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Transmitted Via Email (consultation@bia.gov) and Standard U.S.P.S.

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 4660-MIB
Washington, D.C. 20240

Dear Principal Deputy Assistant Secretary—Indian Affairs Tahsuda:

I am general counsel to the Chicken Ranch Rancheria of Me-Wuk Indians of California (“Tribe”). The Tribe has asked me to respond to your letters dated October 4, 2017 and December 6, 2017 in which you seek: (1) 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 (2) responses to ten questions relating to the land acquisition process. On behalf of the Tribe, I submit the following comments and responses.

I. 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 historical background of federal government policies toward Indian lands and, in particular, the purposes of the Indian Reorganization Act, 25 U.S.C. §§ 5101, *et seq.* (“IRA”). 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”).

A. 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.* 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.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, at p. 86 (Government Printing Office ed. 1942).¹

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 clearly 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 50 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

¹ Felix S. Cohen was the primary author of the IRA. His HANDBOOK OF FEDERAL INDIAN law is the fundamental guide for lawyers practicing Federal Indian Law.

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.

H.R.Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934) (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 lands, while the costs of Federal administration of these lands have steadily mounted, must be terminated.

Id. at 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 in requesting the legislation leave no doubt that two of the fundamental purposes of the IRA were to stop the loss of land by Indians and Indian tribes arising from the Allotment Act and 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'S HANDBOOK, 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.Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

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. Yet, that would appear to be precisely the effect of the Proposed Regulations.

B. 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. No. 446, 100th Cong., 2d Sess. 6 (1988). 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.² 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.

It is against this background that the Tribe offers the following comments on the Proposed Regulations.

² 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”).

II. 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 Tribe’s opinion that the Proposed Regulations are intended to: create more barriers to the approval of fee-to-trust applications, particularly applications related to gaming; to slow the review process down; to restrict off-reservation acquisition approvals to lands close to the tribes’ existing lands; 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.

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.

The new criteria added for both gaming and non-gaming activities are numerous and significant. They 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).³

Finally, the structure and contents of the Proposed Regulations, with a clear emphasis on restricting or discouraging off-reservation fee-to-trust applications, fail 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 effectively punish those tribes for their already difficult circumstances.

The following are the Tribe'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 micro-manage how the land is to be used 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.
- **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 chances that an off-reservation fee-to-trust application would be approved. Most checkerboard jurisdiction issues arise within the boundaries of a reservation. The new regulations would not apply to those situations. While there are examples of tribes that have a number of discrete parcels of reservation land, off-reservation acquisitions would seem, in the majority of cases, to be unlikely to assist in the consolidation of tribal land holdings that are mixed with non-Indian fee land, since the majority of those tribes do not have parcels that are close enough to make the elimination of checkerboard jurisdiction a

³ 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.

- meaningful goal. 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.” That claim is doubtful, since the DOI will consider whether the BIA is equipped to discharge the additional responsibilities in the second phase of evaluation of the application. 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.**” (emphasis added). 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 Tribe 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. Would this require tribes to meet the conventional expectations of a business plan in a non-tribal, non-gaming context? Would it allow the DOI to micro-manage 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 not been required as an element of the application, nor has it been considered a central element of the analysis. 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). 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 governments 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 criterion 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 Tribe 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 adds a significant new criterion: “potential conflicts of land use.” The change in notice requirements set forth in the Proposed Regulations, Section 151. 11(b) again appear 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 states. 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. But 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. 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"—whatever that means. Thus, the new two phase review process would inevitably lead to more 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. § 465⁴) 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 *Carciere v. Salazar*, 555 U.S. 379 (2009). The central ruling in *Carciere* 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 *Carciere* 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 *Carciere* 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 *Carciere* 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. It is not clear whether the DOI would apply the analysis set forth in the Solicitor’s M-37029 (March 12, 2014) Opinion (“Opinion”) and court decisions based on similar criteria. *See, e.g., County of Amador v. United States DOI*, 872 F.3d 1012, 1026-1027 (9th Cir. 2017), *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016). The Opinion was issued during the Obama administration, and the Proposed Regulations reflect a sharp shift in philosophy and policy on the part of the current administration. The DOI, under the current administration, could choose to revisit the question and issue a more restrictive interpretation of the phrase.

