



HO-CHUNK NATION

OFFICE OF THE PRESIDENT

July 2, 2018

John Tahsuda
Principal Deputy Assistant Secretary—Indian Affairs
Attn: Fee-To-Trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street NW, Mail Stop 4600-MIB
Washington, D.C. 20240

Dear Mr. Tahsuda:

The Ho-Chunk Nation (“Nation”) offers the following comments on proposed revisions to the 25 C.F.R. Part 151 regulations set forth in “Consultation Draft, Part 151—Land Acquisitions, §§ 151.11 – 151.12” and responses to ten questions relating to the land acquisition process. The Nation submits these comments as a part of its review of the proposed regulations, as well as its participation at multiple consultation meetings.¹

Background

In order to properly address any changes to the regulations concerning fee-to-trust acquisitions, the Department of the Interior (“DOI”) must consider the regulations against the background of the history of federal government’s policies toward Indian lands and, in particular, the purposes for which the Indian Reorganization Act, 25 U.S.C. § 5108 (“IRA”) was enacted. The purposes for which the IRA were enacted are particularly relevant here, given the fact that the DOI can only adopt regulations to implement the IRA and carry out its purposes.

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law...but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a nullity.

¹ The Nation sent representatives to the Foxwoods Resort Casino on January 23, 2018. However, the Department of the Interior cancelled the scheduled Listening Session on the day of the event. The process was not ideal, and the Nation hopes that the Department of the Interior will revise and update its Tribal Consultation Policy to address prospective, similar situations.

Dixon v. United States, 381 U.S. 68, 74 (1965).

In addition, the DOI must also consider any proposed regulations concerning off-reservation lands to be used for gaming purposes within the context of the requirements and Congressional purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et. seq. (“IGRA”).

1. The History and Purposes of the IRA Compel the DOI to Approve Nearly All Fee-to-Trust Applications.

The IRA was enacted in response to the catastrophic consequences of the federal government’s policy of allotment of tribal lands and assimilation of Indian people into white society pursuant to the General Allotment Act, 25 U. S. C. 331 *et seq.* (1887). Rather than resulting in Indian people owning their own land and assimilating into white society, allotment of tribal lands resulted in the loss of nearly two thirds of the land owned by tribes and the impoverishment of the majority of Indian people.

During the years from the passage of the General Allotment Act of 1887 until the beginning of the present administration, Indian land holdings were reduced from approximately 137,000,000 acres to less than 50,000,000 acres. Of the area that remained in Indian ownership a large part was desert or mountainside. The grazing land and farming land still owned by the Indians had seriously deteriorated as a result of overgrazing, the plowing of sod that should never have been broken, reckless timbercutting and the emigration of the topsoil by various water and aerial routes to points east and west.

These figures represented stark tragedy for a people whose economy was rooted in the soil, whose reverence for the soil was so deep that they never fully grasped the white man’s concept of buying and selling land. Little groups of Indians for whom the process of land-loss had gone to its final end, the advance guard of an army moving towards landlessness, could be found in rural slums and town garbage-dumps, living in the depths of squalor and hopelessness.

Against this background the government’s present conservation policies stand out in sharp relief. The loss of Indian lands through sales to whites was stopped, except for a few emergency cases, by an order of Commissioner Collier, approved by Secretary Ickes August 14, 1933, and by the general prohibition against further allotments and against sales of restricted land, which is contained in the Indian Reorganization Act. Guarantees against alienation of tribal lands have been written into every tribal constitution and charter.

Felix S. Cohen,² *Handbook of Federal Indian Law*, (Government Printing Office, 1942 Ed.), p. 86.

² Felix Cohen was the primary author of the IRA; the HANDBOOK OF FEDERAL INDIAN law is the fundamental guide for lawyers practicing Federal Indian Law.

These devastating effects of the policy of allotment must provide the foundation for the understanding of the proper way to administer the IRA. The motivation for the IRA and its intended purposes was expressed in the Senate Report that accompanied the IRA:

The bill now under consideration definitely puts an end to the allotment system through the operation of which the Indians have parted with 90,000,000 acres of their land in the last 30 years. It conserves the remaining Indian lands by extending the protective trust periods and by revoking the power of the Secretary of the Interior to issue fee patents. It prohibits the sale of Indian lands except to Indians and Indian organizations. **To make many of the now pauperized, landless Indians self-supporting, it authorizes a long-term program of purchasing land for them.**

...

Section 4 forbids the sale of restricted Indian lands except to the tribe or to Indian corporations or their members in order to prevent further dissipation of Indian lands. Inheritance of Indian property is restricted to Indians.

House Report 1804, 73d Congress, 2nd Session (H.R. 1804), p. 6-7 (emphasis added).

The House Report also quotes from the letter from President Roosevelt that was the genesis of the legislation:

The continued application of the allotment laws, under which Indian wards have lost more than two thirds of their reservation land, while the cost of Federal administration of the lands have steadily mounted, must be terminated.

Id., p. 8.

These statements (from the primary author of the legislation, the representative responsible for moving the legislation through the House of Representatives, and the President of the United States requesting the legislation) leave no doubt that two of the fundamental purposes of the IRA was 1) to stop the loss of land by Indians and Indian tribes arising from the Allotment Act and 2) to return land to Indians in an effort to restore the land base of Indian people.

The IRA was also designed to assist tribes to develop their economies:

Under the Reorganization Act \$4,000,000 has already been appropriated for loans to incorporated Indian tribes. These credit funds are being expended almost entirely for capital investment, in the form of agricultural machinery, farm buildings, and other improvements, livestock, saw mills, and fishing equipment. This credit program if it is supplemented by a sound land program, and if it does not become too deeply entangled in departmental red tape and remote control, is likely to establish for the first time a stable basis of economic independence for tribes some of which have lived in the depths of poverty, or are kept alive on the

edge of starvation by income from annuities, land sales, and leases of land.

Cohen, *supra*, pp. 86-87.

In order to enable Indians to make effective use of their land for self-support, the bill authorizes the creation of a credit system for Indians. To facilitate the administration of the revolving credit fund, the organization of Indian credit unions and of other cooperative business associations is authorized.

...
Thus, broadly, the measure proposes 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. 1804, p. 6.

