



## **UTE INDIAN TRIBE**

P. O. Box 190

Fort Duchesne, Utah 84026

Phone (435) 722-5141 • Fax (435) 722-5072

Secretary of Interior Ryan Zinke  
Department of Interior  
1849 C Street NW,  
Washington DC 20240

**January 22, 2018**

**RE: Comments on The Department of Interior's Proposed Revisions to the Fee-To-Trust Regulations Contained at 25 CFR Part 151**

Secretary Zinke:

Please accept and fully consider these comments on behalf of the Ute Indian Tribe of the Uintah and Ouray Reservation ("Tribe") regarding the Department of Interior's ("DOI") proposed revisions to the regulations at 25 CFR Part 151 dealing with the process of placing fee lands into trust. The Tribe is greatly concerned with the proposed regulatory changes and the effects those changes might have in regards to the trust responsibility, tribal sovereignty, and self-governance, among other things. With that in mind, the Tribe submits the following comments.

### **1. Federal Trust Responsibility and Tribal Self-Determination**

The trust doctrine is one of the cornerstones of Indian law. F. Cohen, Handbook of Federal Indian Law 419 (2005) ("COHEN'S HANDBOOK"). The federal government owes a trust responsibility to tribes, not to state or local governments. The trust obligation owed to the Ute Indian Tribe is derived primarily from the Treaty of 1849. Treaty of 1849, Dec. 30, 1849, 9 Stat. 984, II KAPP 585. Under its trust responsibility, the federal government "has charged itself with moral obligations of the highest responsibility and trust" in regards to tribal nations. *Seminole Nation v. United States*, 316 U.S. 286 (1942). The trust responsibility is a legally enforceable obligation requiring the federal government to act in the best interest of tribes and to ensure the survival and welfare of Indian tribes and individuals. This includes supporting tribal self-determination and economic prosperity, both duties that stem from general treaty guarantees to protect Indian tribes and respect their sovereignty.

The proposed revisions to the fee-to-trust regulations undermine tribal self-determination and limit tribal economic opportunity. By giving deference within the decision-making process

to states and local governments, the DOI is proposing to put the interest of those states and local governments before the interest of tribes. As mentioned above, there is no trust responsibility owed to state or local governments, and the trust responsibility owed to tribes is a sacred promise that must be given priority over other interests. Likewise, by providing for more state and local government involvement, the proposed revised regulations have the potential to delay or even halt tribal opportunities in the areas of economic development that would lead to tribal prosperity.

In that same vein, the proposed regulations go against the current federal policy of tribal self-determination by adding a land use approval process in the fee-to-trust process, whereby the federal government can withhold placing land acquisitions into trust unless the federal government agrees with the tribes proposed use of the land to be placed into trust. So long as the purpose of the fee-to-trust acquisition is legal, the federal government should allow tribes to explore economic development options within their right to determine the interests and future of the tribe and tribal members.

Lastly, it is a violation of the trust responsibility for the federal government to treat tribes effectively as political guinea pigs for their experiments on changing policies. Tribal nations have had to deal with changing policies towards dealing with native peoples since the beginning of colonization. These policies have included allotment, assimilation, termination, and finally self-determination. There has been stability in the policy era of self-determination and tribes are thankful for that. However, to implement the proposed regulations as revised would subject tribes to further continuing and uncertain changing policies, not to mention the regulations would undermine fundamental goals of tribal self-determination.

## **2. The Fee-to-Trust Process Sufficiently Considers the Impact on State and Local Governments**

The proposed revisions to the fee-to-trust regulations give substantial deference to state and local governments at the expense of tribal members and tribal nations. Under the proposed revisions, if the land acquisition sought is for gaming purposes, tribes would be required to produce all evidence of cooperative efforts to mitigate impacts of the proposed gaming facility to the local community. 25 CFR § 151.11(a)(1)(xi) *as proposed*. Such evidence includes copies of intergovernmental agreements between tribes and state and local governments, and, if no such agreements or evidence of cooperation exists, an explanation of why that is. *Id.* Additionally, if land is in unrestricted fee status, the Secretary must notify the state and local governments with regulatory jurisdiction over the land to be acquired and give them 30 days after receipt of the notice to provide written comments as to the acquisitions potential impacts on regulatory jurisdiction, land use, real property taxes, and special assessments. 25 CFR § 151.11(b)(1) *as proposed*. The proposed regulations as revised would also force the DOI to take land placed into trust out of trust if a court rules that the DOI erred in taking the land into trust and orders that the land to be taken out of trust. 25 CFR § 151.12(e) *as proposed*.

These proposed revisions, along with others, give substantial deference to state and local governments when deciding to approve or deny applications to get fee land placed into trust.

