COQUILLE INDIAN TRIBE

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SENT VIA EMAIL ONLY

February 27, 2018

John Tahsuda
Principal Deputy Assistant Secretary—
Indian Affairs
consultation@bia.gov

RE: Fee to trust consultation comments
Coquille Indian Tribe

Dear Acting Assistant Secretary Tahsuda:

On behalf of the Coquille Indian Tribe (the "Tribe"), we offer the following comments in response to the October 4, 2017 draft revisions to 25 C.F.R. Part 151.11 and Part 151.12 ("October Letter") and December 6, 2017 Dear Tribal Leader letter ("December Letter").

To provide some context for our comments, we would like to share a bit of the history of the Coquille Indian Tribe. The Tribe's ancestral territory includes a large region encompassing the coastal and inland areas of Southwestern Oregon. Like many other Native American groups across North American post-contact, the Coquille were devastated by diseases of European origin prior to the formation of the United States. As the United States continued its westward expansion and hoping to preserve their land base, the Coquille people signed into two separate treaties in 1851 and 1855 with representatives of the United States. However, those two signed treaties were never ratified by the United States Senate and the Tribe was ultimately unlawfully dispossessed of their lands by non-Indians settlers encouraged by pro-settlement federal policies.

In 1954, the unthinkable happened. As part of its since repudiated tribal termination policy, the United States passed the Western Oregon Termination Act of 1954[1] terminating the status of Coquille and a number of other Oregon tribes' status as tribal nations. The effects of federal termination were devastating. Tribal lands were lost, and tribal members dispersed across the State of Oregon and to other federal relocation centers. Over the following thirty-five years, the Coquille people were treated by the United States as non-Indians, dispossessed of our lands, rivers, forests, waters, resources and lifeways.

[1] P.L. 558, August 13, 1954.

But this ultimate insult did not break the resilience of the Coquille people. The Tribe organized, raised what funds we could with our limited incomes, and confronted the federal government with the injustice of its actions. After years of work by many courageous tribal members and a few key non-tribal members, Senator Mark O. Hatfield demonstrated true leadership by championing the Coquille Restoration Act ("Restoration Act" or "Act"). In 1989, Congress passed the Restoration Act and the Tribe was (once again) federally recognized. The Act required the Secretary of Interior ("Secretary") to take into trust 1,000 acres in Coos and Curry Counties for the Tribe and allows the Secretary to acquire any additional acres into trust within a specifically defined five-county area. Those five counties were deliberately selected after identifying the residence of most Tribal members post-termination and at the time of Restoration. The Act also provided that all such lands taken into trust within this five-county area would immediately become part of the Tribe's reservation at the time of acquisition and that all Tribal members residing within these five counties would be deemed to reside on a reservation for certain purposes. Because the Act was an effort by Congress to begin to remedy the years of dispossession, displacement, disease and disaster caused by the United States, no additional restrictions on fee-to-trust transfers were included. Today, however, the Tribe only possesses trust land in a single county and has applied to take a small 2.4 acre parcel in Jackson County, Oregon – within the Congressionally-defined five county area – into trust. The decision to request the additional trust lands was done carefully and with a goal of providing for the well-being of the Coquille people.

The regulatory changes proposed in the October Letter fail to take proper account of the Tribe's history, the Congressional intent expressed in the Act, and the Tribe's track record of making careful, prudent land acquisitions. These proposed changes should be withdrawn, and the Department should direct its efforts to facilitating additional land acquisitions for the Tribe.

A. October Letter Draft Revisions Should Be Formally Withdrawn

As an initial comment, the Tribe appreciates the Department of Interior's ("Department" or "Interior") response to the concerns raised by tribes regarding the draft revisions contained in the October letter. 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 Land-into-Trust process. Therefore, we request that the Department formally withdraw the draft revisions contained in the October Letter and urge the Secretary to clarify the current consultation goals so we can provide the most relevant response. Tribes have now received two separate letters with the latest one leaving out some of the original October questions and issues. It is not clear whether those questions and issues are no longer consideration. It is also not clear what spurred this latest effort to revise the new fee-to-trust regulations. In order to provide the best response to these efforts and to assist the Department with its evaluation, we further request the Secretary to provide:

(1) The motivation for proposing changes to the fee-to-trust regulatory process including the number of disapproved or withdrawn fee-to-trust applications that would have benefited from the October letter proposed revisions or other relevant data;
(2) The issues with the fee-to-trust process that led to these consultations;
(3) The status of the October regulatory change proposal;

(4) The weight that comments received in this process will be accorded in any revisions; and
(5) A road map of how the Secretary will consult on future matters related to this effort.

