



# USET

SOVEREIGNTY PROTECTION FUND

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John Tahsuda  
Acting Assistant Secretary – Indian Affairs  
Attn: Fee to Trust Consultation  
Office of Regulatory Affairs and Collaborative Action  
Office of the Assistant Secretary – Indian Affairs  
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Dear Acting Assistant Secretary Tahsuda,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write in response to the Department of the Interior's (DOI) consultation on potential revisions to its Fee to Trust Regulations (25 CFR 151). USET SPF is deeply concerned with both the direction of (1) the original proposed changes and (2) the subsequent consultation questions, as they appear to be developed in response to the concerns of entities outside Indian Country. As we have stated in previous communications, while we seek a more efficient fee-to-trust process, we are unaware of any Tribal Nations who are seeking the types of changes proposed by DOI. Following consultations across the country, it must be evident to DOI that Indian Country is communicating its near-universal opposition to the proposed revisions, which, if implemented, would serve as an impediment to the acquisition of trust lands.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine.<sup>1</sup> USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people. This includes advocating for the full exercise of inherent Tribal sovereignty.

### **Extend Comment Period Pending ASIA Listening Tour**

While USET SPF's comments in response to the DOI's consultation appear below, we note that any revisions, which would represent a significant change in federal Indian policy, must not be implemented in the absence of the leadership of the Senate-confirmed Assistant Secretary for Indian Affairs (ASIA). As of this writing, the nominee, Tara Mac Lean Sweeney, to whom USET SPF has extended its support, has been confirmed by the Senate and has committed to conduct a six-month listening tour in Indian Country to better understand the breadth and diversity of concerns of Tribal Nations across the country. It is absolutely critical that the incoming ASIA have the opportunity to understand the views of Indian Country and evaluate

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

any potential revisions to Part 151. USET SPF urges DOI to extend the comment period on fee-to-trust policy until after the ASIA has completed her listening tour.

### **Land Loss and Restoration in the East**

The Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of our Tribal economies. In response to federal policies that stripped us of our land base, DOI has, for nearly 85 years, restored Tribal lands through trust acquisitions to enable Tribal Nations to build schools, health clinics, hospitals, housing, and provide other essential services to Tribal citizens. Over this period, DOI has approved trust acquisitions for approximately 5 million acres of former Tribal homelands, which represents only a small fraction of the more than 100 million acres lost through Federal policies of removal, allotment, and assimilation.

The Tribal Nations located in the eastern part of what is now the United States have a lengthier history when it comes to the systematic dispossession of our lands as a result of hundreds of years of federal (and before that, colonial) policies. In the wake of these policies, a majority of USET SPF Tribal Nations today hold only a fraction of their homelands and some remain landless. Therefore, any changes to the current land-into-trust process will have particularly significant importance in the east.

USET SPF Tribal Nations continue to work to reacquire our homelands, which are fundamental to our existence as sovereign governments and our ability to thrive as vibrant, healthy, self-sufficient communities. And as our partner in the trust relationship, it is incumbent upon the federal government to prioritize the restoration of our land bases. DOI's objective must be to support healthy and sustainable self-determining Tribal Nations, which fundamentally includes the restoration of lands to Tribal Nations through the fee-to-trust process.

While USET SPF member Tribal Nations ultimately seek full jurisdiction and management over our homelands without federal government interference and oversight, we recognize the critical importance of the restoration of our land bases through the land-into-trust process. We further recognize that the federal government has a trust responsibility and obligation to Tribal Nations in the restoration and management of trust lands. With this in mind, USET SPF strongly opposes any effort to diminish, whether intentionally or unintentionally, Tribal Nation reservations and trust lands, to provide for state management of any Tribal ancestral homelands currently managed by the federal government, to allow issues unrelated to the objective of restoring Tribal homelands to guide policymaking, or to otherwise undermine the DOI land-into-trust process.