The Tribe is concerned that giving such an amount of deference to state and local governments will make the fee-to-trust process even more difficult, time-consuming, and costly. This amount of deference, if given to certain states, will make the fee-to-trust process nearly impossible to implement. Some states, such as Utah where the Tribe is located, consistently challenge any and all fee-to-trust land acquisitions under the current regulations, which afford the state substantially less input and deference in the process than would the proposed regulations. The Tribe's application to get Red Rocks Ranch into trust, a parcel located within the exterior boundaries of the Uintah & Ouray Reservation, is a prime example of this.

In July 2015, the Tribe requested that the Bureau of Indian Affairs ("BIA") place Red Rocks Ranch into trust by Secretarial order. Almost two years later, Assistant Regional Solicitor, Grant Vaughn, informed the Tribe that the Secretary could not do this. Now, the Tribe must proceed through the formal fee-to-trust process. Thus, the fee-to-trust process for Red Rocks Ranch continues years later. The fee-to-trust process for Red Rocks was also heavily opposed by Utah and its representatives. Utah Senator Kevin Van Tassell even went so far as to say that the Tribe would take the Red Rocks land into trust "over his dead body." The Tribe also formally submitted several fee-to-trust applications for various on- and off-reservation parcels in July 2015. Two years later, these applications are still proceeding through the fee-to-trust process set forth in 25 C.F.R. Part 151, in large part because of adamant state and local opposition to the Tribes efforts.

For each parcel, the Tribe must expend significant time, energy, and money throughout the fee-to-trust process. These extensive processes provide significant opportunities for every voice to be heard and considered. If a state such as Utah is given the deference afforded under the proposed revisions, then the fee-to-trust process would be effectively unusable for tribes. The process would be delayed for a significant amount of time, if not indefinitely, and tribes would have to continue paying taxes on land that would otherwise be untaxable if placed under trust status.

The fee-to-trust regulations, as currently drafted, already afford state and local governments plenty of deference in the land acquisition process. The current regulations implement a rigorous fee to trust process that already requires consideration of state and local government interests. For on-reservation and off-reservation land acquisitions, the Secretary is required to consider, the impact that an acquisition of unrestricted fee land would have on the State and its political subdivisions resulting from the removal of the land from tax rolls and consider any jurisdictional problems and potential conflicts of land use that may arise. 25 CFR § 151.10(e) and (f). Furthermore, 25 CFR§ 151.10 already provides states and local governments thirty (30) days in which to provide written comments on land acquisitions.

The process as it currently stands is already so demanding and cumbersome that it takes years for the process to be successfully completed. Mark Trahant, *Would that it be True: Bureau of Indian Affairs' Extreme Rubber Stamping for Land to Trust Applications*, INDIAN COUNTRY TODAY (May 27, 2015). The proposed revisions to those regulations only stand to add dissension to the already strained relations between states, local governments, and tribes. It has even been recognized by the Supreme Court that states and the non-Indians that reside within

them are “often their deadliest enemies.” *United States v. Kagama*, 118 U.S. 375, 384 (1886). These proposed revisions are merely another inexplicable attempt of the Trump administration to divide this country.

The federal government has offered no reasoned explanation as to why states and local government should be afforded so much deference in the fee-to-trust process and the Tribe sees no legitimate reason why states and local government should have so much power in this context. The fee-to-trust process is a legal mechanism afforded to tribal nations and tribal individuals for the benefit of tribal nations and individuals under the federal government's trust responsibility. As discussed above, the federal government owes this trust responsibility to tribes, not to state and local governments. State and local government input should be limited significantly more than would be the case under the proposed revisions because states and local governments have little at stake compared to the tribes that apply for fee land to be placed into trust.

### **3. The Fee-to-Trust Process is Necessary for Reservation Restoration**

Due to the disastrous federal government policies of allotment, assimilation, and termination, as well as the sale of reservation lands to non-Indians, the federal government is directly responsible for taking more than 90 million acres of land from Indians, totaling nearly 2/3 of all lands that were once tribal reservations. The Ute Indian Tribe Reservation is now a checkerboard reservation due to the history of these failed policies as applied to the Tribe.

The fee-to-trust process is afforded under the Indian Reorganization Act of 1934 (“IRA”). The IRA was enacted for the purpose of halting the loss of tribal land base across the country and remedying the negative effects that loss of tribal land has had on the economic, cultural, governmental, and social well-being of tribes. Section 5 of the IRA (25 U.S.C. § 5108) provides for the recovery of tribal lands and must be viewed in light of the IRA's overall goals. Section 5 clearly imposes a continuing active duty on the Secretary of the Interior, as trustee for Indian tribes, to take land into trust for the benefit of tribes until their needs of self-support and self-determination are met. Acquiring off-reservation trust lands is vitally important to tribes due to diminishment of reservations and for tribes' economic security. Many reservations are located in subprime areas of the country and others have no reservation boundary. Whatever the issue may be, the point is that many reservations are insufficient to constitute a “homeland” or viable land base for long term economic security and success of the tribe and its members. Tribes need to acquire more lands in order to provide a suitable homeland and government to their citizens.