We continue to urge you to continue to engage in meaningful tribal consultation with regional meetings for any future questions or proposed regulatory changes developed after this current round of consultations. Further, because our unique Act creates an independent legal basis for fee-to-trust transfers, we also request that the Department engages in direct and meaningful government-to-government consultations with Coquille prior to publication of any revisions to the fee-to-trust regulations that will impact the Coquille Tribe's ability to place lands into trust under the Act.

Notably, fee-to-trust matters are overseen by the Assistant Secretary of Indian Affairs and the Deputy Solicitor of Indian Affairs, both of which are currently un-appointed offices. We urge you to postpone further consideration of this matter until these key offices are filled.

B. Coquille Restoration Act Requires Special Consideration In Any Regulatory Revisions.

There are significant legal issues associated with the proposed regulations released with the October Letter. Of particular importance to the Tribe, the proposed regulations appear to conflict with the express language of the Restoration Act and with Congressional intent. Further, the Tribe believes that is an oversight that the current regulatory structure does not specifically identify an expedited path for trust acquisitions for terminated and restored tribes like the Coquille. Any such regulation should, at the least, create a narrow, but important exception for Congressionally-restored tribes, like the Coquille, with legislatively-established fee-to-trust areas, and legislation providing that trust lands in such areas constitute part of the Tribe's reservation. By our count, only nine tribes have Congressional legislation specifically identifying fee-to-trust areas and providing that any trust land in those areas would constitute reservation land immediately upon acquisition.[2]

C. Concerns Regarding October Letter Draft Revisions

1. <u>The two-tier review and approval process in the October Letter's proposal does not respect tribal self-determination and sovereignty.</u>

Of considerable concern to the Tribe 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 the 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

[2] Coquille Indian Tribe, Paskenta Band of Nomlaki Indians of California, United Auburn Indian Community of the Auburn Rancheria of California, Little Traverse Bay Band of Odawa Indians, Little River Band of Ottawa Indiana, Fallon Paiute Shoshone Indian Tribe, Pokagon Band of Potawatomi Indians, Cocopah Tribe of Arizona, and Federated Indians of Graton Rancheria

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 many times over the right of a tribe to make its own decisions in exercise of its sovereignty. If a tribe determines that placing a parcel of land into trust – no matter where located or whether that land is a "commutable" distance in the opinion of an unnamed bureaucrat – then the Department should respect that tribe's decision and process the application with all due deliberation.

Despite the proposal's stated purpose of trying to both prevent wasted tribal resources and increase tribal government certainty over fee-to-trust decisions, the regulations proposed in October would establish new legal bases to reject a fee-to-trust application and would increase uncertainty about the outcome of fee-to-trust applications. The actual effect of this change, however, would be to create new reasons to disapprove proposed fee-to-trust transfers.

The proposed changes also increase uncertainty because they provide no standards to guide the Department's review and application of these new criteria – despite clearly stating that some fee-to-trust applications could be rejected based on the new initial criteria. Is there some finding that the Department must make in this early review stage? Is there some standard that must be met in order to survive a proposed first-tier review? Are all criteria weighed equally? What if some criteria are met and others not met? How in these regulations would the Department address claims that it will use these criteria to accept and reject applications without legal basis or without inconsistency? An applicant tribe has no advance notice to help it assess the treatment of a proposed fee-to-trust transfer under the proposed initial review stage. For this same reason, we question the viability of the proposed regulations particularly when weighed against the requirements of the Administrative Procedures Act.[3]

The proposed revisions in the October Letter will increase the federal involvement in, and regulation of, fee-to-trust transfers which runs completely counter to the direction indicated by the Trump Administration.[4] The Trump administration has taken numerous actions to limit the cost and burden associated with federal regulations.[5] Given that the number of rejected fee-to-trust applications is currently low, the proposed regulations would likely increase the total regulatory burden for business and job growth in Indian country and would, as mentioned above, reduce economic investment in Indian country.

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[3] Pub.L. 79-404, 60. Stat. 237.

[4] "In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations." Executive Order, January 30, 201 7.

