June 28, 2018

Via Email and Federal Express

John Tahsuda
Principal Deputy Assistant Secretary, Indian Affairs
Department of the Interior
1849 C Street, N.W.
MS-4660-MIB
Washington, D.C. 20240

Re: Comments on Potential Revisions to Part 151

Dear Principal Deputy Assistant Secretary Tahsuda,

The Tejon Indian Tribe ("Tribe" or "Tejon") submits these comments in response to your letter dated December 6, 2017 regarding potential revisions to the trust acquisition regulations at 25 C.F.R. Part 151. The Tribe attended the January 16, 2018 meeting in Sacramento and, like every tribe at that meeting, we remain opposed to the Department's pursuit of any revisions to Part 151. This universal tribal opposition is reflected in the transcripts of the other consultations; indeed, we are not aware of any tribe voicing support for the Department revising the regulations. This nationwide tribal opposition is also reflected in the National Congress of American Indians' (NCAI) Resolution strongly opposing revisions to 25 C.F.R. Part 151 and resolving that the Department "cease any efforts to amend the land into trust regulations." NCAI Resolution MKE-17-059. We respectfully reiterate our request that the Department cease any efforts regarding this rulemaking because it is not in our best interest and it will not assist in the restoration of tribal homelands.

During the consultations on this topic, Departmental representatives made statements that changes to Part 151 were being considered to make decisions more legally defensible. However, the Department did not identify any cases that it lost as justification to amend Part 151. Indeed, the Department has been extraordinarily successful in litigation challenging the Department's authority to accept land into trust for tribes and the factors set forth in the Department's Part 151 regulations.[1] We are not aware of any litigation that has called into question the Department's

[1] *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005) (25 U.S.C. § 465 and regulations are "the proper avenue" for restoration of tribal homelands); *Confederated Tribes of Grand Ronde Community v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc) *rev'd on other grounds sub nom.*

regulations or makes such decisions legally vulnerable.[2] Rather, the United States has consistently prevailed in defending the existing regulations, with Bush Administration Solicitor General Paul Clement explaining that the existing regulations were appropriate and addressed the concerns of state and local governments for both on-reservation and off-reservation acquisitions. *See* United States' Brief in Opposition to Petition for a Writ of Certiorari in *South Dakota v. Interior*, No. 05-1428 (July 2006). The unanimous case law fully supports the current regulations and Interior's approach to analyzing whether a tribe was under federal jurisdiction in 1934 and therefore eligible to have land placed into trust pursuant to section 465. In short, there is no litigation driven justification to amend Part 151. The past few decades have shown that courts consistently uphold the Department's decision to restore tribal homelands.

The Tejon Tribe, however, requests that the Department take practical steps to meaningfully prioritize the restoration of tribal homelands. We respectfully request that the Secretary establish an acreage goal of homeland restoration during his tenure at the Department. We further request performance criteria for Regional Directors and senior Department management based on the timely processing of fee to trust (FTT) applications. Finally, we request that the Secretary commit additional resources to BIA realty and the Solicitor's office to support the processing of FTT applications. These non-regulatory resource actions will promote the restoration of tribal homelands which will in turn foster tribal self-determination and self-governance.

A. As a Landless Tribe, The Tejon Tribe is in Particular Need of a Permanent Homeland.

The Tejon Indian Tribe is currently one of the few tribes in the United States without a permanent homeland. We are a landless tribe because of the United States. Early in our Nation-to-Nation relationship, the United States negotiated and signed a treaty with Tejon and other tribes. That 1851 Treaty included provisions in which (1) the signatory tribes acknowledged "themselves to be under the exclusive jurisdiction, control, and management of the government of the United States;" and (2) reserved a homeland described by metes and bounds to be "forever held for the sole use and occupancy of said tribes." The 1851 Treaty, like others with tribes in California, was never ratified by the Senate. Instead, the Senate held those treaties secret for decades.

Carcieri v. Salazar, 555 U.S. 379, (2009); *Upstate Citizens for Equality v. U.S.*, 841 F.3d 556 (2nd Cir. 2016); *South Dakota v. Interior*, 487 F.3d 548 (8th Cir. 2007); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 2018 WL 2033762 (9th Cir. 2018); *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999).