### **The Role of DOI and BIA in Restoring the Tribal Land Base**

The Bureau of Indian Affairs (BIA) has the following mission statement: "The Bureau of Indian Affairs' mission is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives." Nowhere in its mission does it speak to the interests of non-Tribal governments, including state or local governments. Thus, notwithstanding DOI's suggestion to the contrary, there is no obligation to balance state/local interests with the interests of Tribal Nations.

When it comes to the land-into-trust process, DOI's primary focus and objective must always be the restoration of Tribal homelands. Concerns unrelated to this objective, including the concerns of other jurisdictions, must not guide the final decisions or policymaking of DOI. USET SPF is aware that the concerns of state and local jurisdictions may be taken into account as DOI exercises its authority to put land in trust for Tribal Nations. However, when fulfilling its obligation to uphold the federal trust responsibility and support strong, self-determining Tribal Nations through the restoration of Tribal

homelands it is improper for DOI to require fee-to-trust applicants to address and resolve local/state concerns prior to taking land into trust. Moreover, any state and local government concerns should not be prioritized over the responsibility that the United States has to ensure adequate land bases for Tribal Nations and to help foster and support thriving Tribal communities.

As with other processes and functions central to the federal trust responsibility, it is incumbent upon DOI to secure the federal funding required to fulfill its responsibilities in the land-into-trust process, including sufficient financial resources to ensure adequate staffing and infrastructure to carry out these duties, and funding Payments in Lieu of Taxes (PILT) to state and local governments. We note that DOI currently issues PILT to jurisdictions impacted by the non-taxable status of federal lands within their boundaries, including those administered by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service<sup>2</sup>. Extending PILT to trust acquisitions for Tribal Nations would address the tax concerns often expressed by state and local governments. Securing PILT and other necessary funding requires that DOI and BIA provide a full accounting of financial needs to the Office of Management and Budget and Congress.

In addition, USET SPF urges parity for all federally recognized Tribal Nations within the land-into-trust process through a fix to the Supreme Court's 2009 decision in *Carcieri v. Salazar*. We call upon DOI to work with Congress to draft and pass legislation that: (1) reaffirms the status of current trust lands; and (2) confirms that the Secretary has authority to take land into trust for all federally recognized Tribal Nations. Until that occurs, DOI must follow existing authorities and guidance, including the DOI Solicitor's March 12, 2014 M-Opinion to continue processing fee-to-trust applications.

## **Consultation Questions**

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

The objective of the land-into-trust program should and, indeed, must, be to fulfill the statutory intent of the Indian Reorganization Act (IRA) to restore Tribal homelands. The Secretary's ability to acquire land in trust for Tribal Nations is critical for strengthening Tribal governments and improving the lives of Tribal citizens. Through federal policies of removal, allotment and assimilation, more than 100 million acres of Tribal homelands were lost. Yet only a tiny fraction of those lands have been restored to Tribal Nations through trust acquisition.

Prioritizing fee-to-trust acquisitions is consistent with the federal government's obligation to uphold its trust responsibility and act in the best interest of Tribal Nations. The Tribal land base is a core aspect of Tribal sovereignty, cultural identity, and is the foundation of Tribal economies. The ability to place land into trust is a vital mechanism for Tribal governments in protecting and restoring their land bases, and enhancing opportunities to strengthen their communities and exercise the right to self-determination. Fee-to-trust acquisitions have enabled Tribal Nations to provide essential governmental services through the construction of schools, health clinics, elder centers, veteran centers, housing, and other Tribal community facilities. Tribal trust acquisitions have also been instrumental in helping tribes protect their traditional cultures and practices. Equally important, Tribal trust lands have also helped spur economic development in Indian Country, providing much needed financial benefits, including jobs, not only for Tribal communities, but also nearby non-Tribal communities.

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<sup>2</sup> See [www.doi.gov/pilt](http://www.doi.gov/pilt)

In giving the Secretary broad authority to acquire land in trust for trust through the IRA in 1934, Congress aimed to end the devastating loss of Tribal land that marked the federal policies of assimilation and allotment. The IRA does not mention the interests of state or local governments because the statute was not enacted acted to protect those interests. The restoration of Tribal homelands through trust land acquisitions should be considered part of DOI's core responsibilities in its relationships with Tribal governments and individual Indians. DOI must work to fulfill this objective regardless of the concerns of outside interests or jurisdictions. Indeed, taking into account state and local interests to the detriment of or in a manner that would burden Tribal trust acquisitions would frustrate the intent or altogether undermine the purpose of the IRA<sup>3</sup>. DOI should and cannot allow such a result.

