

AK-CHIN INDIAN COMMUNITY

Community Government

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June 29, 2018

VIA EMAIL ONLY

John Tahsuda
Principal Deputy Assistant Secretary – Indian Affairs
Department of Interior
Washington, D.C. 20240
consultation@bia.gov

Re: The Department's potential revisions to 25 C.F.R. Part 151 regulations

Dear Principal Deputy Assistant Secretary Tahsuda:

My name is Gabriel Lopez and I am the Vice-Chairman of the Ak-Chin Indian Community. On behalf of the Ak-Chin Indian Community, I offer the following comments regarding the Department's potential revisions to 25 C.F.R. Part 151 regulations.

Introduction

The Ak-Chin Indian Community is located approximately 37 miles southeast of the Phoenix Metropolitan Area, Phoenix, Arizona. "Ak-Chin" is an O'odham word meaning the "mouth of the wash" or "place where the wash loses itself in the sand or ground." The term refers to a type of farming that relies on washes – seasonal flood plains created by winter snows and summer rains.

Our reservation consists of close to 22,000 acres and our land base is small relative to most other tribal reservations. Unfortunately, much of our land that is not devoted to farming cannot be developed because of the many desert washes running through our Reservation.

Historically, our people survived from the desert washes for water and growing seasonal foods – living our "Him Dak" way. Land means "home" to tribes, not necessarily something to be sold for profits. Home means tribal sovereignty, self-determination, and a place to protect our tribal culture, customs, ceremonies, languages, religions, and traditions.

The Ak-Chin Indian Reservation was formally established by the United States on March 28, 1912, by Executive Order No. 1538 of President William Howard Taft. That Executive Order set aside 47,600 acres to the Ak-Chin Reservation. Shortly thereafter, however, by President Taft's Executive Order 1621 dated October 8, 1912, the United States took back 25,760 acres of land without explanation or compensation, thereby reducing the Ak-Chin Reservation by more than half of its original size. (See Attached Map). In recent years, Ak-Chin Indian Community has been making efforts to recapture some of its lands lost because of the second Executive

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Order. The provisions of the Indian Reorganization Act and the Fee-to-Trust (“FTT”) process are vital tools toward achieving this result.

The Indian Reorganization Act (“IRA”) and the FTT process enable tribes to not only purchase land to accommodate the needs of tribal members, but perhaps, more importantly, to recover ancestral land and return it to their respective tribal reservations. While it is a disgrace that tribes must purchase former and/or ancestral lands that were stolen from them in the past, the IRA requires the BIA to return such lands to tribal trust status.

Because of our growing population and Tribal members wanting to return home from other areas, the Community is constantly looking for options to enlarge its Reservation in order to provide more housing and job opportunities for its members. Each FTT transfer enables the Community to realize the goals of the Indian Reorganization Act in furtherance of tribal sovereignty and self-sufficiency. Thus, Ak-Chin opposes any efforts by the Department to make the process more cumbersome, costly or time consuming. There is no need for additional and more burdensome regulations, which only increase administrative burdens at the expense of tribal job creation and development.

The Department should not adopt any changes that makes it harder for tribe to transfer land into trust, or give local and state governments a role in the process. As you know, some local and state governments work well with tribes, but many are hostile to tribes and refuse to even engage with their tribal neighbors, let alone negotiate in good faith with tribes. While Ak-Chin works with its local and state neighbors, the FTT and NEPA processes already provide sufficient opportunities to those entities to comment on a tribe's FTT application. Consequently, the Community vigorously opposes any requirement for tribal-local inter-governmental agreements. Finally, the Community respectfully requests that the 30-day FTT stay be removed as it invites additional tribal costs, delays, and frivolous litigation.

Indian Reorganization Act

As contemplated by the Indian Reorganization Act – 25 U.S.C. §461 et al.¹ (“IRA”) – FTT for tribes is meant to facilitate brighter tribal futures by assisting with land acquisition, especially regarding former reservation and contiguous tribal homelands so tribes could truly exercise self-sufficiency and sovereignty. The federal trust responsibility and the Department's fiduciary duty is to Indian tribes – not local and state governments. The Department needs to act as a real trustee. Hence, the proposed regulations appear to violate the IRA. In fact, there should be no mention of “local community benefits” in the Regulations because there is no such criterion in the IRA.

¹ 25 U.S.C. §465 specifically authorizes the Secretary to take land into trust for the benefit of Indian tribes.