It would appear that the DOI has forgotten the grim history that gave rise to the enactment of the IRA, has abandoned the purpose of the IRA, and has shifted its focus to an effort to restrict tribal gaming and to limit trust acquisitions to as great an extent as possible. The goals of the IRA, to restore to Indians and Indian tribes land that was lost through allotment and to promote the development of tribal economies, stand in stark contrast with the effect (and apparent purpose) of the Proposed Regulations. As will be discussed in greater detail below, the Proposed Regulations will make the approval of off-reservation trust acquisitions more difficult, they will delay approvals, and they will make the development of tribal economies through the use of tribal land less likely.

The objections to the Proposed Regulations set forth below go beyond differences in policy in how to implement the IRA. The Proposed Regulations conflict with the very purpose of the IRA. Underlying all of the objections to the Proposed Regulations is the premise that, pursuant to the IRA, any changes in the Part 151 regulations should be designed to make fee-to-trust transfers easier and faster. The Proposed Regulations would do the opposite.

The purpose of regulations is to carry out the requirements of statutes, not to rewrite statutes or prevent the statutes from being put into effect. *Dixon v. United States*, 381 U.S. 68, 74 (1965). Yet, that would appear to be precisely the effect of the Proposed Regulations.

2. The Requirements and Congressional Intent of the IGRA Make Further Restrictions on Land Acquisitions for Gaming Purposes in the Part 151 Regulations Unnecessary.

The Proposed Regulations add new criteria for the approval of applications for fee-to-trust transfers for land for gaming purposes, each of which appears to be designed to be a roadblock to trust acquisitions for gaming purposes. Creating obstacles to the approval of applications relating to trust acquisitions for gaming purposes is in conflict with the IRA's purpose to promote the development of tribal economies. It is also in conflict with the structure and Congressional intent of the IGRA.

An entire subsection of the IGRA is devoted to gaming on off-reservation lands, 25 U.S.C. §2719(b). As the DOI is well aware, Section 2719(a) prohibits gaming on land taken into trust after the enactment of the IGRA (October 17, 1988). That prohibition is subject to several exceptions, including an exception for lands that are taken into trust pursuant to a two part determination, Section 2719(b)(1)(A). The two-part determination process takes into account and provides a mechanism for the expression of state and local interests affected by a fee-to-trust transfer of land for gaming purposes. The criteria for approving trust acquisitions for off-reservation land to be used for gaming are, thus, already established. There is no need to add further criteria through the Part 151 process. In this context, it is significant that Section 2719(c) states, “Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.” (Emphasis added.)

Revealingly, the IGRA’s legislative history specifically addresses the possibility of courts balancing tribal and state interests in applying the IGRA, “[The IGRA] is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.” S. Rep. 100-446, p. 6. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F. 3d 536 (8th Cir. 1996). For the same reason, there is no need for the DOI to impose requirements through the Part 151 regulations that are designed to ensure that state and local interests are protected. Equally important, class III gaming pursuant to the IGRA is only permissible where a tribe has entered into a class III gaming compact with the state within which the land upon which the gaming is to be conducted is located. The compact negotiation process is designed to allow states to negotiate over those issues that Congress has concluded a tribe must negotiate. The negotiation process is the mechanism through which states can address their concerns relating to a tribe’s gaming. The IGRA does not require that tribes enter into inter-governmental agreements beyond gaming compacts.

Nevertheless, with the Proposed Regulations, the DOI is effectively changing the IGRA’s balance of the interests of tribes and states with regard to whether gaming will be permitted on off-reservation land by placing greater emphasis on and giving greater weight to state and local interests.³ The addition of more criteria to protect the alleged interests of state and local governments through the Part 151 process conflicts with the Congressional intent in enacting the IGRA by shifting the balance of the interests toward state and local interests. The Proposed Regulations thereby frustrate Congress’ carefully crafted procedures for compact negotiation and qualification for off-reservation gaming. The added criteria give state and local governments more leverage to extract concessions from any tribe that seeks to negotiate with a state concerning a two part determination. Arguably, by doing so, the Proposed Regulations violate the IGRA, because it adds additional criteria above and beyond those identified in the IGRA relating to off-reservation gaming.

³ See e.g., Proposed Regulations Section 151.11(a)(2) (viii) “Information on economic benefits, if any, to the local community from the gaming project”; Section 151.11(a)(2)(xi) “Evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and the State and local governments, if any, or an explanation as to why no such agreements or efforts exist”; Section 151(b)(1) “The notice will inform the State and local government that each will be given 30 days in which to provide written comment as to . . . potential conflicts of land use”].

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously express intent of Congress.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984). It is against this background that the Nation offers the following comments on the Proposed Regulations.

Detailed Analysis of the Proposed Regulations:

According to the Assistant Secretary, the Proposed Regulations are designed to change the fee-to-trust process in order to preserve tribal resources. The October 4, 2017 letter states,

The application process for taking land in trust can be costly for Tribes. In consideration of the often-time limited tribal resources, the Department of the Interior . . . is considering revisions to 25 CFR § 151.11 and § 151.12 that will reduce the burden on tribal applicants." In the Summary Sheet of Consultation Draft, the Assistant Secretary describes the purpose of the changes in the Proposed Regulations as "[c]reating a two-phased Secretarial review and approval process for discretionary off-reservation trust acquisitions so that certain resource-intensive application information will be required only if the application meets the threshold criteria to reach the second phase of review and approval.

Despite the Assistant Secretary's repeated efforts to characterize the Proposed Regulations as an effort to improve the fee-to-trust application process for tribes by making it less expensive, it is the Nation's opinion that the Proposed Regulations create more barriers to the approval of fee-to-trust applications. Areas of concern include applications related to gaming, which slow the review process down, and restrict off-reservation acquisition approvals to lands close to the Nation's existing lands. Additionally, the Proposed Regulations appear to give greater weight to the "interests" of State and local governments, and to give the State and local governments more influence over the review process and the regulation of tribal gaming.

At the January 18, 2018 consultation at the Mystic Lake Casino Hotel in Prior Lake, Minnesota, DOI representatives expressed that these regulations were created and introduced as a result of meeting with certain tribes at the beginning of the Trump Administration. With a vast majority of tribes at the various consultations now in opposition of the proposed regulations, the DOI should refrain from adopting the regulations that will have a significant effect on so many tribes.

