



February 20, 2018

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Honorable John Tahsuda
Acting Assistant Secretary – Indian Affairs
1849 C Street, NW
Washington, DC 20240

Sent Via E-mail to consultation@bia.gov

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DCN: 1A00007182
Executive Secretariat - Indian Affairs (ESIA)

RE: Comments on the Proposal to Revise the Fee to Trust Regulations, 25 C.F.R. Part 151

Dear Acting Assistant Secretary Tahsuda,

I write on behalf of the Yocha Dehe Wintun Nation, a federally recognized Indian tribal government in Northern California, to express our Tribe's views regarding the announced intent of the Department of the Interior ("Department") to amend the Fee to Trust Regulations, 25 C.F.R. Part 151.

At the outset, we feel compelled to express our complete and deep-seated opposition to the draft changes to 25 C.F.R. Part 151 that the Department circulated in October 2017. While we completely oppose any draft regulatory change developed without proper tribal consultation, here, we are fundamentally opposed to the draft's proposed substantive changes. In particular, we submit that it is misguided to remove the "Patchak Patch" and reinstate the 30-day waiting period on taking land into trust. Reinstating the 30-day self-stay on taking land into trust after a positive decision is an invitation for litigation. It also creates unnecessary delays for a tribe seeking to take land into trust.

Yocha Dehe also strongly opposes another aspect of the proposed draft, specifically, the requirement that tribes enter "mitigation" agreements with state and local governments as a condition to any trust acquisition. Such amounts to an inappropriate incursion on tribal sovereignty. State and local governments often oppose tribal trust land applications because, by the very nature of a federal trust acquisition, these state and local governments will lose power and authority they would otherwise possess. The mitigation agreements enable these governments to effectively hold trust acquisitions hostage to sometimes overreaching demands. Such a result is untenable, not to mention, an abdication of a federal trust responsibility that should be exercised to support tribal sovereignty, not undermine it.

Yocha Dehe Wintun Nation

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This is not to suggest the Department should give no consideration to the third party impacts of a particular acquisition, and in fact, the agency does so routinely. Indeed, the jurisdictional and environmental impacts of a particular federal trust application are already part of the process, with the impacts evaluated and mitigated as necessary in connection with any trust application. In short, the Department is already in a position to protect, and does protect, these interests. But the approach of requiring tribes to enter “mitigation” agreements with local governments changes the fundamental dynamic, empowering sometimes hostile state or local governments to effectively, and improperly, veto tribal trust acquisitions.

In your December 6, 2017, correspondence to Tribal leaders, you pose several questions. We answer those questions in the order in which they were presented.

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

The objective of the BIA fee-to-trust program should be to facilitate the reacquisition of land lost by tribes in the most efficient, quickest possible way. In furtherance of this goal, the Department should be seeking to identify ways to make the fee-to-trust process faster, cheaper, and easier for tribes.

Instead of adding requirements and making the process more difficult and confusing, we feel it is important for the Department to look for ways to make the process easier, particularly for on-reservation, or contiguous, land acquisitions.

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

While we believe the process generally works to assist tribes, improvements can be made to the process to make it easier for tribes to acquire on-reservation and contiguous lands.

In our view, the biggest problem with the process for reviewing all BIA fee-to-trust applications is that it takes far too long, even for straightforward, non-controversial applications. In addition to requiring time-consuming NEPA reviews, BIA staff takes an extraordinary long time to review submissions. We do not believe this is capricious on the part of BIA staff, and that it is partially due to a lack of resources. Still, the problem can also be attributed to a lack of time requirements mandating BIA action on applications. The regulations should be amended to deal with this problem.

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

We believe that tribes only request to take land in trust if they have identified a need to acquire that land. Accordingly, a tribe acquiring off-reservation land should be subject to the same process as on-reservation acquisitions, no more and no less.

In central California the average tribal land base is less than 200 acres. This means that the amount of both on-reservation and off-reservation land to be acquired is next to nothing. Tribes must often seek nearby, off-reservation land to augment their on-reservation lands (if any). Under the current regulations, there is some recognition that the nearer off-reservation lands are to a tribe's reservation, the less scrutiny the Department is required to make under 25 C.F.R. §151.11. We feel this is appropriate and should be preserved if the Department determines to continue treating on-reservation and off-reservation requests differently.

We are also aware that the Department is concerned with off-reservation gaming acquisitions, which we also have some concerns about, but which we feel are best addressed in the 25 C.F.R. Part 292 regulations.

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

We believe the Department should use the same criteria for both on-reservation and off-reservation acquisitions.

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)?*

The same criteria should be used for all purposes. Every acquisition a tribe makes is in furtherance of their governmental self-determination, whether the land will be used to house its people, educate its children in a newly developed school, or strengthen its economic standing through a commercial development. Therefore, the review process should be the same.