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The IRA was passed, in part, with the goal of preventing the further erosion of the tribal land base, and to provide a means for the federal government, acting as trustee for the tribes, to facilitate recovery of lands lost as the tragic consequence of the Dawes Severalty Act (General Allotment Act) of 1887. The goals of the Dawes Severalty Act are incompatible with current philosophy and objectives of both the United States government and tribes. Francis Paul Prucha, the noted historian of federal-tribal relations, has demonstrated this by citations to many spokesmen who advocated the Act. One Interior Secretary, for example, asserted that allotting lands in severalty to individual Indians would “rapidly break up tribal reservations and Indian communities.”² Senator Richard Coke of Texas, another early advocate of the concepts behind the Dawes Act, aimed to “break up large reservations...and to break up their tribal relations.”³

From 1880 to the passage of the IRA in 1934, tribal homelands shrunk from 153,000,000 acres to 52,000,000 acres. Commissioner John Collier, who was the driving force behind passage of the IRA, had understood back in 1928 that “ending the allotment policy was crucial to preserving the reservation land base for many Native societies, which was in turn vital to preserving the distinctive cultures and social structures that still characterized much of Native America.”⁴ Endorsing the IRA by letter dated April 28, 1934, President Franklin D. Roosevelt wrote that the legislation, then under consideration by Congress, was intended to halt the loss of Indian lands.

As we have already noted, Ak-Chin lost over half of its reservation acreage in less than seven months. While much of the tribal lost lands have not been recovered, John Collier, Indian Affairs Commissioner, made it clear in testifying in support of the IRA in May, 1934, that the IRA, in providing for the acquisition of land for tribes by the Federal Trustee, aimed at restoring lost Indian acreage wherever possible. In later writings, Collier reiterated that under the IRA, “land allotment was to be stopped, and the revestment of Indians with land was provided for.”⁵ One scholar studying the passage and legislative history of the IRA, has noted that the reservation land issue was central in the minds of its proponents, especially that section authorizing the Secretary to acquire lands outside existing reservations and to place them into trust for the tribes.⁶ Modern Indian legal scholars agree, characterizing the IRA FTT section as

² Francis Paul Prucha, *The Great Father: The United States Government and the American Indian* (Lincoln: University of Nebraska Press, 1984; 1995), 660, 661.

³ *Id.* at 665.

⁴ Elmer R. Rusco, *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act* (Third Printing, University of Nevada Press, 2000), p. 255.

⁵ John Collier, *Indians of the Americas: The Long Hope* (New York: New American Library, 1947), 157.

⁶ See, generally, *Id.*, pp. 255-281.

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“the capstone of the land-related provisions of the IRA,” expressing the Congressional “policy of protecting and increasing the Indian trust land base.”⁷

To give effect to the IRA as its drafters and supporters intended, the Secretary should issue no regulations that impede or delay the central purpose of the legislation.

Finally, not every FTT decision needs to be made at the Central Office. For years, Area Offices were making those decisions. Centralizing such decision making, where some Washington, D.C. bureaucrats have no knowledge of the local community or situation, will only slow the process down even more.

Automatic Approvals

In an effort to streamline the FTT process, we propose that the following tribal applications be automatically approved by the BIA without the public comment period, site visit, and lengthy environmental review process:

1. Acquisitions of former Reservation lands.
2. Acquisitions of on-Reservation restricted and fee lands.
3. Acquisitions of fee lands within the Reservation, which were not allotted lands but are within the exterior boundaries of the Reservation.
4. Applications where there are no changes in use for contiguous parcels.
5. Applications where there is no change in use for a nearby parcel located within 5 miles of the Reservation that was not former Reservation land.
6. Applications that are not opposed by local governments.

We believe that providing these applications with automatic approvals will expedite the FTT process and allow the BIA to utilize their resources on non-automatic applications, thereby streamlining the entire application process. The current process is glacial and cumbersome. As you know, the FTT process delay significantly harms tribes and their tribal members. Every day that an application languishes in the process is another day that a tribal project is not constructed, tribal economic development is not initiated, tribal jobs are not created, or tribal government infrastructure, services, and programs are not available for tribal members.

10 BIA Questions

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

⁷ Nell Jessup Newton (Editor-in-Chief), *Cohen's Handbook of Federal Indian Law* 2005 Edition (Lexis/Nexis, 2005), Section 15.07 (1)(a).

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The objective of the land-into-trust program should be to bring “land into trust” for the benefit of Indian tribes and their members. The Department should be working, as the trustee for tribes to bring land into trust as expeditiously and cost-effectively as possible for the benefits of tribes. The IRA clearly mandates that the federal government bring land into trust after an oppressive history of stolen and diminished tribal homelands. Thus, the Department needs to work on processes for a speedy “yes” for tribes instead of a languid “no.”

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

The Department's approval process is not effective. Although the Community does not have any on-reservation allotments, the Department's slow and cumbersome approval process of on-Reservation applications adversely affects our Tribe and others who work with the Department to because the Department's slow approval process for simple on-Reservation application adversely affects all the other applications. Please see our proposed Automatic Approvals, listed above, as a way to improve the current process.