The most fundamental change in the regulations would be to create a two-step application process. The first step would require tribes to submit fewer documents in support of the initial application than the current regulations require. Under the current regulations, tribes submit all necessary documentation at the time of the filing of the application, including NEPA compliance

documentation. The proposed two-step process gives the DOI the ability to deny an application quickly, based on less complete documentation than is currently considered. If the DOI denies an application during the first phase, tribes would be forced to file suit or an administrative appeal to get the decision overturned. If the first phase denial is eventually overturned, the tribe would be left, months or years after filing of the original application, back at square one, with the knowledge that the DOI will be inclined to disapprove the application it has rejected once before. These objections to the two part process would apply even more forcefully to individuals, since an individual would be more negatively affected by the additional delays and costs associated with the two part process. If applications do make it past the initial first phase, no other benefit is afforded. The Nation would still be required to go through the current process but with additional requirements as set forth in the proposed regulations. The DOI could have streamlined or eliminated steps for applications that passed the first phase; however, it did not. By not doing so, the DOI actions only make it easier for it to reject applications and give opponents immense advantage to delay or outright deny applications.

The new criteria added for both gaming and non-gaming activities are numerous and significant. The criterion constitute a dramatic shift in both the number and the purpose of the criteria. Almost all of the new criteria included in the Proposed Regulations appear to be designed to prevent the approval of fee-to-trust applications. None appears to be designed to make the approval of applications faster or more likely. Rather, all of the new criteria seem to be designed to provide criteria for denial of an application. (As will be discussed below, this impression is strengthened by the Proposed Regulations statement of how the criteria are to be considered: "If the initial review reveals that the application fails to address, or does not adequately address, the information required in paragraph (a), the Secretary will deny the application and promptly inform the applicant in accordance with section 151.12." Proposed Regulations, § 151.11(c)(1) (iii).)⁴

Finally, the structure and content of the Proposed Regulations, with a clear emphasis on restricting or discouraging off-reservation fee-to-trust applications, fails to take into account those tribes that are either landless or currently have a small land base that would not allow it to file a fee-to-trust application relating to on-reservation land. That would be inappropriate, because those tribes would be forced to meet the more stringent standards for off-reservation applications, despite the fact that they would have no option to seek approval of trust transfers for any on-reservation land. Moreover, those tribes are most likely to be in the greatest need for the land, whatever the use, and would have the most limited resources in order to pursue the application. The Proposed Regulations would punish those tribes for their already difficult circumstances. The Ho-Chunk Nation is similarly situated. The Nation has nearly 5,000 acres in fee status across 21 counties and 3 states. The Proposed Regulations proposes a daunting and near impossible task of placing the Nation's properties in trust due to the scattered nature of the Nation's land base. For your benefit, the Nation has attached a map, which highlights the scattered land acquisitions of the Ho-Chunk Nation. *See* Ex. A. Nevertheless, this does not serve as any indication as to which land acquisitions are potential trust parcels, rather it shows the potential for all such acquisitions to be

⁴ This analysis of the new criteria applies to off-reservation fee-to-trust applications for both gaming and non-gaming purposes, since the new criteria for non-gaming applications overlap with most of the new criteria applicable to applications for land to be used for gaming.

determined off-reservation applications.

The following are the Nation's comments on the new provisions of the Part 151 regulations set forth in the Proposed Regulations.

- **Section 151.11(a).** “The applicant must submit an application that states the purposes for which the land will be used, and, if applicable, provide a detailed description of the project to be developed.” The phrase “if applicable” is vague, in that it does not make clear what “the project to be developed” means. Assuming that it refers to any development, meaning anything beyond the current use of the property, this provision would appear to have only negative implications. It would allow the DOI to determine and/or micromanage how the land is to be held prospectively and it would provide the DOI with grounds for denying the application based on objections to specific aspects of the project description.
- **Section 151.11(a)(1)(i), Section 151.11(a)(2)(i).** “The Tribe’s historical or modern connection, if any, to the land.” Adding this as a required criterion will have primarily negative results for tribes. If the tribe has little connection with the land, even if there is a reasonable explanation for the selection of the land, this criterion will weigh heavily against approval. Nonetheless, the Nation does not support off reservation gaming by other tribes on lands where in the Nation has historical or aboriginal connections. Off reservation gaming by another tribe should not be conducted on land that is in close proximity (within 60 miles) to another Ho-Chunk Nation gaming facility so as to cause a detrimental impact on the Nation, unless the Nation consents to it. *See HCN Legis. Res. 7-17-12L.*
- **Section 151.11(a)(1)(v), Section 151.11(a)(2)(v).** “An analysis whether the acquisition will facilitate the consolidation of Tribal land holdings and reduce checkerboard patterns of jurisdiction.” It would difficult to conceive of any way that this criterion would enhance the approval of an off-reservation fee-to-trust application. Most checkerboard jurisdiction issues arise within the boundaries of a reservation. The new regulations would not apply to those situations. All off-reservation fee to trust applications, by their very nature, will neither consolidate lands, nor reduce checkerboard jurisdiction. In the majority of cases, therefore, this criterion would be a strike against a tribe’s application, because the tribes will not be able to demonstrate that the trust acquisition will meet this criterion.
- **Section 151.11(a)(1)(vi), Section 151.11(a)(2)(vi).** “An analysis whether the Tribal government can effectively exercise its governmental and regulatory powers at the proposed site.” According to the DOI, this criterion is included, “in deference to Tribal sovereignty and self-determination, instead of focusing on whether the BIA is equipped to discharge additional responsibilities.” This new criteria will have no positive effect on the analysis of the application; it is an additional hurdle. It also will result in making it harder to meet the requirements by giving the DOI the opportunity to find another ground for denial—because it finds that the tribe cannot “effectively” exercise

regulatory power. The term “effectively” is not defined, so the DOI will have leeway to apply this criterion in a manner that promotes its agenda, which appears to be to prevent fee-to-trust transfers.