The federal government's shameful treatment of Tribal Nations, particularly the millions of acres of land lost under federal policies and the destabilization of many Tribal communities, compels the restoration of Tribal homelands as a necessary component of Tribal Nation rebuilding efforts. Consistent with the IRA's policy goals, current federal Indian policy must prioritize the protection and rebuilding of Tribal land bases, alongside other measures that support stronger Tribal self-government and provide more and better educational and economic development opportunities to Tribal citizens. To ensure DOI can reach these goals, all presumptions should favor Tribal and individual applicants when evaluating trust acquisition requests under 25 C.F.R. Part 151.

In addition, no Tribal Nation should remain landless. All Tribal Nations, whatever their historical circumstances, need and deserve a stable, sufficient land base – a homeland – to support robust Tribal self-government, cultural preservation and economic development. DOI should ensure every Tribal Nation has the opportunity to restore its homelands, regardless of the concerns of state and local governments or other interests.

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

The existing regulations at 25 C.F.R. Part 151.10 provide rigorous criteria under which the Department evaluates on-reservation applications. The current requirements consider the need for land, the purpose for which it will be used, as well as taxation and jurisdictional impacts of an acquisition on state and local governments, among other criteria. Given the broad range of issues covered in the Part 151 on-reservation criteria and the thorough nature of the Department's review process as experienced first-hand by USET SPF's member Tribal Nations, USET SPF sees no need for additional steps or criteria in the Part 151 process that would further burden fee-to-trust applicants or make the application approval process more onerous for them.

However, given the importance of Tribal trust acquisitions, DOI's lack of efficiency in reviewing and approving trust applications is often frustrating. Many simple, straight-forward requests for acquisition of trust lands often linger for months, if not years, well beyond the period of time that seems necessary for the

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<sup>3</sup> Supreme Court Justice, Neil Gorsuch, speaks to the preservation and primacy of obligations to and agreements with Tribal Nations, in spite of the interests of state and local governments, during the oral arguments in *Washington v. United States*, saying in part,

"The point of a treaty I would have thought would have been to -- to freeze in time certain rights and -- and to ensure their existence in perpetuity, regardless of what other social benefits a later municipality might be able to claim....Surely, it allowed -- the whole point of the treaty was to give up land. I understand that. But it -- I don't see anything in the treaty -- maybe you can point it to me, maybe I'm just missing it textually -- anything in the treaty that says: Ah, and your rights to those usual and customary grounds and stations is limited by, and may be completely eliminated, if necessary, to meet other domestic interests that a municipality might have, which is, I think, the position you're taking, I think, before this Court." See Transcript of Oral Argument 18-19, *Washington v. United States*, 584 U. S. \_\_\_\_ (2018) (No. 17-269)

Bureau of Indian Affairs (BIA) to thoroughly review and issue an application decision. The delay in application processing is rarely explained, beyond informing an applicant that BIA is overburdened with other tasks and projects that compete for attention and priority with pending trust applications. These delays create significant harm for Tribal governments who are seeking trust acquisitions for critical governmental and economic development purposes for the benefit of Tribal citizens and communities.