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

If a tribe submits a FTT application, then it has decided that it is important to the tribe that such land become tribal trust land. As the trustee for tribes, the Department should, under normal circumstances, respect the sovereign decisions of the tribes. On the other hand, we understand if the Department decides to disapprove applications from tribes wherein such land is in another tribe's ancestral homelands or far flung from the applicant's present Reservation.

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

See No. 3 above. The current 25 CFR §151 criteria are more than sufficient.

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, health care, or housing)?*

Please see our proposed Automatic Approvals. We also believe the current regulations more than address the purposes.

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

We recognize that gaming applications are different from other economic development. However, we also firmly believe that the current FTT and Indian Gaming Regulatory Act (“IGRA”) two-part approval processes provide more than sufficient review and approvals.

c. Whether the application involves no change in use?

A no-change-in-use application should be automatically approved. Furthermore, the Department’s NEPA analysis should extend Categorical Exclusions to such no-change-in-use applications.

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

If a tribe has determined that it wants to improve its contiguous or nearby tribal trust lands in its exercise of self-determination, that tribal sovereign decision should not be second-guessed by the federal government or any other government. Moreover, the statutory language, findings, and goals of the IRA clearly elucidate the objectives and benefits of the FTT process. More specifically, operating within tribal jurisdiction on trust versus fee land is the paramount expression of tribal sovereignty and self-determination.

In addition, placing land into trust status allows tribes to better regulate activities on its own land; otherwise, tribes are subject to state and local laws and regulations, which can be adverse to not only economic development, but to tribal culture and tradition as well. Finally, there is a financial burden to tribes. If land owned in fee by tribes is not placed into trust, tribes must pay taxes to the state, including real estate taxes and taxes associated with doing business within the state.

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

It depends. If the new regulations are more cumbersome and time consuming than the previous regulations, then the pending applications should be processed under the existing regulations. Perhaps the best way to address this is to allow tribes with pending applications to elect which process to follow. Nevertheless, pending applications should be processed and finalized with all deliberate speed. In fact, every pending application should be moved to the BIA’s next step in its 16-step application approval process within the next 30 days.

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

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The IRA does not contemplate state or local concerns, thus, any expansion of state or local participation would violate federal law – the IRA. The IRA was and is for tribes. The Department just needs to comply with the IRA and not attempt to institute a balancing test for state or local governments in the IRA. Accordingly, we believe the FTT and NEPA processes⁸ already provide more than enough weight for local and state concerns. As you know, tribal histories and interactions with state and local governments are full of racist and discriminatory dealings. Unfortunately, a lot of those past practices permeate present FTT applications as non-Indians attack the owner (tribe) of a FTT project under the guise of the project itself. Stand Up California's funding and involvement in non-California FTT applications is a prime example of such discriminatory action being taken by politicians and those with political influence.

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?

In our experience, probably like other tribes, the local and state governments initiating such concepts have fought against practically every tribal FTT application. Despite such opposition, our Tribe continued to communicate with local and state governments and address their concerns. After the first application(s), the local and state governments realized that their irrational fear was unfounded, and welcomed the job opportunities and economic activity that such Tribal housing, infrastructure and other economic development brought to the entire local community. Thus, MOUs are not required for improved government-to-government relationships. In fact, not requiring an MOU actually fosters good faith negotiation, and respectful and effective collaboration. Requiring such cooperative agreements only provides the local and state governments with extortion leverage and veto power - thus, they should not be required.

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

Please note that the Department, as the tribes' trustee, has a statutory fiduciary duty under the IRA and legal duty to facilitate tribal land acquisitions – not frustrate IRA's mandate. Consequently, we believe the current FTT regulations, with the exception of IGRA's two-part determination process, are too cumbersome for tribes. Finally, again we urge following our proposed Automatic Approvals, and we believe some sort of "deemed approved" timelines should be added.

⁸ IGRA also provides an additional mechanism for local and state concerns for off-reservation gaming applications.

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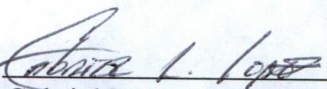
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Conclusion

In summary, any Department revisions to the FTT process should make it more efficient for tribes with more expedited timelines. Moreover, for the reasons stated above, we believe that if the Department truly wants to reduce federal government regulatory hurdles and streamline its processes for the benefit of tribal job creation, infrastructure development, and other tribal purposes, it should adopt our proposed Automatic Approvals. Finally, any such revisions should become effective only after the new Assistant Secretary is sworn in and has had time to review such changes.

Respectfully,

AK-CHIN INDIAN COMMUNITY

By  _____
Gabriel Lopez, Vice-Chairman

Attachment: Map



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