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

We believe gaming acquisitions are appropriately given a second level of review pursuant to the regulations at 25 C.F.R. Part 292. Accordingly, 25 C.F.R. Part 151 does not need to be amended to address gaming acquisitions.

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

We believe that the process should be made easier for applications that involve no proposed change in use of the property, or that are located within, or contiguous to, existing reservation land.

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

There is one attribute to holding land in trust that we value above all else. That is the ability to determine how the land will be used, to truly call it our own. That is the fundamental means by which we exercise our sovereignty, to govern our own people in our own jurisdictions.

Once in trust, land is no longer under the control of state and local government, leaving the tribe to decide how the land can best meet its needs, and alleviating the requirement for the tribe pay taxes to the state for services the tribe provides.

Land in trust is also inalienable, and that carries both symbolic and practical meaning to us. Given the history of this country, that land in trust may not be taken from us is critically important.

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

No. We absolutely oppose to subjecting existing applications, many of which will have been in the works for years at the cost of many thousands (if not millions) of dollars, to be suddenly subjected to new standards. It would be completely unjust to make the tribes who submitted such applications to suddenly re-adjust to new rules and make potentially costly revisions to their documentation, which was developed in reliance upon existing law.

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

The Yocha Dehe Wintun Nation strives to be a good neighbor, and we have worked cooperatively with the state and the local governments surrounding us to address concerns they may have about our fee-to-trust acquisitions. We believe this is important and we strive to work with our local governments in good faith.

As an example, in the renegotiation of our Compact with the State, we specifically sought the right to redirect gaming payments to benefit local governments and local communities, whether for public services, revitalization or infrastructure. We also have the right and power to redirect money to local governments that might suffer a measure of lost taxes with any particular trust acquisition.

Not all tribes are in this unique position. However, tribes all over the country are fighting to reacquire land that was lost to them through no fault of their own, and they often must deal with state and local governments that are antagonistic to them. These tribes' efforts should not be subject to the whims, or overreach, of these third parties.

We do not believe the Department should give undue weight to the concerns of state and local governments — governments that stand to lose power and authority by virtue of a trust acquisition — when deciding whether to take land into sovereign trust for a tribe. There is already a process for the Department to consider impacts of a trust acquisition on those other governments, and that process works.

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?*

We believe that cooperative agreements between state and local governments are beneficial to all parties and represent a best practice for governing. That is, in fact, how Yocha Dehe tends to operate in connection with the county in which its lands are situated. But the relationship was not always this cooperative, and there was a time when the county opposed the Tribe's efforts to achieve economic development for the protection of its own people. It has taken effort, and years of work, to achieve the productive relationship Yocha Dehe now enjoys.

Not all tribes possess this kind of relationship with their local governments. Moreover, when these cooperative (or "mitigation") agreements are mandated, they tend to cease to be beneficial to both parties, and more often work to the benefit of the non-tribal party. If such an agreement is required in this context, it will give the non-tribal government undue leverage, with the power to hold any particular trust application hostage to that government's whims or overreach.

For this reason, we strongly oppose any required agreements as a condition to the fee-to-trust process.

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

As stated above, we believe the requirement of deadlines for BIA review of fee-to-trust applications would help improve the fee-to-trust process. We also believe that increased staffing for this area, which is a fundamental service the BIA provides to all tribes, should be increased.

Finally, we believe that requirements for on-reservation and contiguous lands should be easier, even automatic. We urge the Department to explore ways this could be achieved, whether through a streamlined process or other means.

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In closing, I would like to express the strong feeling of the Yocha Dehe Wintun Nation that the fee-to-trust process should not be made more difficult, costly and time-consuming, as the proposed changes would exact; instead, the process should be made easier and more supportive for all tribes, out of recognition for their sovereignty and fundamental rights to self-determination.

Should you have any questions regarding these comments, please contact our representative, Aurene Martin, at (202) 250-0477, or amartin@spiritrockllc.com.

Wile bo,

A handwritten signature in black ink, appearing to read "Anthony Roberts". The signature is fluid and cursive, with the first name being more prominent.

Anthony Roberts
Tribal Chairman

cc: Aurene Martin, Spirit Rock Consulting LLC

Ex.

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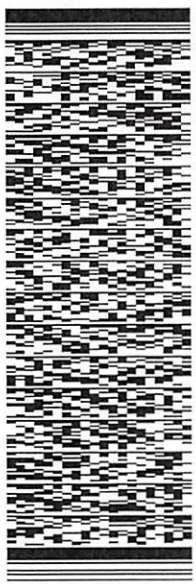

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