- **Section 151.11(a)(1)(vii).** “A plan that specifies the anticipated economic benefits to the Tribe and its members associated with the gaming project, **including investment and recurring revenues.**” While the anticipated economic benefits of the gaming project have been a common feature of applications for fee-to-trust transfers for gaming purposes in the past, the Nation questions the purpose of including the phrase “including investment and recurring revenues.” It is unclear what this phrase means in the context of off-reservation gaming. The provision may require tribes to meet the conventional expectations of a business plan in a non-tribal, non-gaming context; thus limiting the tribal autonomy. Additionally it could potentially allow the DOI to micromanage how the project is financed. Clearly, many, if not most tribes borrow money to finance off-reservation gaming operations, so “investment” by tribes is often limited at the time that a trust acquisition application is submitted, and “recurring revenues” would be limited for at least an initial period while the tribe repays the loans needed to finance the project. Again, this criterion appears to have no positive impacts for tribes, as it merely adds to the requirements that the tribes must meet while leaving the criteria vague, which will allow the DOI to interpret it to the detriment of the tribes.
- **Section 151.11(a)(1)(viii).** “Information on economic benefits, if any, to the local community from the gaming project.” This criterion suggests that the focus of the analysis will not be primarily on the benefits to the tribe. Rather, the tribe will be required to demonstrate specific benefits to the surrounding community. While trust applications in the past, especially for gaming, commonly described the positive economic impact on the surrounding community, it has neither been required as an element of the application, nor has it been considered a central element of the analysis. The statute does not require a showing of “benefits” to the local community. It only requires a showing that the acquisition will not be “detrimental” to the surrounding community. 25 U.S.C. § 2719 (b)(1)(A). Thus, the proposed regulations place an additional burden on tribes not contained in the statute. Under the proposed regulations, in addition to showing that a gaming project will cause no harm to the surrounding community, the tribe must also now show that the local community will benefit from the project. It is, furthermore, unclear what level of “benefits” to the local community would be sufficient to get past the first phase of evaluation. That vagueness would allow the denial of an application because the benefits to the local community would not be enough to satisfy the DOI.
- **Section 151.11(a)(1)(ix).** “Identification of the unemployment rate on the reservation, and an analysis of the effect on the unemployment rate by the operation of the gaming project.” This criterion, while not irrational, would weigh against approval of an application that relates to land that is not close to existing reservation trust lands. An off-reservation gaming facility might employ a substantial number of tribal members who do not live on the tribe’s reservation land, but that would not be taken into account

by this criterion. This criterion also does not take into account tribes that have a small or non-existent reservation population (usually because of a small or non-existent land base). Many tribes have lost land as a direct result of the United States illegal conduct. For example the DOI violated the California Rancheria Act resulting in many small tribes in California losing all or most of their reservation and land. *Duncan v. Andrus*, 517 F. Supp. 1 (N. D. Cal. 1977); *Smith v. United States*, 515 F. Supp. 56 (N.D. Cal. 1978); *Duncan v. United States*, 667 F. 2d 36 (Ct. Cl. 1981). Even tribal members living just outside the reservation boundaries would not be relevant for the purposes of this criterion. To the degree that the DOI intends to encourage increased tribal employment, the criteria should be based on an identification of tribal unemployment, regardless of residence, and the projected reduction of tribal unemployment based on hiring by the gaming facility. But that does not appear to be the purpose of this criterion. Similar to the previously discussed criteria, tribal on-reservation employment opportunities are commonly a goal of gaming related fee-to-trust applications, and has been commonly addressed in fee-to-trust applications for gaming. Making it a mandatory criterion has the effect of creating an obstacle for approval, rather than allowing the tribe to highlight the benefits of the project.

- **Section 151.11(a)(1)(x).** “Identification of the on-reservation benefits from the proposed gaming project, including whether any of the revenue will be used to create on-reservation job opportunities.” This criterion is, at best, redundant. Section 2710(b)(2)(b) of the IGRA requires tribes to use net revenues only “(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.” Section 2710(b)(3) requires that tribes create and receive approval of a Revenue Allocation Plan from the Secretary. Thus, the use of gaming revenues is already highly restricted under the IGRA and focused on benefits to the tribes and their members. This criterion has been addressed in applications in the past where it supported the application. By making it mandatory and focusing exclusively on on-reservation employment, it becomes an obstacle to approval. In situations where tribal members are dispersed, tribal efforts to provide for tribal members who live off-reservation would be considered a failure to meet the stated criteria or not given appropriate consideration as a benefit arising from the gaming.
- **Section 151.11(a)(1)(xi).** “Evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and the State and local governments, if any, or an explanation as to why no such agreements or efforts exist.” This criterion effectively forces tribes to enter into intergovernmental agreements with State and local governments, regardless of whether the tribe finds that any such agreements are necessary or beneficial to the tribe. This criterion is in conflict with the plain wording and structure of the IGRA. “Congress enacted [the IGRA] to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp— while setting boundaries to restrain

aggression by powerful states.” *Rincon Band of Luiseño Mission Indians v. Schwarzenegger*, 602 F. 3d 1019, 1027 (9th Cir. 2010). As with a number of the other new criteria, it also gives more weight to the interests of the State and local government than under the current regulations. Along with violating the IGRA, including this criterion has the effect of weakening the tribes’ bargaining position in its dealings with State and local governments. Since intergovernmental agreements would be effectively mandatory, State and local governments will be able to take a hard line and make demands that would currently be considered unreasonable, knowing that, if the tribes refuse to accept an agreement or provisions of an agreement proposed by a State or local government, the tribes will have to explain “why no such agreements or efforts exist.” Once again, the practical effect of this criteria is primarily to create a barrier to approval of the application.

- **Section 151.11(a)(2)(vii).** “For acquisitions for economic development purposes, excluding gaming, a plan that specifies the anticipated economic benefits to the Tribe, its members, and the local community (if any), associated with the economic development.” While the anticipated economic benefits of an economic development project, including economic benefits to the local community, have been a common feature of applications for fee-to-trust transfers for gaming purposes in the past, the Nation questions the necessity of including the anticipated economic benefits to the local community as a mandatory criterion. It raises the further question of whether the absence of a demonstration of anticipated economic benefits to the local community will be weighed against approval.
- **Section 151.11(b)(1).** “Upon receipt of the information required in paragraph (a), if the land is in unrestricted fee status, the Secretary will notify the State and local governments having regulatory jurisdiction over the land to be acquired. The notice will inform the State and local government that each will be given 30 days in which to provide written comment as to the acquisition’s potential impacts on regulatory jurisdiction, potential conflicts of land use, real property taxes, and special assessments.” This tracks the current regulation, but it adds a significant new criteria: “potential conflicts of land use.” The change in notice requirements set forth in the Proposed Regulations Section 151. 11(b) again appears designed to give greater weight to State and local government interests than in the past. The “potential conflicts of land use” is a new criterion that is focused on the interests of local governments. It provides an additional basis for denying the application, while providing no benefit to tribal interests. It is also very open ended—a State or local government will always be able to claim that an element of any tribal development project is in conflict with local land use. This provision seems to plead for the filing of objections by State and local governments.
- **Section 151.11(c)(1).** “Initial review. Upon receipt of the application information required in paragraphs (a) and (b), the Secretary will complete an initial review of the application. (i) The initial review of an off-reservation application should precede any effort to comply with NEPA and 602 DM 2. (ii) In completing the initial review, as the