In response to these inefficiencies, DOI should seek opportunities to streamline the trust acquisition process through a variety of approaches, such as:

- Following the model set forth in the Indian leasing and right-of-way regulations (25 C.F.R Parts 162 and 169) that allow applicants to appeal to higher levels of Department supervision when BIA fails to act on a pending application within a set amount of time.
- Issuing internal guidance that prioritizes processing fee-to-trust applications for relevant BIA and Solicitor's Office personnel. Prioritization of such work, however, should not force DOI employees to disregard other critical services provided by BIA to Tribal Nations and individual Indians.
- Requesting additional funding from Congress for increased resources in order to prioritize fee-to-trust initiatives, including hiring additional BIA and Solicitor's Office personnel to work exclusively or primarily on trust land acquisition.
- Where possible, eliminating or combining some of the 16 steps for processing trust applications that DOI has identified in its Fee-to-Trust handbook. A number of tasks in the 16-step process could be conducted simultaneously.
- Broadening the use of categorical exclusions in the Department's NEPA review process for fee-to-trust acquisitions.<sup>4</sup>
- Eliminating the requirement that all off-reservation applications obtain approval at DOI headquarters in Washington, D.C.
- Establishing a Tribal Nations-DOI taskforce of Tribal leaders/staff and key DOI employees from BIA, the Solicitor's Office, and DOI leadership who regularly work on fee-to-trust issues to jointly identify areas where increased efficiency is possible, and make recommendations for policy improvements.

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

The location of land, regardless of location, must not categorically disqualify a parcel from being taken into trust. USET SPF acknowledges that a range of considerations and interests can come into play when an application for an off-reservation acquisition is reviewed, including potential economic and other benefits to the applicant, impacts to other Tribal governments located near the land to be acquired, or even whether the activity proposed for the land to be acquired in trust is permitted under applicable law (e.g. Indian gaming on lands acquired in trust after 1988). Nor should the activity proposed for the parcel to be acquired categorically disqualify the parcel from acquisition if the proposed activity is otherwise permissible under applicable law.

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<sup>4</sup> See attached USET SPF Comments.

DOI's consideration of off-reservation acquisitions should not necessarily start from the perspective that an application is controversial merely because the parcel to be acquired in trust is outside of or not contiguous to the boundaries of an existing reservation. The vast majority of fee-to-trust applications, whether on- or off-reservation, are not controversial in any way. Many off-reservation applications are submitted for conservation purposes or to protect cultural and natural resources. In planning to revise the criteria for such applications, DOI should not allow a handful of applications that may be considered controversial to guide policy making and unnecessarily disrupt homeland restoration efforts for a much broader group of applications.

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

The off-reservation application criteria (25 C.F.R. §§151.10-11) set forth a rigorous process under which DOI will evaluate off-reservation trust applications. USET SPF defers to its member Tribal Nations on specific criteria that should be employed for such applications. For all applications, however, regardless of the location of the parcel to be acquired, DOI must evaluate such requests through the lens provided by the IRA, *i.e.* with a view towards securing land bases for all Tribal Nations and encouraging Tribal self-determination and economic development opportunities in Tribal communities.

#### **5. Should different criteria and/or procedures be used in processing off-reservation applications based on:**

##### **a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?**

Tribal economic development is an essential governmental function akin to the efforts of Tribal governments to provide housing and health care or expand other Tribal government services. Thus, there should be no distinction for the purposes of trust land acquisition whether the acquisition is for economic development or other purposes. Tribal governments fulfill a critical role in providing economic development opportunities on Tribal trust land for the benefit of Tribal citizens (and non-citizens who live in surrounding communities) as well as in providing essential governmental services such as health care, education and housing. New Tribal business enterprises and other economic development activities that occur on trust land often generate revenues that allow Tribal governments to undertake and expand governmental services for the benefit of Tribal citizens. In fact, these economic development activities can often be the only source of revenue that support those government services, and provide the only job opportunities available for many Tribal citizens. Accordingly, Tribal trust applications – whether or not for economic development-related activities – should always be considered as intended to support an important Tribal government function.

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

USET SPF stresses caution to the extent DOI intends to propose changes to the regulations that further distinguish treatment of gaming-related applications from other economic development-related applications. In the Indian Gaming Regulatory Act (IGRA), Congress generally prohibited gaming on land acquired in trust after 1988, leaving room for only a handful of exceptions. IGRA Section 20, which sets out the exceptions for gaming on land acquired in trust after 1988, states “Noting in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.” 25 U.S.C. §2719(c). Interior’s regulations at 25 C.F.R. Part 292 already lay out regulatory requirements that govern whether gaming may occur on off-reservation lands acquired in trust after 1988.