[2] Of course, *Carcieri v. Salazar*, 555 U.S. 379 (2009) limited the section 5 of the IRA to those tribes that were under federal jurisdiction in 1934. However, a rulemaking cannot redress the limiting language of the statute. Thus, it remains with Congress to enact a clean *Carcieri* fix.

While the 1851 Treaty reservation was never formally set aside, BIA Superintendent E. F. Beale brought the treating tribes under his active supervision on the would-be reservation, administered a smaller portion of the area as a reservation, and explicitly referred to it as such. Having acquired knowledge of the outstanding Spanish grants to Tejon aboriginal territory when he was the Tribe's agent, Superintendent Beale began to purchase those grants and continued to do so long after he left his position as superintendent; as a result, by 1867, Beale had acquired 265,215 acres of the Tejon Valley, encompassing much of the Tribe's aboriginal territory, at the same time the Tribe remained in possession. George Harwood Phillips, *Bringing Them Under Subjection: California's Tejon Indian Reservation and Beyond, 1852-1864,* at 254. Thus, BIA Superintendent Beale acquired our lands for himself never telling us that we needed to protect them through the California Claims Commission.

In the early Twentieth Century, the United States acted honorably as our trustee by filing a land claim on our Tribe's behalf against what is today known as the Tejon Ranch. The United States pursued our land claim all the way to the United States Supreme Court, but the Supreme Court ruled against us because of a statute of limitations problem caused by Beale's dishonorable actions. *United States of America v. Title Insurance & Trust Company,* 265 U.S. 472 (1924). Although our trustee lost the land claim – the Departments of Justice and Interior negotiated on our behalf so we could lease some of our homelands from Tejon Ranch.

Before and after the loss in the Supreme Court, the BIA attempted to confirm a permanent homeland for the Tribe, including offers to purchase portions of the Tejon Ranch ("Ranch") and a public land order setting aside land out of the public domain for the Tribe, none of which succeeded in establishing a permanent homeland for the Tribe for various reasons. Thus, the Tribe's present status as landless is the direct consequence of actions by the United States and it agents, in particular the unethical (if not illegal) self-dealing by the Tribe's superintendent. Because of our trustee's actions, we are landless today. Because of our trustee's actions, every trust application for us is treated as "off-reservation."

We have two FTT applications pending before the Department. One application is for a 10 acre parcel that is already improved with four buildings, including small classrooms, a commercial grade kitchen, and office space. This parcel will be used as a Tribal Center. The other application is for a 300+ acre parcel near Mettler, CA. The Mettler parcel will be used for multiple homeland purposes, including a gaming facility if the Secretary issues a positive two-part determination that is concurred in by the Governor and the land is placed into trust. While the ten acre Tribal Center site is far too small to support development for other tribal purposes such as those at the Mettler Property, its available now to address at least some of the Tribe's needs is a part of the Tribe's overall homeland development.

B. COMMENTS TO INTERIOR'S POTENTIAL AMENDMENTS TO PART 151

While the Tribe submits these comments in response to the December 6, 2017 letter, the Tribe objects to this process because consultation has not been adequate. The Department has not explained a rational basis for pursuing changes to the land into trust process. Further, the Department's proposed changes, which were replaced by the questions below, propose longer processes, additional hurdles, and delay after it makes a favorable decision. The Department's

course of action to date does nothing to promote the restoration of tribal homelands. It punishes landless tribes. It helps only those that oppose this Department's duty and responsibility to restore tribal homelands.

If the Department continues to pursue changes to these regulations, it needs to start this process over with a clear statement as to why it is pursuing these changes and holding extensive consultations in every BIA region. Secretarial Order 3317 and the Department's Consultation policy require "open and transparent" communication. This consultation process needs to start with such communication clearly setting forth why the Department is pursuing these regulations and on whose behalf the Department is acting. Who is asking for this rulemaking? We deserve to know.