After almost 50 years of Federal Indian allotment laws and policies that severed the Federal government's treaty and trust relationship with Indian tribes and resulted in the taking of Indian lands and resources, the IRA ended allotment and laid the foundation for modern and unquestionably successful Federal policies of tribal self-determination. Beginning with the General Allotment Act in 1887 Indian-held land decreased from about 138 million acres to 48 million in 1934. In addition to the loss of land and resources, allotment resulted in an unmanageable checker boarding of tribal jurisdiction, and the fractionation of Indian lands.



Congress' primary purpose in enacting Section 5 of the IRA was to enhance tribes' economic situation, in part by restoring land to tribes which was lost under the General Allotment Act. By 1934, it was clear to Congress that a majority of Indians were living in poverty and substandard living conditions, suffering from poor health, and lacking access to educational or vocational opportunities. INSTITUTE FOR GOVERNMENTAL RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* (Lewis Meriam ed., 1928). In fact, the policy goal of improving the economic welfare of Indian people remains an essential policy goal. "[T]he unemployment rate in 2005 among all Indians on or near reservations and Indian areas was 49% and remained as high as 89% on the poorest reservations. Economic and job development thus remains an important priority for tribes and their members." COHEN'S HANDBOOK, § 21.01, at 1321. Additionally, research "suggests that tribes are more likely to succeed when they control their economic resources." *Id.* § 21.01, at 1322. Thus, access to and management over land and its accompanying natural resources is critical to tribal economic development.

The IRA ended these policies and provides opportunities to correct those policies. In fact Congress and Federal agencies should invest more resources and funding in the opportunities provided in the IRA. Study after study shows the deep and important connection between Indian tribes and their land base. Maintaining our land base and recovering lands and resources taken, is necessary to supporting our rich and diverse tribal cultures and providing for our members.

Moreover, trust land is essential to strong tribal governments and tribal economies. This is especially true for many large, land-based tribes, such as the Ute Indian Tribe, whose reservations were typically opened for settlement, causing the checkboard reservations dealt with on a daily basis by the Ute Indian Tribe and other tribes. *See* Act of May 5, 1864, 13 Stat. 63; Act of February 23, 1865, 13 Stat. 432. For these tribes, it is of critical importance that they be able to consolidate fee lands within their reservations back into trust for both jurisdictional purposes and maintaining peaceful relations between tribal members and non-members on and off the reservation. The proposed revisions punish these larger land-based tribes, presumably for the past actions of small, urban-based tribes in regards to trust land acquisitions.

The IRA is well known as a vital correction to disastrous federal Indian policy and the issues the IRA is working to resolve still exist today. However, only ten percent (10%) of the 90 million acres of tribal lands lost under allotment laws and policies have been restored as tribal trust lands under the IRA. *Frequently Asked Questions*, Bureau of Indian Affairs, <http://www.bia.gov/FAQs/> (last updated June 6, 2017). As noted by the Supreme Court, "[t]he intent and purpose of the [Indian 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." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). In order for tribes to make a homeland out of their reservations, there needs to be jurisdictional certainty and uniformity within reservations, both of which the fee-to-trust land process is currently able to provide. The proposed revisions would only stand to delay and further undermine any tribal attempts at creating a homeland in order to further goals of tribal self-determination.

**4. Potential Illegality of the Proposed Regulations**

The proposed revisions to the regulations would violate the IRA

As briefly discussed above, the power for the fee-to-trust land acquisition process comes directly from the IRA. Specifically, Section 5 of the IRA provides the power and reads, "The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, *for the purpose of providing lands for Indians.*" The current criteria set forth in 25 CFR Part 151 are derived from the DOI's interpretation of the IRA and its purposes. However, "Congress, as the trust settlor for all Indian Affairs matters, has the sole authority to evaluate and amend existing statutes, including the Indian Reorganization Act, to determine if the existing Fee-to-Trust statutes need to be constrained or expanded." Statement of James Cason, Acting Deputy Secretary United States Department of Interior, Before the United States House Subcommittee on Indian, Insular, and Alaska Native Affairs, Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act, July 13, 2017. Therefore, the DOI should not attempt to constrain the ability of tribes to utilize the fee-to-trust land acquisition process by itself through regulation, and should instead defer to Congress.

The DOI invites litigation on the proposed regulations by trying to limit tribal utilization of the fee-to-trust process and by making the process more difficult due to enhanced deference to be afforded to state and local governments. Effectively, the DOI is attempting to change an Act of Congress and statutory law through regulation. Instead of attempting to revise the fee-to-trust regulations, the DOI should leave the regulations as they currently are and allow Congress to exercise its authority over Indian affairs when and how it sees fit. Otherwise the DOI would be usurping Congress' power and subjecting itself to litigation for its actions.

Thank you for your consideration of our comments on this important issue. The Ute Indian Tribe stands ready to assist this agency in identifying and addressing the pressing needs in Indian country.