[5] Presidential Executive Order on Promoting Energy Independence and Economic Growth, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, January 30 2017; Presidential Executive Order on Core Principles for Regulating the United States Financial System, February 3, 2017; March 28, 2017; Budgetary Impact Analysis for Executive Order Entitled "Identifying and Reducing Tax Regulatory Burdens", April 26, 2017; Presidential Executive Order on Promoting Agriculture and Rural Prosperity in America, April 25, 2017;

2. Reinstatement of 30-day stay before placing land into trust will increase cost for tribes requiring them to use their "limited resources" – precisely what these revisions purport to avoid.

The 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 *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 567 U.S. 209, 132 S. Ct. 2199, 183 L. Ed. 2d 211 (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, restating 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 you are keenly aware, most tribes are operating on the smallest of margins and constantly looking for additional resources 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 simply because many tribes do not have the resources available to sustain a prolonged legal battle.[6]

D. General Comments to December Letter

1. Why trust land?

The importance of trust land for tribes cannot be overstated. Perhaps most importantly, trust land provides tribal governments the ability to exercise 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."[7] There is no better illustration of the disadvantages to not having trust land than in Alaska.[8]

Until 2016, Part 151 did not permit Alaska tribes to acquire trust land in Alaska. Alaska tribes then had jurisdiction over their members for issues such as child custody and divorce but they often did not have criminal jurisdiction over the crimes committed within the village including domestic abuse, sexual violence and other offenses that disproportionately affect

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

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

[8] *See,* Geoffrey D. Strommer, Stephen D. Osborne & Craig A. Jacobson, *"Placing Land Into Trust in Alaska: Issues and Opportunities"*, 3 AM. INDIAN. L.J. 508, (2015) (discussing the issues facing Alaska tribes without trust land).

Alaska Native women and children.[9] Without trust land, Alaska tribes could not develop their own tax base nor establish the tribally appropriate hunting and fishing regulations over their land which protect their subsistence lifestyle. "Territorial jurisdiction" only comes with trust land and is an important component of tribal sovereignty and tribal self-determination. Trust land is important, and fee-to-trust transfers are perhaps most important for restored tribes, like the Coquille, which have few opportunities to exercise territorial jurisdiction.

Some examples of advantages of operating on land that is in trust include, but is not limited to, the following:

- A tribe may exercise territorial jurisdiction over trust land and the activity occurring there;
- Trust land is eligible for tax advantages, including:
  - Exemptions from state and local government taxes;
  - Eligibility for certain tax benefits, including tax credits;
- Tribe retains ownership while authorizing long term leases;
- Federal government retains trust responsibility and law enforcement responsibility;
- Tribe has assurance that it will not lose ownership of these lands; and
- Government and economic development programs on trust lands are eligible for many potential grants.

Examples of disadvantages of operating on land that is in trust include, but is not limited to, the following:

- Application of the NEPA and other federal laws to decisions involving trust land, resulting in delay;
- Delays and cost related to requirements for federal approval of certain matters involving trust land;
- Complications resulting from the non-alienability of trust land such as the inability to use the land as collateral;
- Complicated regulatory regime required to grant easements / rights of way; and
- Interest in portions of land cannot be severed from realty (e.g. timber deeds).

2. <u>The objective of the land-into-trust program should be to efficiently facilitate the acquisition of tribal homelands as intended by Congress when enacting the Indian Reorganization Act or other land acquisition statutes such as the Coquille Restoration Act.</u>

Congress has authorized the Secretary to accept land-into-trust for the benefit of a tribe in over fifty separate statutes.[10] The Part 151 process is used by the Department to process tribal

[9] *See generally,* DEP'T OF THE INTERIOR REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 59-67 (2013).

[10] 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

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 Indian Reorganization Act of 1934, 25 U.S.C. § 5108, ("IRA").

The IRA reflected a drastic sea 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 halting divestment and restoring land back into tribal ownership.