distance between the Tribe's reservation, if any, and the land to be acquired increases, the Secretary will give greater scrutiny to the applicant's justification of anticipated benefits from the acquisition, and greater weight to the concerns raised pursuant paragraph (b). (iii) If the initial review reveals that the application fails to address, or does not adequately address, the information required in paragraph (a), the Secretary will deny the application and promptly inform the applicant in accordance with section 151.12." Proposed Regulations, § 151.11(c)(1), describing the initial review of the application and supporting documents suggests that the initial review will lead to denial if the application does not address all of the criteria, or does not address "adequately" the information required in the initial phase. However, it is self-evident that the DOI's focus is not primarily on the amount and thoroughness of information submitted in support of an application. Complying with NEPA and 602 DM 2 will create a burden on tribes to produce materials when an application may not be accepted. This creates a hardship upon tribes because the process for taking land into trust may be costly for tribes. The amendments are being introduced to reduce burden on tribal implications; this amendment falls short. As the analysis of the new criteria set forth above reveals, the focus of the Proposed Regulations is on whether the proposed use of the land, especially if the use is gaming, would fall within a narrow set of circumstances that the DOI now believes is appropriate for approval. The new criteria would have the primary effect of providing the Secretary more grounds for denial of approval—a tribe could provide detailed information supporting each category, and that detailed information would provide the basis for denial because it is not "adequate." Thus, the new two-phase review process would inevitably lead to more, albeit costly, denials.

- **Section 151.11(c)(2).** "(2) If the Secretary does not deny the application during the initial review, the applicant will be informed and must submit the following information: (i) Documentation that the Secretary needs in order to comply with NEPA and 602 DM 2; (ii) If applicable, any information in support of the Tribal applicant being "under federal jurisdiction" in 1934. (iii) If the application is for gaming, information regarding the eligibility to conduct gaming, in accordance with 25 CFR Part 292; (iv) Any additional information the Secretary requires." In the unlikely event that an application is not denied at the end of the first phase, an applicant will be required, in the second phase, to file further documentation. This provision of the Proposed Regulations repeats the requirement from the current Section 151.11 that applicants provide the Secretary with information necessary for the Secretary to comply with NEPA, but it adds two new criteria for specific information and adds an explicit authorization for the Secretary to seek more information. The changes in the criteria for the second phase of evaluation, Section 151.11(c)(2)(ii)-(iv) of the Proposed Regulations have no apparent purpose other than to create new, significant barriers to approval. They can be interpreted to reflect an overt hostility to any off-reservation trust acquisition and even greater hostility to off-reservation gaming acquisitions.

Of particular significance is the addition of the new criterion relating to tribes' eligibility to have land taken into trust for them under the IRA, Section 15.11(c)(2)(ii): "If applicable, any information in support of the Tribal applicant being 'under federal

jurisdiction” in 1934.”” There are a number of issues arising from this provision.

As an initial matter, it is unclear what “If applicable” means. The phrase suggests that each tribe will know whether there is a potential basis for concluding that the tribe was not under federal jurisdiction in 1934. It seems to leave it up to each tribe to determine whether there was any reason to believe that a tribe’s eligibility to have land taken into trust pursuant to Section 5 of the IRA (25 U.S.C. §465)⁵ might be challenged. In light of the way that the Proposed Regulations appear to weigh against approval, it is unclear whether the failure to address the issue on the part of a tribe would provide a basis for denial of the application in the first phase of review. It would seem necessary, therefore, for all tribes to address whether they were under Federal jurisdiction in 1934, even if the Proposed Regulations do not expressly require that tribes do so.

As the DOI is well aware, the requirement that tribes provide support for the tribes being “under federal jurisdiction” in 1934 arises from the United States Supreme Court decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). The central ruling in *Carcieri* was that “the term ‘now under the federal jurisdiction’ in [Section 19] unambiguously refers to those tribes that were under the federal jurisdiction of the United States **when the IRA was enacted in 1934.**” *Id.* at 395. (Emphasis added.) The *Carcieri* court concluded that, if a tribe was not under federal jurisdiction in 1934, the Secretary is not authorized to take land into trust for that tribe under the IRA.

The inclusion of a requirement that tribes demonstrate that they were “under federal jurisdiction” in 1934 in the Proposed Regulations is problematic for many reasons. First and foremost, the inclusion of the *Carcieri* language as a criteria for fee to trust applications would disqualify any tribe that cannot demonstrate to the DOI’s satisfaction that it was “under federal jurisdiction” in 1934. The application of the criteria will be difficult and unpredictable, because the *Carcieri* decision did not define the phrase “under federal jurisdiction.” The standard the DOI would apply in determining whether a tribe was under federal jurisdiction in 1934, thus, is a crucial question that is not answered by the Proposed Regulations. Until the Solicitor’s M-37029 Opinion has been either suspended or withdrawn, the Nation will continue to apply its policy.

The inclusion of the *Carcieri* based criterion could open a Pandora’s box of problems for tribes throughout the United States. Not only is it unclear what evidence will be required in order to show that a tribe was “under federal jurisdiction” in 1934, the consequences of a determination by the DOI that a tribe was not under federal jurisdiction in 1934 are also unknown and threatening. Clearly, a determination by the DOI that a tribe was not under federal jurisdiction in 1934 would result in the denial of the fee-to-trust application of the tribe in question. But it would also seem to disqualify a tribe from ever having land taken into trust for it pursuant to the IRA unless Congress amends the IRA. It is also possible that such a determination would be used as the basis

⁵ This section has been recodified at 25 U.S.C. § 5108.

for a challenge to the legitimacy of recent fee-to-trust transfers.⁶ The provision is an invitation to litigation that will result in unpredictable results and consequences.

