes in furthering the fee-to-trust process. Nothing more should be required.

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

**Answer:** ITAA Member Tribes will each likely have their own thoughts as to how the Department might streamline/improve the lands-into-trust program based upon that Member Tribe's particular circumstances. ITAA has already described some streamlining options that the Department might consider, such as broadening the opportunity for categorical exclusions under NEPA and providing greater resources and training to BIA regional offices and local agencies on the administration of the current Part 151 requirements.

NCAI has also offered a number of potential improvements for the Department's consideration, including moving decision making back to BIA regions and keeping the *Carcieri* M-opinion in place. Certainly, there is no reason to have a 30-day waiting from when a decision is made and when the Department actually takes lands into trust. This policy is unwarranted and unnecessarily telegraphs the potential for litigation and challenge.

Given the fundamental importance of the Part 151 process to Tribal self-governance and self-determination, ITAA respectfully urges the Department to allow the newly confirmed AS-IA to engage in further Tribal consultation before taking any action on this proposal.

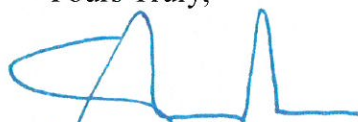
**III. Conclusion**

ITAA appreciates the opportunity to engage in the Department's consideration of potential changes to Part 151. We hope that the Department carefully considers our comments as well as the individual comments from our Member Tribes and Tribes across the country. In doing so, the Department should keep the purposes of the Indian Reorganization Act in mind at all times.

The fundamental need to restore Tribal lands identified by Congress in 1934 in the IRA continues to persist today. The Department should therefore take action to assist Tribes in fulfilling the promise of the IRA, not undermine this promise through changes to Part 151 that would impose additional hurdles to the fee-to-trust process. At the minimum, the Department should allow the newly confirmed AS-IA to engage in further Tribal consultation before taking any action on this proposal.

To discuss this matter further, please contact Ms. Maria Dadgar, Executive Director at (602) 258-4822. Thank you for the opportunity to provide comments.

Yours Truly,



Shan Lewis,  
President, Inter Tribal Association of Arizona  
Vice-Chairman, Fort Mojave Indian Tribe

Cc: Tribal Leaders