(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, 62 Stat. 939; Ch. 423, 69 Stat. 392, as amended by Pub. L. No. 88–540, 78 Stat. 747 (1964); Pub. L. No. 100–581, title II, 102 Stat. 2941 (1988); Pub. L. No. 101–301, 104 Stat. 206 (1990) (formerly 25 U.S.C. § 608); Seminole Indian Reservation Act, ch. 645, 70 Stat. 581; Isolated Tracts Act, Pub. L. No. 88-196, 77 Stat. 349 (1963), amended by Pub. L. No. 91-115, 83 Stat. 190 (1969); Pub. L. No. 90–335, 82 Stat. 174, as amended by Pub. L. No. 93–286, 88 Stat. 142 (formerly 25 U.S.C. § 487); Pub. L. No. 90–534, § 3, 82 Stat. 884 (formerly 25 U.S.C. § 610b); Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770, 772-3 (formerly 25 U.S.C. §§ 903-903g); Texas Band of Kickapoo Act, Pub. L. No. 97-429, § 5, 92 Stat. 2270 (formerly 25 U.S.C. § 1300b-14); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96–420, 94 Stat. 1785 (formerly 25 U.S.C. §§ 1721-35); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, §§ 3(a) and 7(d), 91 Stat. 141 (formerly 25 U.S.C. §§ 711a and 711e(d)); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95–395, 92 Stat. 813 (formerly 25 U.S.C. §§ 1701-16); Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97–399, 96 Stat. 2012 (formerly 25 U.S.C. §§ 1741-49); Pub. L. No. 97- 459, 96 Stat. 2515; Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98–134, 97 Stat. 851 (formerly 25 U.S.C. §§ 1751-60); Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481, § 7, 98 Stat. 2253 (formerly 25 U.S.C. § 714e).; White Earth Land Settlement Act of 1985, Pub. L. No. 99-264, 100 Stat. 61; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, §§ 203(a) and 206, 101 Stat. 670 (formerly 25 U.S.C. §§ 733(a) and 736); ; Pub. L. No. 93-531, 10, 88 Stat. 1716, as amended by Navajo and Hopi Indian Relocation Amendments of 1988, Pub. L. No. 96-305 § 4, 94 Stat. 930 (formerly 25 U.S.C. §§ 640d); Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101–41, 103 Stat. 83 (formerly 25 U.S.C. §§ 1773-73j); Coquille Restoration Act, Pub. L. No. No 101-42, §§ 3(e) and 5, 103 Stat. 92 (formerly 25 U.S.C. §§ 715a and 715c); Ponca Restoration Act, Pub. L. No. 101-484, § 4(c), 104 Stat. 1167-8 (formerly 25 U.S.C. § 983b); Seneca Nation Settlement Act of 1990, Pub. L. No. 101–503, 104 Stat. 1292 (formerly 25 U.S.C. §§ 1774-74h); Crow Boundary Settlement Act of 1994, Pub. L. No. 103–444, 108 Stat. 4632 (formerly 25 U.S.C. § 1776-76k); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103–377, 108 Stat. 3501 (formerly 25 U.S.C. §§ 1775-75h); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub L. No. 103-324, §6, 108 Stat. 2158 (formerly 25 U.S.C. § 1300k-4); Auburn Indian Restoration Act, Pub. L. No. 103-434, title II, §§ 202(e) and 204, 108 Stat. 4533-4 (formerly 25 U.S.C. §§ 1300l(e) and 1300l-2); Paskenta Band Restoration Act, Pub. L. No. 103-454, title III, §§ 303(e), 305 108 Stat. 4793-4 (formerly 25 U.S.C. §§ 1300m-1(e) and 1300m-3); Act to Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, §6, 108 Stat. 2154 (formerly 25 U.S.C. § 1300j-5); Miccosukee Settlement Act of 1997, Pub. L. No. 105–83, title VII, 111 Stat. 1624 (formerly 25 U.S.C. §§ 1750-50e); Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652; Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, Pub. L. No. 106–568, title VI, 114 Stat. 2906 (formerly 25 U.S.C. § 1778-78h); Cherokee, Choctaw, And Chickasaw Nations Claims Settlement Act, Pub. L. No. 107–331, title VI, 116 Stat. 2845 (formerly 25 U.S.C. § 1779-79g); Graton Rancheria Restoration Act, Pub. L. No. 106-568, § 1405, 114 Stat. 2940 (formerly 25 U.S.C. §§ 1300n-3); Shawnee Tribe Status Act of 2000, Pub. L. No. 106-586, § 707, 114 Stat. 2915-6 (formerly 25 U.S.C. § 1041e); Santo Domingo Pueblo Claims Settlement Act of 2000, Pub. L. No. 106–425, 114 Stat. 1890 (formerly 25 U.S.C. §§ 1777-77e); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 109-126, 119 Stat. 2546 (formerly 25 U.S.C. § 766).; Pueblo de San Ildefonso Claims Settlement Act of 2005, Pub. L. No. 109–286, 120 Stat. 1218 (formerly 25 U.S.C. §§ 1780-80p).

