SUSANVILLE INDIAN RANCHERIA

January 22, 2018

Sent via Email to consultation@bia.gov
Attn: Fee-To-Trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C St. NW
Mailstop #4660-MIB
Washington, DC 20240

RE: Comments on Draft Revisions to 25 C.F.R. Part 151.11 and Part 151.12

Dear Acting Assistant Secretary Tahsuda:

These comments are submitted on behalf of the Susanville Indian Rancheria (the "Rancheria"). The Rancheria, as with all other federally-recognized tribes, has its own complex and unique history. The Rancheria is made up of descendants of Maidu, Paiute, Pit River, and Washoe peoples. As such, the territorial reach of the Rancheria was expansive, not limited solely to the Susanville, California area. While some initial trust land was reserved at an early time for the Rancheria in that area, since then the Department of Interior (hereinafter "the Department" or DOI) has taken multiple parcels of land into trust across a wider geography that more closely resembles the broad and extensive ancestral homelands of the Rancheria.

The history of the Rancheria is one of hard fought efforts to reestablish a trust land base. This process is lengthy, expensive, resource-intensive, and fraught with complications when surrounding jurisdictions object to tribal self-determination. As such, any efforts by the Department that would make the process harder or more time-consuming in proposed regulations provisions cut directly against the Department's stated goal of reducing regulatory burdens. From the Rancheria's perspective, the proposed regulations will add unnecessary delay to the land into trust (LIT) process, and embolden and strengthen non-tribal interests that object to the tribal lands being placed into trust.

The realities of Indian Country vary from tribe to tribe, region to region. The Rancheria appreciates that the Department has made efforts to conduct consultations regionally. But having read the transcripts of those consultations, and after hearing from other tribes commenting on this process, the Rancheria is concerned about whether the Department understands the negative impact its proposed actions would have on Indian Country.

The enclosed comments address our concerns related to the October 4, 2017 draft revisions to 25 C.F.R. Part 151.11 and Part 151.12 ("October Letter") as well as the December 6, 2017 Dear Tribal Leader letter ("December Letter").

The October Draft Revisions Should Be Formally Withdrawn

As an initial comment, the Rancheria has tracked tribal rulemaking processes by the federal government for decades. The informal and somewhat unstructured offering of draft revisions to 25 CFR Part 151 contained in the October Letter is not in line with previous rulemaking procedures used by the Department. Over the past 25 years, the Department has made strong efforts to make tribal consultation meaningful and timely. Generally, the Department has engaged in a tribal input process prior to issuing draft regulatory revisions. In this case, the Department simply attached them to a letter and sent it out. As you note in the December Letter, it is more appropriate to begin this process with a broader discussion of 25 C.F.R. Part 151 ("Part 151") and the LIT process rather than a truncated approach. Therefore, we request that the Department formally withdraw the draft revisions contained in the October Letter.

Comments on Questions Posed in the December Letter

In its December 6, 2017 letter, the Department asked a series of questions to prompt tribal comments. What follows are the Rancheria's responses to these questions:

1. What should the objectives of the LIT program be? What should the Department be working to accomplish?

This set of questions is straightforward to answer: the Department should be working tirelessly in furtherance of its trust responsibility to tribes, and place land into trust with the least amount of expense, time, and controversy for tribes. The Rancheria had 30 trust acres in 1923, then placed into trust because of the horrific conditions and existence of Rancheria Indians. Over the next 50 years, only 120 additional acres were placed into trust, and that did only occurred with special legislation in 1978, again due to drastic Rancheria needs.

Without trust land, tribes have no hope of building governments, language, their cultural identity, local economies, addressing housing needs, and creating the capacity to be less reliant on the federal government. The importance of trust land for tribes cannot be overstated. Perhaps most importantly, trust land provides the tribal government the ability to exercise its territorial jurisdiction without interference from state or local jurisdictions. Tribes can then decide for themselves whether to develop the land for economic development or governmental purposes such as housing, health care, or tribal administration. Trust land also insulates tribes from state and local taxation, can provide the tribe with a limited tax base, and gives tribes the ability to protect land with historical

and cultural significance. The Supreme Court itself has recognized that "there is a significant territorial component to tribal power."[1]

2. How effectively does the Department address on-reservation LIT applications?

The Rancheria, as a result of having to rebuild its trust land base from zero, does not have the same issues as other tribes with on-reservation allotments. The Rancheria encourages the Department to remove all impediments to tribes taking land into trust on existing reservations, as well as lands that are adjacent to existing reservations and trust parcels. Those adjacent parcels should be treated as "on-reservation" applications, since concerns about distance, jurisdiction, checker-boarding and non-Indian impacts are minimized and/or non-existent.