**c. Whether the application involves no change in use?**

For applications that propose no change in use, and presumably create little or no controversy, DOI's view – as with all trust applications – should be guided by Congress' intent in the IRA to promote Tribal self-determination and ensure that Tribal nations can build and restore homelands that were lost through failed federal policies of assimilation and allotment. Further, USET SPF strongly supports expediting agency review of such applications, including any required NEPA analysis, which should be minimal when no change in use is contemplated by the fee-to-trust applicant.

To the extent DOI is considering changes to its regulatory process to account for changes in use of land at some point after land is taken into trust, Tribal Nations should be afforded the same treatment and deference given to federal and state governments for any additional requirements that must be met when a change of use is implemented on lands under their respective jurisdictions.

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

As acknowledged by Congress in enacting the IRA, trust lands are foundational to the existence and operation of strong Tribal governments and promoting Tribal self-determination. Trust lands support the exercise of Tribal sovereignty, providing an area of land over which Tribal governments exert their jurisdiction and laws, and are generally free from state interference. The existence of trust lands also ensures a permanent Tribal land base that is not alienable. The federal government's obligation to uphold its trust responsibility to Tribal Nations is attendant with trust land status, as the United States maintains legal title to such lands, holding them for the benefit of Tribal Nations.

Fee land operations often work to the disadvantage of Tribal governments. Because of legal structures that undermine exclusive Tribal sovereign authority, Tribal government activities on unrestricted fee land must contend with state and local jurisdictions, potentially limiting the ability of Tribal Nations to maximize the benefit of such activities for their citizens and hinder Tribal self-determination efforts.

Tribal sovereignty and self-determination, and the trust relationship that exists between Tribal Nations and the United States, afford Tribal governments the choice as to whether to locate operations on trust or fee land. The IRA, which remains controlling law for this Administration, establishes policy goals of securing permanent land bases for Tribal Nations in order to strengthen Tribal governments and economies, and improving the social and economic welfare of Indian people. While these goals were set in place in 1934, they are no less valid today. The IRA envisions that Tribal Nations will exercise self-government and manage their own affairs. A policy shift away from controlling law that discourages or does not prioritize trust land acquisition forces Tribal Nations to contend with the same burdens and requirements imposed through state and local law on non-sovereign entities, working counter to Tribal sovereignty and self-determination, the trust responsibility, and the promise of the IRA.

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

Should DOI modify Part 151, applicants with pending applications at the time any new modifications are implemented should be allowed to choose whether to proceed under the new revisions or the current regulations. Applicants invest significant time, money, and other resources in preparing trust applications. To require pending applications to be resubmitted because this Administration revises Part 151 would unfairly burden applicants, particularly those whose applications have been in the Department's review process for some time and could be close to a final decision. If an applicant wants to resubmit its

application under revised regulations or have a pending application evaluated under revised regulations, an applicant should have the option to do so.

DOI's Indian right-of-way regulations provide useful precedent for how DOI should treat pending applications. 25 C.F.R. 169.7(c), gives right-of-way applicants who had applications pending when the Part 169 revisions went into effect the option of withdrawing the pending application and resubmitting it for review under the revised regulations, or proceeding with review under the regulations that were in effect when the application was submitted.

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

Current regulations already fully account for the concerns of state and local governments. Such concerns must not outweigh the views of Tribal and individual Indian applicants, to whom DOI has a trust responsibility. When considering trust applications under Part 151, DOI should consider state and local input as but one factor to weigh in fulfilling some of the IRA's chief purposes – to restore Tribal land bases in order to encourage economic development in Tribal communities and support Tribal self-determination and cultural preservation. It is DOI's responsibility to address any concerns held by state and local governments, and not the responsibility of the Tribal Nation seeking trust land.