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

Section 5 of the Indian Reorganization Act (IRA) is a cornerstone of the United States' trust responsibility. Having lost over 80 million acres of tribal homelands cumulatively since 1881 alone, Congress enacted Section 5[3] to halt and reverse this devastating loss of land. Section 5 authorized the Secretary of Interior to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations, for the purpose of providing land for Indians."[4] Enacted over 80 years ago, Section 5 remains the federal government's primary vehicle for restoring lands belonging to tribes since time immemorial and which remain critical to our future. Trust land acquisitions are key to achieving the IRA's "overriding purpose" "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically *and economically*."[5]

By restoring a tribal land base through trust acquisitions, Interior supports the continued vitality of tribal self-governance. The objective of the land-into-trust program should be to restore tribal land bases to the greatest extent consistent with the stated purpose of Section 5. During the past Administration, Interior restored over 500,000 acres of land into trust for tribes. This Administration can do better. Over the remaining years of this Administration, Interior should set a goal to restore at least a million acres of land into trust for tribes.

The intent behind Section 5 is not in question. To the contrary, Congress has revisited and amended the IRA but has never changed the overarching purpose of FTT determinations.[6] Thus, the objective of the FTTprogram is clear—acquire land in trust as requested by tribes to enable them to assume a greater degree of self-government according to their own objectives and

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[3] 25 U.S.C. § 5103 *et seq.*

[4] 25 U.S.C. § 5108.

[5] *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (emphasis added).

[6] *See* Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, § 101,102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 et seq. (extending the reach of Section 465 to all Tribes).

priorities. As the implementing regulations for Section 5, the Part 151 regulations should not only reflect but also further this objective.

Congress has not signaled any need to amend Section 5. Nor have tribes requested a revision to Part 151. Therefore, Interior's revision of regulations governing fee-to-trust applications is neither necessary nor appropriate.

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

The Department has proved that the law and its regulations work. Over the course of the last Administration, the Department restored over 500,000 acres of land into trust both on and off reservation. Accordingly, Tejon submits that the Department should shift additional resources to BIA realty and the Solicitor's office so that the Department has the personnel in place to more quickly address applications. Delay in processing fee to trust applications not only stifles tribal investment and jobs, but the tribe incurs additional costs the longer there is delay. Similar to other administrative processes that Interior undertakes, allocating sufficient funding for the BIA and the Solicitor's Office to administer the trust land acquisition program would greatly improve the pace at which Interior responds to applications.

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

Because the devastating policies predating the passage of the IRA deprived tribes of tens of millions of acres and left some, like Tejon and other California tribes, completely landless,[7] Section 5 clearly contemplates and authorizes the Secretary to acquire lands for tribes without a reservation. The Secretary may acquire "any interest in lands, water rights, or surface rights to lands, within *or without* existing reservations, for the purpose of providing land for Indians."[8] Congress's intent for Interior to acquire trust land located off-reservation on behalf of tribes under Section 5 remains unchanged today.

Despite the lack of a distinction between on- and off-reservation acquisitions in Section 5, Part 151 subsections 10 and 11 nevertheless establish different criteria for Interior's consideration of trust acquisition applications. The current regulations do not mandate approval or disapproval of a particular acquisition based on this on-reservation/off-reservation status—nor should they.

The myriad circumstances in which a tribe requests acquisition require a fact-specific approach to applications and belie a one-size-fits-all approach. Indeed, some tribes like Tejon are landless. For other tribes, an "off-reservation" acquisition could be 25 feet from a reservation boundary. As a landless tribe, we are working to restore a small fraction of our historical

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[7] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); 25 U.S.C. § 5110 ("Unquestionably, the [IRA] . . . aimed to put a halt to the loss of tribal lands through allotment . . . and tribes were encouraged to revitalize their self-government".).

[8] *Id.* § 5108 (emphasis added).

homeland to promote the health and welfare of current and future generations. Because we do not have a reservation, "off-reservation" land is the only land available to reestablish a permanent tribal homeland.