3. Under what circumstances should the Department approve off-reservation trust applications?

The Indian Reorganization Act (IRA) does not distinguish between "on-reservation" and "off-reservation" trust land. The Department should not create preferential processes, but rather streamline all LIT processes.

The Department has had relatively consistent regulations found at 25 CFR Part 151 for the last two decades or so. However, the resources necessary to process LIT applications has varied over those years, with the Department never having sufficient funding to meet need. Nonetheless, the Department has generally viewed its role in placing land in trust as that of implementing the IRA in a manner that fosters tribal self-determination while encouraging local cooperation where possible.

The Department should approve land in trust where doing so benefits an Indian tribe and addresses needs laid out in the LIT application. Many tribes are their region's largest employer. However, many of these jobs would be non-existent without trust land. The Department should have a solid grasp and understanding of the thousands of examples in the United States where tribal trust land substantially benefits both the tribe and the surrounding non-Indian community and economy. With those principles in mind, the Department can approve off-reservation placement of land in trust knowing that there is a strong likelihood of short- and long-term benefits to the broader community.

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

One of the most important criteria the Department should consider is that each tribe is different. Some tribes have a huge land base while many tribes like the Rancheria

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[1] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

struggle to provide enough land to meet tribal needs. Everywhere, land is expensive and where tribes acquire title to fee land, the Department should give the Tribe great deference when a tribe makes a determination that the land is necessary to meet tribal objectives.

As noted above, the IRA does not distinguish between "on" and "off" reservation in its authority for the Department to place land into trust. That language arose from the enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, in regard to what trust land would be eligible for gaming purposes and that decision – whether the land is eligible for gaming – is vested with the Chair of the National Indian Gaming Commission and not the Secretary or the Department. In fact, the text of the IRA and associated Congressional reports indicate that the IRA ". . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians". 78 Cong.Rec. 11125.

The presumption that an "on-reservation" acquisition is somehow the "preferred" acquisition is the very type of bureaucratic control and paternalism that Congress was directing the Department to move away from when it passed the IRA. The IRA was specifically intended to put tribal decisions, including decisions about trust land acquisitions into the hands of tribes without second-guessing by the Department. *Id.* Today, tribes are more capable than ever to make those types of informed decisions and the Department should defer to tribal expertise and process all applications in the same manner regardless of location or purpose.

Indeed, the notion that "economic development" applications should be cordoned off from "non-economic development" purposes applications is directly in contrast with the purpose of the IRA. "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life...", *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), *citing* H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). Congress *intended* the land acquisitions to facilitate all types of tribal economic development, including gaming if the tribe so chooses. The erosion of this central fundamental purpose is outside Congressional intent and should be rectified in any revisions to Part 151. The Department should not engage in the politics and rhetoric around gaming applications and simply process these applications in a uniform and efficient manner that meets the statutory requirements of the IRA or other authorizing statute and complies with other applicable federal law – as intended by Congress. If there is no proposed change in use of the property, then the Department should ensure that a Categorical Exclusion to National Environmental Policy Act (NEPA) requirements is adopted and efficiently applied.

The Department has for decades applied criteria that take into account location, jurisdictional impacts, cost-benefit analysis, environmental considerations, etc. These criteria appear to have created opportunities for tribes and local governments to have

conversations, and create some cooperative agreements to meet local needs along with the tribal need for trust land. The Department should utilize criteria that encourage these conversations and cooperative agreements, but without diminishing the clear goals and objectives of the IRA to strengthen tribal governments and communities. The existing regulations found at 25 CFR Part 151 include sufficient criteria for the placement of land into trust, so long as an additional criteria is added to examine the specific land history of the applicant tribe, since that is a critical element the current regulations do not adequately address.

5. Should different criteria or procedures be used for off-reservation applications that are for economic development, housing, gaming, non-gaming, and/or no change in land use applications?

No. As argued directly above, these distinctions only create division, confusion, and complications. The Department should use the same criteria and procedures, but the Department should have the internal capacity to streamline applications based on factors such as absolute tribal need, clear lack of controversy, no change in land usage, and/or a tribal request to the Department to prioritize a specific LIT application. Housing applications made to address homelessness are clear examples of the type of LIT application that should move through the process quickly.