- **Section 151.11(c)(2)(iii).** “If the application is for gaming, information regarding the eligibility to conduct gaming, in accordance with 25 CFR Part 292.” Proposed Regulations, § 151.11(c)(2)(iii). Once again, this provision of the Proposed Regulations is vague. It is unclear what the tribes will be required to present in order to conduct gaming. It could, for example, mean that tribes would be required to demonstrate that it has entered into a gaming compact and has enacted a gaming ordinance that has been approved by the Secretary. It might also require tribes to submit all of the information that they would be required in order to seek an Opinion from the Office of Indian Gaming as to whether the land meets the requirements of one of the exceptions to the prohibition on gaming on land taken into trust after October 17, 1988 or it might require tribes to submit a lands opinion issued by the Office of Indian Gaming.
- **Section 151.11(c)(3).** “Upon receipt of the information required by this paragraph, and review of the entire application record, the Secretary will issue a decision to approve or deny the application in accordance with section 151.12. The Secretary’s decision will document consideration of all of the criteria required by this section and: (i) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and (ii) As the distance between the Tribe’s reservation, if any, and the land to be acquired increases, the Secretary will give greater scrutiny to the Tribe’s justification of anticipated benefits from the acquisition, and greater weight to the concerns raised pursuant paragraph (b).” These criteria are largely unchanged; they are just located in a different place. The concern here is the inclusion, as discussed above, of “potential conflicts of land use” (which is listed among the “concerns raised pursuant paragraph (b)”).
- **Section 151.12, “Action on Requests.”**

“(c)(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary will: . . . (iii) Acquire the land in trust under § 151.14 **no sooner than 30 days after** the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Departmental requirements.

Section 151.12 (d)(iv), provides that, if the application is approved by a BIA official action with delegated authority, the Secretary or the Assistant Secretary shall: “(iv) Acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or **no sooner than 30 days** after exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of § 151.13 and any other Departmental requirements.”

⁶ For land taken into trust a long time ago, such a challenge would probably be barred by the statute of limitations for such a challenge under the Administrative Procedures Act, 5 U.S.C. § 701, et. seq. However, recent transfers, in the last six years, could be vulnerable to challenge.

These changes to Section 151.12, reinstating a 30 day delay in taking land into trust after an application has been approved, appear to be intended to give opponents of approval of fee-to-trust applications more time to file suit before the land goes into trust. By providing for a 30 day delay, the regulations make it easier to block an approval. It positively invites opponents to file suit upon the approval of a fee-to-trust application. Imposing the 30-day delay is rendered unnecessary as opponents now have up to six years to file an appeal, after the land has been placed in trust.⁷ By reintroducing the 30-day delay, the DOI is inviting opponents to challenge and deplete tribal resources through legal actions. Adding yet another layer of the already long and stressful land-into-trust process.

- **Section 151.12 (e)** “If land has been acquired in trust before judicial review of the decision to take the land into trust has concluded, and a court rules that the Department erred in making the trust acquisition decision, the Department will comply with a final court order and any resulting judicial remedy, including, for example, taking land out of trust.” It is unclear whether this provision would have a significant effect, unless it can be interpreted to provide that the DOI will not appeal final decisions of a trial court of competent jurisdiction. In that case, it would be a clear violation of the Department’s trust obligations to tribes. If it is intended to merely reaffirm DOI’s obligation to comply with court orders, it is not only unnecessary, it is inflammatory. It suggests that the DOI’s concern is not focused on the interests of tribes, but, rather it is focused on assuaging the concerns of those state and local governments and private entities that oppose taking land into trust for tribes. That least on a philosophical and public relations level, this is inconsistent with the DOI’s trust obligations.

Recommendations in Lieu of the Proposed Regulations

The forgoing discussion makes it clear that the Nation regards the Proposed Regulations to be highly objectionable across the board. Rather than attempt to tweak the fatally flawed set of Proposed Regulations, the Nation recommends that the Proposed Regulations be scrapped and the current Part 151 regulations left in place. Alternatively new regulations could be drafted to more appropriately fulfill the federal government’s responsibilities arising from the IRA and the IGRA.

As stated above, the Nation believes any regulations should be designed to make it easier and faster for tribes and individuals to have land taken into trust for them by the United States. Most applications should be approved with little more than a cursory review. This would be particularly true for applications relating to land within the boundaries of a tribe’s aboriginal homelands. Such a policy would be consistent with the DOI’s current thinking, since the Proposed Regulations are designed to address only applications relating to off-reservation lands. It is important, however, to make clear that, given the purposes of the IRA, any fee-to-trust application for land that is located within the **original** boundaries of a reservation or contiguous to existing trust lands should be

⁷ *Salazar, et al. v. Patchak et al.* 567 U.S. 209 (2012).

approved with minimal submission requirements and delay. As the DOI is well aware, the boundaries of the land reserved or set aside for numerous tribes have been diminished over time, often as a result repeated cessions to the federal and state government as well as diminishment of the boundaries of Indian reservations. The purpose of the IRA, to return land to individuals and tribes that were lost as a result of the Allotment Act, should apply to all lands within the boundaries of any historic Indian territory, not just to land located within the current boundaries of a current reservation. This category would encompass situations in which a tribe's lands were reduced or disestablished by treaties⁸ or by an Act of Congress or as a result of the DOI illegal conduct.⁹ It would also encompass nearly all fee land owned by an individual or tribe that was once allotted to an individual. These lands should be taken into trust on the basis of minimal requirements, since such lands are directly tied to the Allotment Act, the Burke Act, also known as the Forced Fee Patenting Act, 25 U.S.C. § 349 or the DOI illegal conduct and its catastrophic effects. NEPA compliance should be waived for former allotments and any lands that were ceded by the Nation, as the original 'land use' was for the tribes/tribal members to determine and utilization.

In these cases, the only criteria that should be applied are possession of marketable title to the land in question, that the land is located within the boundaries of historical or aboriginal homelands or lands created by treaty, statute, executive order or DOI administrative action and successful completion of an environmental review. The Nation recommends that a new provision of the Part 151 regulations be promulgated that states the following:

Draft regulation—minimal requirements for tribal and individual fee land located within boundaries of any reservation.

With regard to land that is outside the boundaries of a reservation, the DOI could legitimately require tribes to meet an additional criterion, an evaluation of whether the taking of the land into trust would have a measureable, detrimental effect on the economic interests of another tribe within whose aboriginal territory the fee land is located. This provision would include applications relating to both governmental and economic development uses of the land, as any negative impacts arising from any use would be revealed and evaluated as part of the analysis of whether the fee-to-trust transfer would have a detrimental effect on another tribe. The Nation recommends that a new provision of the Part 151 regulations be promulgated that states the following:

Draft regulation—requirements for tribal fee land located outside of tribe's reservation boundaries.

Responses to the Questions Set forth in the October 4 and December 6 Letters

⁸ The Nation, for example, is a descendent of, and a political successor to, signatories of a 1832 and a 1837 treaty ("Treaties") with the United States of America which established, diminished and terminated the Nation's reservations in the States of Wisconsin and Illinois.