> "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 v. Jones, 411 U.S. 145, 151, 93 S. Ct. 1267, 1272, 36 L. Ed. 2d 114 (1973). "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). As Senator Wheeler, on the floor, put it:
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> > 'This bill . . . 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.
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> Representative Howard explained that:
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> 'The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition.'
> Id., at 11732.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152, 93 S. Ct. 1267, 1272, 36 L. Ed. 2d 114 (1973). *See also* Felix S. Cohen's Handbook of Federal Indian Law 1039-10041 (2012 ed.).

> The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. See 48 Stat. 984, 25 U.S.C. § 461 *et seq.* Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. See §§ 461, 462. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership, see § 463, and for acquiring, on behalf of the tribes, lands "*within or without* existing reservations." § 465.

Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255, 112 S. Ct. 683, 686, 116 L. Ed. 2d 687 (1992). (Emphasis added).

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.[11] There is no statutory authority or court opinion that changes this long-standing objective of the IRA and so it should remain.

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[11] *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 IDEPARTMENT 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).

However, there are certain scenarios where the Department should consider additional factors such as the following –

(1) Unique statutory authority for the acquisition.
(2) Acquisitions for restored tribes.
(3) Acquisitions for newly recognized and landless tribes.
(4) Acquisitions designed to mitigate the effects of previous or likely future natural disasters such as tsunamis, wildfires, floods, and landslides.
(5) Acquisitions intended to fulfill Congressional intent.
(6) Acquisitions intended to mitigate the impact of failed and repudiated federal policies including but not limited to unratified treaties, federal allotment acts, loss of tribal subsistence land base, federal termination, and federal relocation.
(7) Acquisitions designed to provide the tribe an adequate tax base to provide for self-government.

3. Generally, the land-into-trust process could be made more efficient and timely.

As the IRA does not distinguish between "on-reservation" or "off-reservation" trust land application, the Tribe does not believe such a distinction is within the authority of the Secretary. Generally, however, all aspects of the land-into-trust process could be made more efficient. Often the staffing limitations (both realty and Solicitor staff) at the Regional level result in unnecessary delays. For example, a mandatory acquisition under a tribal settlement act in the Eastern Region took well over 18 months to process and finally be accepted into trust in 2017. These types of delays for an acquisition that does not even require National Environmental Policy Act ("NEPA") review is simply unacceptable but could easily be resolved by instituting mandated timelines for decision-making.

The Tribe 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.

4. The Department should not distinguish between on-reservation and off-reservation applications.

As noted above, the IRA does not distinguish between "on-reservation" and "off-reservation" trust land. 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 . . .". 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. at 152, *citing* H.R.Rep.No.1804. Congress *intended* the land acquisitions to facilitate all types of tribal economic development, including gaming if the tribe so choses. 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 NEPA requirements is adopted and efficiently applied.

5. Applying any new revisions to pending revisions would violate the Administrative Procedures Act.

It is a well-established principle of administrative law that regulations promulgated by an agency hold the force of law for that agency. 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, an affected tribe would be able to file an administrative appeal and bring a claim in federal court.

Federal courts have held that "[a]n administrative agency must explain its departure from prior norms (guidelines)." *Cotton Petroleum Corp. v. U.S. Dep't of Interior, Bureau of Indian Affairs*, 870 F.2d 1515, 1526 (*citing Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)); *see also Sec'y of Agriculture v. United States*, 347 U.S. 645, 653 (1954). Where it is shown that an administrative agency deviated from its established procedures, the presumption of administrative regularity does not apply. *Wilson v. Hodel*, 758 F.2d 1369 (10th Cir. 1985).

6. Memoranda of Understanding and/or Cooperative Agreements should not be required or given any special status in a land-into-trust application.

Although the Tribe is committed to being a good community partner, the IRA does not require consideration of state and local governments. The Tribe 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. Similar concerns exist even if such agreements are given preferential regulatory treatment in a fee-to-trust application.

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.[12] Importantly, however, these are agreements appropriately reached by contracting parties on equal footing to 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 growing their land base.

In our experience MOUs such as that described above are a consequence of positive tribal / state/ local relationships but are not a facilitating or actual cause of those relationships. The Coquille Tribe enjoys many such MOUs with other governments and generally enjoys positive intergovernmental relationships. However, using such MOUs as a criterion in fee-to-trust transactions would disturb the balance between state, local, federal and tribal interests because it would allow local governments to leverage approval of a MOU for an excessive amount of consideration that could otherwise be used to fund critical tribal government services, such as health care, education or housing for tribal members.