The Rancheria recommends the Department look closely at the land-into-trust process and develop reasonable timeframes for completing any bureaucratic functions necessary to making the final decision. Further, the Department should establish a timeframe for reaching a final decision. These defined timeframes will provide guidance to the Department staff and certainty for the tribal applicant.

The criteria that the Department utilizes should not be complex, arcane, and multi-faceted. The criteria should be straightforward for every application, the procedures should be streamlined for every application, and the Department should consult with each applicant tribe as to how to prioritize a given application. It is important for the Department to understand that the regulations have to be adaptive to meet tribal needs.

Congress has authorized the Secretary to place land-into-trust for the benefit of a tribe in over fifty separate statutes.[2] The Part 151 process is used by the Department to

[2] *See eg.*, Indian Financing Act of 1974, 25 U.S.C. §§ 1466, 1495; Indian Land Consolidation Act, 25 U.S.C. § 2202; Indian Land Consolidation Act of 1983, as amended by the Act of November 7, 2000, also known as the American Indian Probate Reform Act, 25 U.S.C. § 2216(c); Rocky Boy's Indian Reservation, Pub. L. No. 85–773, 72 Stat. 931 (formerly 25 U.S.C. § 465); Payson Band, Yavapai-Apache Indian Reservation Act, Pub. L. No. 92–470, 86 Stat. 783 (formerly 25 U.S.C. § 465); 25 U.S.C. § 5322(a)(3); Federal Property and Administrative Services Act, 40 U.S.C. § 483(a)(1)-(2); Oklahoma Indian Welfare Act, 25 U.S.C. § 5201, ch. 831, § 1, 49 Stat. 1967 (formerly 25 U.S.C § 501); 76 Cong. Ch. 387, § 4, 53 Stat. 1129 (formerly 25 U.S.C. §§ 574); Pub. L. No. 88-418.

process tribal requests for the Secretary to place land into trust on behalf of a particular tribe under authority delegated by a given statute. Generally, the majority of trust land applications cite to the Secretary's authority under the IRA. However, the Part 151 process is also used by the Department to process trust land applications under other statutory authority such as discretionary tribal settlement or restoration act acquisitions.

6. What are the advantages of operating on land that is in trust?

It is somewhat concerning to the Rancheria that the Department feels the need to ask for this information given the success of the IRA, the success of the Indian Self-Determination, Education and Assistance Act, and the wide range of stories from the United States of tribal strength and recovery. Of course Indian Country still suffers and includes some of the most impoverished, remote, and underserved populations in the country. However, the placement of land in trust for tribes has been a bright spot and it is helpful to go back to the adoption of the IRA to understand why land in trust is so important.

The IRA reflected a drastic sea of change from a policy of divesting tribal lands under the Indian General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388 (1886), to a policy of restoring halting divestment and restoring land back into tribal ownership.

> "Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe*, 411 U.S. at 151.
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> "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934). *See also* S.Rep.No.1080, 73d Cong., 2d Sess., 1 (1934).

To date, Congress has not changed this fundamental purpose of the IRA nor has the Supreme Court held – despite numerous challenges – that land should not be placed into trust on behalf of tribes under the Secretary's authority.[3]

As stated earlier, the importance of trust land for tribes cannot be overstated. Trust land provides the tribal government the ability to exercise its territorial jurisdiction

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[3] *See generally, Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433, 197 L. Ed. 2d 660 (2017); *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Dir., Bureau of Indian Affairs*, 32 IBIA 309, 312 (1998); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016).

as a true form of self-determination and sovereignty. Tribes can decide for themselves whether to develop the land for economic development or governmental purposes such as housing, health care or tribal administration. These are the types of decisions that sovereign governments make for themselves. Trust land also can provide the tribe with a limited tax base to support its own governmental services and infrastructure, and gives tribes the ability to protect land with historical, spiritual and cultural significance.

7. Should pending applications be subject to any new regulatory revisions?

No, unless the new revisions provide more streamlined and simple processes for the tribes. It is a well-established principle of administrative law that regulations promulgated by an agency hold the force of law for that agency. The existing Part 151 was promulgated under the Department's federal rulemaking authority and establishes the regulatory process for exercising its trust acquisition authority under the IRA. In the event that the Department decides to subject pending applications to new Part 151 standards without completing the current Part 151 process that applies to a pending application, the Rancheria is concerned this will lead to costly and unnecessary litigation.

8. & 9. How should the Department weigh the state and local government concerns? What about public comments? Should MOUs be required?