Other mechanisms, including Memoranda of Understanding (MOUs) and gaming compacts, provide a means by which state and local jurisdictions and other stakeholders can address concerns over issues like jurisdictional conflicts as well as loss of property taxes and other revenues. An effort by this Administration to change regulations to give greater weight to the views state and local jurisdictions and the general public while diminishing the views of Tribal and individual Indian applicants violates the trust responsibility and the intent of the IRA. State and local jurisdictions should never have veto power (explicit or implicit) over trust land acquisitions.

Public comment should not be entitled to additional weight under any changes in the application review process that DOI may consider. The fee-to-trust process is grounded in the government-to-government relationship between two sovereigns—a Tribal Nation and the United States. The United States does not have the same responsibilities and obligations to the general public that it has to Tribal Nations. Further, both the on reservation and off-reservation criteria in Part 151 account for impact of an acquisition on state and local governments, with DOI notifying and providing state and local governments a 30-day period to provide written comments on the impacts of a potential acquisition. The concerns of the public can be accounted for through DOI's consideration of the comments of state and local governments whose elected officials represent the public.

#### **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/cooperative agreements with other jurisdictions are beneficial to the land-into-trust process. These agreements should be encouraged and DOI should assist in their development. However, such agreements should never be required, and the lack of any agreement must not foreclose or unduly delay a request to put land in trust. USET SPF is open to further consultation about incentivizing cooperative agreements, but is strongly opposed to any effort to require or otherwise use cooperative agreements to delay the fee-to-trust process or provide state and local governments a veto over a fee-to-trust acquisition.



Any efforts to have DOI mandate that tax or other payment agreements (*i.e.* payment in lieu of taxes) between Tribal fee-to-trust applicants and local governments before land can be taken into trust must be rejected. Such a requirement would give local governments significant leverage over Tribal applicants, allowing them to wield veto authority and have applicants at the mercy of local interests. These types of payments to state and local governments should be the responsibility of DOI, not Tribal Nations.

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

As we note earlier in this document, there are several measures this Administration should explore to enhance the ability of Tribal Nations to put land into trust:

- Following the model set forth in the Indian leasing and right-of-way regulations (25 C.F.R. Parts 162 and 169) that allows applicants to appeal to higher levels of DOI supervision when BIA fails to act on a pending application within a set amount of time;
- Ensuring that requisite resources are devoted to fee-to-trust initiatives, such as targeted and additional hiring of BIA and Solicitor's Office personnel to work exclusively or primarily on trust land acquisition;
- Where possible, eliminating or combining some of the 16 steps for processing trust applications that the Department has identified in its Fee-to-Trust handbook. A number of tasks in the 16-step process could be conducted simultaneously;
- Broadening the use of categorical exclusions in DOI's NEPA review process for fee-to-trust acquisitions;
- Eliminating the requirement that all off-reservation applications obtain approval at DOI headquarters in Washington, D.C.;
- Establishing a Tribal Nations-DOI taskforce of Tribal leaders/staff and key Department employees from BIA, the Solicitor's Office, and Departmental leadership who regularly work on fee-to-trust issues to jointly identify areas where increased efficiency is possible, and make recommendations for policy improvements.

#### **DOI's October 2017 Proposed Revisions to 25 C.F.R. §§ 151.11-12**

The December 6, 2017 "Dear Tribal Leader" ("DTL") letter regarding consultation with Tribal Nations on Part 151 issues suggests that DOI is not formally considering any proposed revision of 25 C.F.R. §§ 151.11-12 at this time. However, to the extent DOI is still considering revisions to those sections consistent with the draft proposal provided to Tribal Nations in DOI's October 4, 2017 DTL letter ("Consultation Draft"), USET SPF will address those potential changes in these comments.

#### Consultation Draft §151.11

As an initial matter, in issuing the Consultation Draft before consulting with Tribal Nations, DOI has not acted consistently with Executive Order 13175, DOI Secretarial Order 3317, and DOI's Tribal Consultation Policy. Consistent with promoting Tribal self-determination and upholding the federal trust responsibility to Tribal Nations, any proposed Part 151 changes should have only come after a call for such changes by Tribal Nations or at the very least, should have been preceded by meaningful dialogue with Tribal Nations on whether Part 151 changes were necessary. Acting otherwise ignores DOI's obligation to consult with Tribal Nations in good faith on a policy change that, if enacted, will have wide-ranging impacts on the ability of Tribal Nations to restore our homelands.