⁹ *Russ v. Wilkins*, 624 F. 2 914 (9th Cir. 1980) (boundaries of Reservation reduced as a result of opening up the Reservation to allotment); *Table Bluff Band v. Watt*, 532 F. Supp. 255 (N.D. Cal. 1981) (Tribe loses most of the land to its reservation as a direct and proximate cause of the DOI violating the California Rancheria Act); *United States v. Mottaz*, 476 U.S. 834 (1986) (Allottee lose land as a result of the United States violating the Burke Act).

The Nation's responses to the questions set forth in the October 4 and December 6 letters will be set forth below, but the questions require a few general observations. First, it is not clear why the DOI is asking tribes to respond to the questions. It would have made more sense to ask questions like these before drafting and publishing the Proposed Regulations. That way, the answers could have been incorporated into the Proposed Regulations. Since the questions are being asked after publication of the Proposed Regulations, one must question whether the DOI is interested in the answers and whether DOI sincerely intends to use the answers to draft or modify the Proposed Regulations.

Second, the new questions added in the December 6 letter give more reason to question DOI's purpose in asking the questions. The new questions sound like they were drafted by someone doing an opinion survey or a customer satisfaction survey. The questions do not seem serious in the context of the practical significance of the Part 151 regulations to Indian tribes and individual Indians.

The responses to each of the questions will be set forth in the order they are presented in the December 6 letter.

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

Observation: This is a particularly clear example of the dubious sincerity of the questions. Tribes would agree that the purpose of the program is to take land into trust for the use of Indians for both governmental and tribal economic development purposes. As was discussed above, the purpose of the IRA was to stop the policy of allotment and to reverse the devastating impact of that policy. What information provided in response to this general question would have an effect on the drafting of the Proposed Regulations? Is DOI planning to reconsider the existence and purpose of the program? Why, furthermore, does the question make a distinction between the purpose of the fee-to-trust program and the goals of the DOI? The goals of the DOI should be the same as those of Congress as embodied in the IRA, to increase tribe's land base in order to allow tribes to develop their governments and economies.

Answer: The purpose of the program should be to carry out the purposes of the IRA: to restore land to Indians and Indian tribes and to allow them to develop strong tribal governments and economies. The objective of the land-into-trust program and the purpose of the IRA is not to advance the needs of state and local governments over tribes. If Congress wanted the Secretary to consider state and local government interest in the land-into-trust process, than language in the IRA would have reflected such a stance. The DOI should work with each tribe individually and adapt to their needs on a regional/agency level.

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

Observation: As stated above, this seems more like a customer satisfaction survey question than an effort to elicit information that would allow the DOI to develop improved regulations. Again, it raises questions. Why is the question restricted to on-reservation applications? This seems to be an attempt to amplify the distinction between on-reservation and off-reservation applications in order to allow the DOI to further complicate and discourage off-reservation transfers.

Answer: The Department addresses on-reservation requests somewhat better than off-reservation requests, but the process is still too slow and cumbersome. The goals of the IRA remain mostly unfulfilled. To date only a small percentage of lost lands have been restored to tribal nations. There is no reason why the Department should ever deny an on-reservation application, since the land, by definition, was recognized to have belonged to the applicant tribe and was taken away. All on-reservation applications are simply requests that the Department return to tribes what was once theirs. They should be granted with as few required submissions as possible and with minimum delay. As mentioned before, NEPA compliance should be waived for applications for on-reservation land-into-trust applications as the original 'land use' was for tribes usage.

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

Observation: This question and questions 3 and 4 are more appropriate than the previous two, but, again, these questions should have been asked before the Proposed Regulations were drafted, not after.

Answer: In light of the purposes of the IRA, the policy of the DOI in addressing all fee-to-trust applications should be to approve as many as possible. With regard to fee-to-trust applications for off-reservation land in particular, applications should be disapproved only where there is a demonstrable conflict between the interests of the applicant tribe and one or more other tribes if the land in question is not within the applicant tribe's aboriginal territory, and the proposed use of the land does not violate NEPA. Thus, disapprovals would only be necessary in the context of the land being used for commercial purposes (whether gaming or non-gaming), and that will have a significant, measurable, negative impact on another tribe's commercial activities. There is no reasonable basis for denial of off-reservation applications where the land is being used for purely governmental purposes, since it will not affect other tribes.

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

Answer: In order to fulfill the purposes of the IRA, the Department should consider the fewest and least onerous criteria for approving off-reservation trust applications. As stated in response to Question 3, the only necessary criteria are those that would address whether the land is within the applicant tribe's aboriginal territory, whether approval of the off-reservation land application will result in a demonstrable conflict between the interests of the applicant tribe and one or more other tribes, and whether the proposed land use would violate NEPA. Therefore, the criteria should be limited to the location of the land in question, the planned use of the land and compliance with NEPA. If the land is to be used for commercial purposes outside of the tribe's aboriginal

territory, the application should also require a more detailed description of the proposed use of the land, market studies showing whether the proposed use will significantly affect the commercial interests of tribes within whose aboriginal territory the land is located and that are engaged in the same commercial activity (i.e., both tribes would have to be engaged in the same commercial activity, not merely engaged in any commercial activity), and any agreements, such as MOUs between the applicant tribe and the affected tribe that would mitigate the impact of the proposed commercial activity.

Question 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 changes in use?

Answer: Again, the DOI should consider all applications within the context of the IRA, so distinctions between types and different uses of the land should only be made in order to protect the interests of other tribes that might be affected by the approval of the application.

a. Applying different criteria to governmental as opposed to economic development uses of the land is appropriate. There is no reason for denying an application for non-economic purposes beyond an inability to comply with NEPA. Applications for economic development purposes should be evaluated based on the criteria listed in response to Questions 3 and 4, based on whether the proposed use is located outside of the applicant tribe's aboriginal territory and, if so, whether the proposed use will have a significant, demonstrable, negative effect on the same economic activity conducted by the tribe(s) within whose aboriginal territory the land that is the subject of the application is located. The proposed use should also be required to comply with NEPA.

b. There is no reason to distinguish between applications relating to gaming and non-gaming economic development activities. The only criteria discussed above relating to applications related to economic development activities applies equally to both gaming and non-gaming activities. Furthermore, the IGRA already comprehensively addresses the regulation of gaming on Indian lands. The compacting requirement allows states to protect their interests in regulating gaming on Indian lands. The IGRA's specific procedures and criteria for taking land into trust after October 17, 1988, in particular 25 U.S.C. 2719(b)(1)(A), further protect state and local interests. Those provisions do not require further restrictions. Tribes should not be penalized for pursuing trust acquisitions that would benefit the tribe and its members. In fact amendments should be proposed to decrease the number steps required to place land into trust if the tribes can show the intended us benefits its members through increased funds of tribal programs. This would

decrease the wait time and cost associated with that wait while increasing the number of potential jobs and benefits to local municipalities.

c. There is no reason to deny an application where there is no change in use. By definition, the interests of other tribes would not be affected, nor would those of state and local governments beyond the loss of tax revenue. The only potential issue would arise where the state environmental regulations are more strict than those of NEPA. If there is no change of land use than the subject property should be categorically excluded under NEPA.