The IRA does not require consideration of state and local governments. The Rancheria strongly believes that requiring cooperative agreements outside of the NEPA process creates a "pay-to-play" scenario whereby tribes simply seeking to increase their land base are forced into unfavorable agreements with state or local jurisdiction in exchange for their support or neutrality on a land-into-trust application. Local cooperation is only possible where the federal government continues to support tribal objectives under the IRA. Without that support, LIT will come to a halt.

Given the checker-boarding effect of the Dawes Act, many reservations have non-tribal fee land within their borders, or circumstances where a tribe, like the Rancheria, has to put distinct parcels into trust even if surrounded by fee land. It is simply good governance for the governments with jurisdiction over or around those parcels to work together for the provision of public health and safety services such as water, fire, emergency services and law enforcement. Tribes often reach such agreements with their surrounding state and local jurisdictions over tribal land held both in trust and in fee or restricted status. While these agreements are often done outside of the trust land application process, sometimes they are also reached during the NEPA review portion of the land-into-trust process to mitigate traffic or other concerns.[4] Importantly, however, these are agreements appropriately reached by contracting parties on equal footing to

[4] *See* https://www.walkingoncommonground.org/ for many examples of intergovernmental agreements between tribes and state and local governments.

obtain a certain desired result in the interest of both parties. To require these types of agreements to be included in the land-into-trust process would place a tribe on unequal footing and thus subject to either acquiescing to the demands of the other jurisdiction or being forced to not grow their land base.

The IRA does not require the Department to consider comments of public citizens or state and local concerns when evaluating a land-into-trust application. In fact, the IRA was passed to *protect* tribes from those very interests who – much like today – sought to keep land out of tribal ownership. The only possible place to consider citizen, state or local concerns is strictly within the NEPA review process, and there, once the environmental concerns are adequately mitigated, then the citizen, state or local jurisdiction concerns should not interfere with the fiduciary duty of the Secretary to acquire land-into-trust on behalf of the applicant tribe.

10. How else can the process be streamlined?

Of considerable concern to the Rancheria was the addition of a two-tier review and approval process in the October Letter Draft Revisions. First, unilateral denial without conducting a complete review of the application will result in additional costs for a tribe – not less. A tribe whose application is denied in the first review will have to expend valuable resources to appeal the decision which – if they succeed in overturning the initial decision – will require them to continue proceeding through the remainder of the process. Many tribes may not have the resources to sustain the application through such delay and cost and then would be deprived of their right to homelands. We know that delay is a common tactic utilized by well-funded tribal land acquisition opponents and this would only serve to bolster their opposition.

Second, an initial denial will substitute a tribe's determination with the Department's. Congress has recognized the right of a tribe to make its own decisions in exercise of its sovereignty many times over. If a tribe determines that placing a parcel of land into trust – no matter where located or whether that land is within its ancestral homelands– then the Department should respect that tribe's decision and process the application with all due deliberation.

The Department should do away with its reinstatement of an additional 30 day appeal period. This proposed administrative repeal of the so-called "Patchak Patch" is contrary to the stated goal of the revisions – preservation of tribal resources. In 2012, the Supreme Court of the United States held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 567 U.S. 209 (2012) ruled that the law does not bar Administrative Procedure Act challenges to the Department of the Interior's determination to take land in trust even after the United States acquires title to the property. Acquiring the land-into-trust immediately allows a tribe to proceed with its development plans without undue delay. It does *not* prejudice a potential challenger from filing a lawsuit challenging the Secretary's decision as that challenge can be brought for 6 years after the decision has been made. Alternatively, reinstating the 30-day period

before placing the land-into-trust *does* prejudice a tribe which may be faced with a lawsuit brought within the 30-day period and an injunction prohibiting it from proceeding with its gaming plans and benefitting from that economic development opportunity while the challenge is litigated.

As the Department knows, most tribes are operating on the smallest of margins and constantly looking for additional resources in order to provide for tribal members, this proposed revision opens those tribes up to an additional drain on scarce resources which could result in a missed opportunity to reacquire lost trust land simply because the tribe does not have the resources available to sustain a prolonged legal battle.[5]

Conclusion

On behalf of the Susanville Indian Rancheria, we appreciate the opportunity to comment on the Department's draft revisions and strongly urge you to carefully consider our concerns and Congress' intent when passing legislation to return land to tribal ownership in light of your federal fiduciary responsibilities.

Sincerely,

Déana Boyée, Tribal Chairwoman

cc: Geoff Strommer

[5] *See generally* http://www.standupca.org for example of group committed to opposing tribal gaming endeavors in California.