Section 5 does not require tribes or Interior to define specific instances in which Interior should approve or deny a proposed off-reservation acquisition, nor is further restriction required to fulfill Interior's trust responsibility. The Tejon Tribe repeats its request that the Department not make any changes to the 151 Regulations.

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

Please see response to Question 3. No revisions or additional criteria are justified.

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)?

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?

No, Interior should not use different criteria and/or procedures in processing off-reservation applications based on the purpose of the application or a change in use. In enacting Section 5 of the IRA, Congress did not suggest that the Secretary should favor or discriminate against any particular land use in its determination of an application; Congress directed Interior to "provid[e] land for Indians." Yet Section 151.11 already requires the Secretary to scrutinize a tribe's application for off-reservation acquisition to a greater degree than applications for on-reservation acquisition.[9] As a landless tribe without a reservation, every acquisition for Tejon is "off-reservation." Moving forward, once we have land in trust, future acquisitions that are not contiguous to those trust lands will be processed under the off-reservation criteria. No further hurdles for off-reservation applications are necessary or appropriate.

In short, nothing in Section 5 suggests that Interior is required to discriminate between land uses in its consideration of off-reservation applications and doing so would be contrary to tribal self-determination.

[9] *See* § 151.11(c),(d),(e).

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

Through the IRA, Congress affirmed that restoring tribal homelands by placing land into trust remains a vital component of fostering and encouraging tribal self-determination and self-governance. Holding land in fee offers few, if any, advantages to tribes. Fundamentally, history has taught us that fee land does not constitute a permanent homeland. While tribes own fee land, the laws applicable to such land can be less clear than trust land. This lack of clarity can deter investment, cause friction, and promote instability. Trust land, on the other hand, promotes stability and provides the certainty needed for meaningful long-term planning and investment.

To be clear, tribes are not—and should not be—required to justify why land should be held in trust, as opposed to fee status.[10] Neither Section 5 nor the current regulations require an applicant tribe to "demonstrate the need for additional property to be held in trust – just the need for additional property."[11] In short, if a tribe has decided that it wishes to place initial or additional land into trust, the federal government should under no circumstances require a tribe to explain why it does not wish to leave it in fee status.

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

If the Department moves forward with a rulemaking despite the unanimous objections from Indian country voiced in the consultations, tribes with pending applications, such as Tejon, should have the option to decide whether the existing regulations or revised regulations will apply to their application. Most tribes have limited resources with which to develop FTT applications. Imposing revised regulations on pending applications may require tribes affected by the revisions to go back to the drawing board and delay tribal projects and job creation slated for newly acquired trust land through no fault of the tribe. Such a retroactive application may also further exacerbate the current backlog of applications at Interior. If Part 151 is revised, Interior should permit a tribe to decide which regulations should apply to its pending FTT application.

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

Question 8 reflects Interior's intent to balance these interests, however, the text of Section 5 does not mention the concerns of state and local governments or any need for Interior to "balance" the interests of tribes with those concerns. To the contrary, Chapter 45 is entitled "Protection of Indians and Conservation of Resources." The chapter's provisions do just that:

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[10] *See Pres. of Los Olivos and Pres. of Santa Ynez v. Pacific Reg'l Dir.*, BIA, 58 IBIA 278, 314 (2014)).

[11] *Pe'Sla Property* at 12. *See S. Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005) (finding that it "would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in a particular circumstance.").

prohibit allotment (§ 5101), restore tribal ownership of surplus lands on Indian reservations (§ 5103), authorize Interior to acquire interests in lands and water rights (§ 5108) and proclaim new reservations (§ 5110). Section 5 does not assign states or local governments any rights or interests in a trust land determination. To the extent that any balancing occurs, courts have found that an economic benefit to a tribe arising from a trust acquisition outweighs impacts on state or local governments.[12]

Indeed, any revision to Part 151 that gives greater influence to states and local governments risks departure from the United States' fiduciary duty to tribes and Congress' intent in Section 5.[13] This trust relationship between tribes and the United States is unique, and these responsibilities are not owed to states or local governments.