Second, there is no legitimate need to make a distinction in Part 151 between off-reservation gaming- and non-gaming-related land acquisitions. IGRA Section 20 governs the eligibility for gaming on land acquired in trust after 1988, setting out very specific criteria for gaming-eligible lands. See 25 U.S.C. §2719. DOI has promulgated longstanding regulations to implement IGRA's requirements. See 25 C.F.R. Part 292. Further, Congress made clear in IGRA Section 20 that "nothing in [Section 20] shall affect or diminish the authority and responsibility of the Secretary [of Interior] to take land into trust." 25 U.S.C. §2719. Accordingly, nothing additional is needed in Part 151 to distinguish off-reservation gaming-related trust acquisitions from other off-reservation acquisitions. As Congress in the IRA has not distinguished between off-reservation gaming- and non-gaming-related acquisitions, DOI need not draw any such lines in the IRA's implementing regulations.

As to the specific criteria proposed for acquisitions for gaming and non-gaming purposes, USET SPF strongly opposes the addition of any criteria or requirements for off-reservation trust applications that would create a greater burden on applicants, increase the time it takes to prepare or process an application, or otherwise frustrate the fee-to-trust acquisition process and make it more difficult for Tribal Nations to put land in trust and restore their homelands. In sum, the application criteria included in §151.11 as currently enacted is adequate to evaluate a request to take off-reservation land into trust.

If any of the changes reflected in Consultation Draft §151.11 were to be enacted, none of those criteria standing alone should be dispositive in DOI's decision to reject a Tribal Nation's trust application. Indeed, USET SPF strongly opposes the denial of a trust application based on the use of proposed criteria in the Consultation Draft concerning economic benefits resulting from a trust acquisition, impacts on reservation employment rates, or other on-reservation benefits resulting from an off-reservation gaming project. Such requirements are paternalistic and undermine Tribal self-determination as they suggest that a Tribal applicant must first prove to DOI that economic benefits will follow before an application can be approved. Such a requirement does not exist in the IRA. Tribal Nations are fully capable of deciding, without DOI oversight, whether the use of a trust acquisition for gaming or other commercial purposes makes sense from an economic development perspective for the Tribal Nation, its membership, and the surrounding community.

USET SPF likewise objects to including any criteria in §151.11 that would provide DOI a basis to deny a trust application because a Tribal Nation has not reached an intergovernmental agreement with a local or state government or has not undertaken efforts to mitigate impacts to the local community resulting from the proposed acquisition. Such criteria could effectively provide state and local governments with a veto over trust applications or give those governments unfair leverage in negotiating intergovernmental agreements with Tribal Nations. While USET SPF sees significant benefit in and supports the development of strong relationships and partnerships between Tribal Nations and neighboring local and state governments, DOI's focus in evaluating fee-to-trust applications should remain on upholding the federal trust responsibility to Tribal Nations and reaching outcomes that serve the interests of Tribal Nations and their citizens. The impacts of an off-reservation trust acquisition on neighboring state and local governments should be a secondary concern.

USET SPF has significant concerns about any proposal to bifurcate DOI's review process as set forth in the Consultation Draft. Conceptually, USET SPF welcomes DOI's stated rationale in the "Summary Sheet of Consultation Draft" for the proposed bifurcation of "reduc[ing] burden, saving applicants time and money from expending resources on National Environmental Policy Act (NEPA) compliance, a *Carcieri* analysis, and (if applicable) information regarding eligibility to conduct gaming under 25 CFR Part 292, for an application that the Department would ultimately disapprove on other factors." The Consultation Draft is problematic, however, in summarily declaring that DOI will deny an application in the initial review portion of

the bifurcated process if the application fails to address the criteria identified in the proposed §151.11(a). Instead, USET SPF suggests that DOI consult with the applicant about any required information that is missing from an application before taking steps to issue a denial.