If the Federal government truly believes that tribal governments should have sovereignty and self-determination it will allow the free market and intergovernmental discourse to evolve and progress according to the needs of each governing body, and not impose some artificial leverage or other standard. Amending Part 151 to reference MOU's could change the delicate negotiating balance that state, local and tribal governments now enjoy. At the Portland consultation we heard many tribal leaders caution you that disturbing this balance will create significant negative consequences to their tribes and echo that concern.

7. <u>The United States trust responsibility and fiduciary duty flows only to tribes – not to public citizens, state or local governments.</u>

The IRA does not require the Department to consider 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.

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

F. Response to December Letter

To the extent not previously addressed in this comment letter, we offer the following responses to specific questions raised in the December Letter. Generally, the objective of the fee-to-trust program should be to assist all federally recognized tribes in achieving their political, economic, environmental and cultural self-determination. This objective should be guided by each tribe's own determination regarding what steps and transactions are necessary.

There are also specific laws and policies that are attuned to the historical and legal circumstances for each tribe that must be considered when evaluating the merits of a fee-to-trust application. For example, in restoring federal recognition of the Coquille Indian tribe, Congress purposely sought to remedy the harms of termination by adopting a fee-to-trust policy that was attuned to the Coquille Tribe's specific needs. In this case, the objective of the Coquille Tribal Congressionally directed fee-to-trust program is to both achieve self-determination and to remedy the harms of termination and other disastrous federal policies of the past.

G. The Department Should Not Be in the Business of Pitting Tribes Against Each Other.

Finally, and perhaps most importantly to the Coquille Tribe, I attended the January 25, 2018 consultation in Portland, Oregon. At that event tribal leaders expressed overwhelming opposition to revising the current Part 151 regulations or any other aspect of the fee-to-trust process, except to removing barriers to placing lands into trust. I echo those concerns.

Two tribal representatives, however, raised concerns regarding the inability of "resident tribes" to comment on off-reservation fee-to-trust proposals. One tribal leader referenced that she considered her tribe to be the resident tribe with respect to the geographic range of its treaty ceded lands. The second tribal representative stated, "There should be some concern about a foreign government going into our territory and using the US government as a proxy," with no description or reference to what constitutes "territory."

We advise the Department to exercise extreme caution with regard to these issues. The decisions that you make here could easily have tremendous unanticipated effects. Overzealous responses to these concerns have the potential to re-write history to favor wealthy tribes at the expense of those less fortunate. They also have the potential to thwart or negate the express language of legislation that authorizes fee-to-trust transfers in a specific geographic area. We wholeheartedly support the right of our brother and sister tribes to exercise their own self-determination and find economic success and, by the same token, we wholeheartedly object to the concept that a financial or commercial interest of one tribe should impact the ability of another tribe to achieve the same success. We demonstrated this willingness to support a fellow tribe even to our own detriment when a tribe placed a gaming facility within three miles of our gaming facility. We respect tribal sovereignty and we strongly recommend that Department to respect each tribe's right to self-determination equally.

With the expansion of tribal gaming, several tribes have reassessed or re-designated their aboriginal or ancestral territories beyond even their adjudicated treaty lands. Some of these tribes have *dramatically* expanded the lands that they call their own, perhaps in response to potential commercial competition. Now, many of these ancestral territories have expanded to a point where they significantly overlap.

These events pose a significant and not uncontroversial challenge for the Department if it chooses to permit "resident tribes" to comment on another tribe's off-reservation fee-to-trust applications. There is no standard definition of a "resident tribe" and, if it chooses to wade into these very murky waters, the Department will have to decide whether to adopt an *objective* or a *subjective* standard to determine whether a tribe is a "resident" over a given area. If it adopts a subjective standard, the Bureau invites a dramatic expansion of geographic ancestral claims and renders its fee-to-trust decisions vulnerable challenge on appeal for a lack of a significant supporting factual basis. Litigation over fee-to-trust decisions will expand in quantity and intensity.

On the other hand, by adopting an objective standard, the Department will designate itself an adjudicator of a storm of endless intertribal claims to geography throughout the United States. The potential for these claims to cause unnecessary acrimony and litigation and have a final result of thwarting the economic and self-determination efforts of less well-funded tribes. We strongly advise the Department to remain neutral on these issues.

Conclusion

On behalf of the Coquille Indian Tribe, 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. We remain available for any questions or concerns.

Sincerely,

Brenda Meade, Chairperson
Coquille Indian Tribe