However, Part 151 already recognizes state and local governments' concerns and ensures that they are heard. In particular, section 151.10 requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" for on-reservation acquisitions. Section 151.11 requires consideration of the location of the land relative to state boundaries and the relative distance between the tribe's reservation and the land to be acquired for off-reservation acquisitions. Subsection (d) further requires the BIA to notify the state and local governments having regulatory jurisdiction over the land to be acquired and invite their comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. Interior is then required to give "due consideration . . . to timely submitted comments by interested parties."[14] Thus, Part 151 already adequately accounts for non-tribal interests. No further consideration or weight is necessary.

In short, Section 5 requires the Secretary to prioritize tribes' need to restore their land base, not to "balance" tribes' needs with countervailing interests of states and local governments to whom the United States owes no special duty.

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?

Intergovernmental MOUs between tribes, states and local governments should not be added to the regulatory criteria for several reasons. First, as Section 5 of the IRA and Part 151 currently reflect, the acquisition of off-reservation trust land should be determined by the needs of a tribe for additional land—period. Trust land acquisitions are part of the fulfillment of the United States' trust responsibility to tribes and are an entirely separate matter from a tribe's

[12] *S. Dakota*, 423 F.3d at 802 (8th Cir. 2005); *Sauk Cty. v. U.S. Dep't of Interior*, No. 07-CV-543-BBC, 2008 WL 2225680, at *3 (W.D. Wis. May 29, 2008).
[13] *Worcester v. Georgia*, 31 U.S. 515, 555 (1832).
[14] *See Vill. of Hobart, Wis. v. Midwest Reg'l Dir.*, 57 IBIA 4, 13 (2013).

exercise of its sovereign right to enter into an intergovernmental MOU with a local government or state.

Second, MOUs are negotiated in various contexts and at various times and can cover both fee and trust lands. They are sometimes developed to ensure the provision of water or emergency services to existing trust lands. Because it is a tribe's choice whether and when to enter into an MOU, MOUs should not be added to Interior's criteria to acquire the land in the first place.

Third, even an inquiry as to whether a tribe has an intergovernmental MOU for an off-reservation acquisition would permit states and local governments to interfere with the federal government's primary duty to provide land to tribes. Opponents could attempt to use the lack of an MOU to oppose the acquisition or to exact compromises from a tribe contrary to its interests in order for the application to proceed. Interior has previously cautioned that "it would be nonsensical to apply the IRA, an act designed to remedy repudiated policies aimed at destroying tribal governments, in a manner that frustrated the very purpose of restoring tribal homelands to the tribes that survived those repudiated policies."[15] Interior should not add MOUs as part of the factors in evaluating an application for off-reservation trust land.

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

Tejon recommends that Interior rescind its Letter to All Regional Directors, dated April 6, 2017 delegating authority for off-reservation land-into-trust acquisitions under 25 CFR § 151.11 to the Acting Assistant Secretary – Indian Affairs and the Acting Deputy Secretary for the Department of Interior. Interior's April 6 letter did not attempt to devote more resources or promote timely decisions. Instead it created a log-jam of applications and consternation that did not exist before the policy.

Maintaining regional office's authority in the trust acquisition process ensures the most efficient use of the federal funding and human resources. Regional offices are most familiar with the unique circumstances of each tribe and are in regular contact with tribal leaders and staff. Regional offices are therefore better positioned to effectively resolve issues that arise during the FTT process. The regional offices can obtain direction and approval on complex or controversial issues that arise from the Office of the Solicitor. But not all off-reservation applications, indeed, not all off-reservation applications for gaming, are complex or controversial. Interior should avoid a one-size fits all approach to a problem which accompanies only a fraction of applications.

[15] *Pe'Sla Property* at 7.

Should the Department ignore our Tribe's (and all other tribes') request that the Department abandon this rulemaking, Tejon urges Interior to avoid imposing any changes to Part 151 that could negatively impact the Tribe's pending FTT applications. Thank you for the opportunity to provide comments. Tejon firmly believes that revisions to the Part 151 regulations are not warranted.

Best regards,

Chairman Octavio Escobedo
Tejon Indian Tribe