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

Answer: The simple answer is that the land is not subject to state and local jurisdiction but instead, in a non-P.L. 280 state, is under the exclusive jurisdiction of the tribe and the United States.

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

Answer: No, current applications should fall under the laws and regulations that were in place when the application was submitted. The Nation has pending applications that were submitted with the current regulations and fee-to-trust handbook in mind. Requiring the Nation and other tribes to amend their current applications would create a financial burden. Enforcement of the new revisions should go into effect for new applications after being posted in the federal register. Tribes should still be afforded the right to withdraw their applications at any time during the land-into-trust process and resubmit under the new rules.

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

Answer: The focus of the fee-to-trust application process should be to facilitate fee-to-trust transfers in order to fulfill the purposes of the IRA—to reverse the impact of the policy of allotment by returning land to Indian tribes and individual Indians, and to promote the development of tribal governments and economies. With regard to non-economic development purposes, there is no reason to balance state and local concerns, since use of land for government offices, housing, tribal infrastructure would have no negative impact on the state or local jurisdictions so long as the tribe complies with NEPA. With regard to economic development purposes, again, the focus should be on the benefits to the tribe and its members and compliance with NEPA, since the purpose of the IRA is to promote the economic interests of Tribes and NEPA protects the environmental interests of both the tribes and the state and local jurisdictions. Because the IGRA already balances the interests of tribes and states through the compacting process and the restrictions on land taken into trust after 1988, there is no need to add any additional restrictions on tribal gaming for the benefit of state and local jurisdictions. Moreover, tribes may voluntarily agree to reimburse local jurisdictions for lost tax revenue and the costs of services provided by the state or local jurisdictions

in P.L. 280 states, in order to facilitate their relations and cooperation with those jurisdictions, since, under some circumstances that would promote the tribes' interests. The IRA was enacted for the benefit of tribal nations and concerns only the relationship between tribal nations and the U.S. federal government. With respect to our state counterparts, other interests are not part of this relationship. Our dealings as it relates to the IRA are only to Congress, the Secretary and their federal delegates.

Question 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?

Answer: MOUs and other similar cooperative agreements between tribes and state/local governments can help facilitate improved tribal/state/local relationships when they are entered into voluntarily and for achieving mutually beneficial goals. It should be completely the prerogative of the Nation and the state/local governments to enter in them. They should not be made either mandatory or be a topic that tribes are required to address in their applications, because such requirements would improperly grant state and local jurisdictions the power to force tribes to negotiation under duress. Should tribes chose to enter into such agreements, they can cite to those agreements as evidence of cooperation between the tribes and the local jurisdiction, and can be used, where relevant, in meeting the requirements of NEPA. The relationship between tribes and neighboring municipalities is a unique relationship that the DOI should not be required to participate. The federal, state, and tribal governments have unique relationships, and should be able to communicate between each other without intrusion of one another.

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

Observation: Once again, one must question the timing and sincerity of this question. If DOI genuinely wished to receive and implement tribal suggestions relating to the fee-to-trust process, it should have asked before the Proposed Regulations were drafted.

Answer: To the degree that this is a sincere question, the Department should begin the process of drafting new regulations in this area by asking for recommendations before it drafts proposed regulations. There are many other possible recommendations, but the most fundamental are the following: (1) The program should be focused on the purposes of the IRA; (2) The program should be focused on facilitating taking of land into trust, not discouraging fee-to-trust transfers; (3) Applications for non-economic uses should be approved so long as the tribe complies with NEPA; (4) Applications for economic uses should be approved so long as the proposed use will not cause significant, demonstrable damage to the interests of other tribes where the land in question is located in the other tribes' aboriginal territory and they comply with NEPA and (5) Applications for land to be used for gaming should be distinguished from those for other economic development purposes only to the degree that they must meet the requirements set forth in the IGRA. (6) In order to streamline the program, expand consultation with all tribes for any future proposed

changes. The tribes know best what issues and problem areas exists in the current fee to trust process. The program must reach out to Indian Country and understand the problems that tribes have – this should be the top priority of the Department. The program needs to revise the fee to trust handbook for any changes, and would assist and clarify what is expected in future applications for tribes and Regional/Agency BIA staff.

Wait for a confirmed AS-IA to better communicate and gauge what changes tribes want of CFR 151.

Conclusion

As far as the Nation is concerned, there is not a single element of the new provisions contained in the Proposed Regulations that can be interpreted to favor the interests of Indian tribes. The Proposed Regulations seem to be designed to make it easier and faster to deny off-reservation fee-to-trust applications. Diminishing the trust responsibility that the US has for tribal nations. It allows the DOI to deny applications on the basis of less information, requires that tribes overcome a significant set of new criteria. It establishes criteria that act as barriers to approval; it gives greater weight to the interests of states and local governments, and forces tribes to legitimize their status as tribes eligible for land under the IRA and eligible for gaming under the IGRA. The Proposed Regulations are so extreme that they appear to be intended to discourage tribes from applying for fee-to-trust transfers for off-reservation lands. No consideration appears to be given to landless tribes or tribes whose existing land base allows for no meaningful economic activity. The Proposed Regulations should be disregarded and either replaced with designed regulations that promote the purposes of the IRA or the current Part 151 Regulations continue in the same manner.¹⁰

Sincerely,



Wilfrid Cleveland

cc: Ho-Chunk Nation Legislature
Ho-Chunk Nation Attorney General Amanda L. WhiteEagle
Ho-Chunk Nation Legislative Counsel Michael P. Murphy

¹⁰ I would like to thank the following individuals with their assistance in drafting this response: Ho-Chunk Nation Real Estate Director Matthew S. Carriaga, Attorney Lester J. Marston of Rapport & Marston, Ho-Chunk Nation Legislative Counsel Michael P. Murphy, and Ho-Chunk Nation Attorney General Amanda L. WhiteEagle.

Exhibit A

Ho-Chunk Parcels

Fee Simple

Trust