USET SPF is also troubled by the Consultation Draft's lack of clarity about whether DOI may, in any second phase/final review as part of the bifurcated process, reject an application for failure to satisfy the criteria examined in the initial review. If DOI retains discretion to deny an application during second phase/final review based on criteria that will be considered in the initial review, such a result significantly undermines DOI's justification for bifurcating the process as Tribal Nations could find themselves in the circumstance of having prepared analyses required by NEPA, *Carcieri v. Salazar*, and/or 25 C.F.R. Part 292 only to have a pending application rejected based on criteria that should have been fully examined as part of DOI's initial review. Accordingly, any change to §151.11 to implement the bifurcated process set forth in the Consultation Draft should make clear that once an applicant is instructed to submit information for second phase/final review, DOI's examination of initial review criteria is complete and that the application will not be denied based on any criteria considered in the initial review.

Finally, USET SPF objects to any requirement in Consultation Draft §151.11(d) that would subject all pending fee-to-trust applications to a revised §151.11. Rather, for any application that is pending at the time any revised regulations are enacted, the applicant should be allowed to choose whether the regulations that were in effect at the time the application was submitted should apply or whether any newly revised regulations should apply.

#### Consultation Draft §151.12

USET SPF strongly objects to Consultation Draft §151.12, which would reinstitute a 30-day waiting period for land to be taken into trust after a Part 151 approval by the Secretary of Interior or Assistant Secretary – Indian Affairs or after the time has run for an appeal or the exhaustion of administrative remedies when approval is made by BIA. As explained by DOI when eliminating the 30-day waiting period by final rule in November 2013, the waiting period is not necessary in light of *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U. S. 209 (2012). See 78 FR 67928-67938.

Given that an Administrative Procedure Act challenge to a trust acquisition may now be filed up to six years after an agency decision to put land into trust, there is little, if any, value in waiting at least 30 days after an application approval to actually put the land in trust. Rather, the acquisitions should occur as quickly as possible to give Tribal landowners some sense of certainty, even though a threat of litigation remains after the acquisition. Taking the step of immediate acquisition following application approval (and exhaustion of administrative remedies in the case of BIA approval) allows Tribal landowners to act that much more quickly to use the land for the purpose(s) for which it was acquired in trust and means that Indian landowners do not have to wait for DOI to complete the acquisition or take other administrative steps after the threat of a litigation challenge has passed. This position is further justified given the high rate of acquisitions that are non-controversial and never subject to challenge, as well as the United States' success rate in litigation defending trust acquisitions that have been challenged.

While USET SPF acknowledges DOI's concern expressed in the October 4, 2017 DTL that reinstating the 30-day waiting period "will help to prevent situations where title is transferred into trust and a Tribe expends resources developing that land, only to face protracted litigation and the possibility of a court reversing the Department's decision and ordering that the land be taken out of trust," the facts simply do not support a need for reinstating the waiting period. Tribal Nations are more than capable of assessing for themselves whether they are willing to take the risk of using Tribal resources to develop land whose trust status may be

subject to litigation challenge. The proposal made in Consultation Draft§151.12 can only be viewed as a step backwards in the effort to restore Tribal homelands. USET SPF wholeheartedly rejects this approach.

### **Conclusion**

USET SPF urges DOI, in accordance with its trust obligations, to heed the call of Tribal Nations across the country and avoid any further activity on any proposed revisions to the fee-to-trust process. To continue to move forward would fly in the face of guidance received during consultations throughout the country. The restoration of Tribal homelands is a critical function of the federal government and DOI must work in partnership with **all** Tribal Nations to determine what changes, if any, should be made to the land-into-trust process, including opportunities to streamline the process, as we propose above. We continue to look forward to the opportunity to work with DOI, and the incoming ASIA, to reach this goal.

Should you have questions or require additional information please do not hesitate to contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (202) 624-3550 or by email at [lmalerba@usetinc.org](mailto:lmalerba@usetinc.org).

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director