The inclusion of the *Carciere* 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

⁴ This section has been re-codified at 25 U.S.C. § 5108.

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 for a challenge to the legitimacy of recent fee-to-trust transfers.⁵ 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.” 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 they have entered into a gaming compact and have 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

⁵ 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. However, recent transfers, in the last six years, could be vulnerable to challenge.

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.”

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.

- **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, at least on a philosophical and public relations level, is inconsistent with the DOI’s trust obligations.

III. RECOMMENDATIONS IN LIEU OF THE PROPOSED REGULATIONS

The forgoing discussion makes it clear that the Tribe regards the Proposed Regulations to be highly objectionable across the board. Rather than attempt to tweak the fatally flawed set of Proposed Regulations, the Tribe 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 Tribe 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 reservation. 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 should be 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 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 reservation, not just to land located within the current boundaries of a current reservation. This category would encompass situations in which a tribe's reservation lands were reduced or disestablished by treaties or diminished by act of Congress. 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 Allotment Act and its catastrophic effects.⁶

In these cases, the only criteria that should be applied are possession of marketable title and successful completion of an environmental review. The Tribe recommends that a new provision of the Part 151 regulations be promulgated that states the following:

The Secretary shall take into trust any lands within the original boundaries of an Indian reservation, provided that the United States has the legal authority to take such land into trust and the Indian tribe meets the following criteria:

- (1) the Indian tribe can demonstrate that it owns the property and possesses marketable title to the property; and
- (2) the Indian tribe has met the requirements of the National Environmental Policy Act.⁷

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

⁶ In addition, where the U.S. government has engaged in illegal conduct that has proximately caused the loss of a tribal land base, a tribe seeking to restore its original acreage lost as a result of the illegal conduct ought to only be required to demonstrate marketable title in order to have such lands taken into trust. For example, if a tribe is illegally terminated and due to illegal termination was dispossessed of 40 acres of land, the tribe should be permitted (and encouraged) to purchase 40 acres of replacement property and, upon a showing of marketable title, have the 40 acres taken into trust—without more.

And, where the U.S. government has engaged in legal (albeit morally objectionable) conduct (*e.g.*, the General Allotment Act, condemnation of tribal land, forced fee-patenting, etc.) that has proximately caused the loss of a tribal land base, a tribe seeking to restore its original acreage lost as a result of such conduct should only be required to demonstrate marketable title in order to have lands taken into trust. For example, if a tribe had 7,772 acres of their land condemned by the U.S. government in order to build a dam, the tribe should be permitted (and encouraged) to purchase 7,772 acres of replacement property and, upon a showing of marketable title, have the 7,772 acres taken into trust.

In both cases, land should be taken into trust for both gaming and non-gaming purposes, because, if the tribes had not been dispossessed of their lands in the first place, they would have been able to use the land in whatever manner they saw fit. Moreover, the process proposed in this footnote 9 is consistent, and, in furtherance of, the very purposes of the IRA.

⁷ This provision could also apply to fee land outside of the boundaries of a reservation, too, because any impact that occurs on the off-reservation environment as a result of the trust acquisition, including impacts on the local governments, would be addressed through NEPA. Thus, there is no need for tribes to negotiate municipal service agreements to compensate local governments for the loss of the land.

have a measurable, 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.

IV. RESPONSES TO THE QUESTIONS SET FORTH IN THE OCTOBER 4 AND DECEMBER 6 LETTERS

The Tribe'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 now. It would have made more sense to ask such questions 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 a person 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 the program: to increase a tribal 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 to allow them to develop strong tribal governments and economies.

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. 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.

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

Observation: This question and question 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 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 with respect 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.

- 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 stricter than those of NEPA. Where necessary, the tribal activities could be modified to comply with NEPA.

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

Answer: This question does not deserve an answer. It is a question better suited to a test for an introductory course in Federal Indian law. If the employees of the DOI do not know the answer to this question, they need to be replaced with people with at least a minimum knowledge of the history of Indians in this country and the provisions and purposes of the IRA. The Tribe nevertheless submits the following discussion of two fundamental principles.

First, when land is taken into trust on behalf of an Indian tribe, the very purposes for which reservations are created are accomplished: to create homeland for Indians. An examination of the unique terrors perpetrated against California Indians also highlights the need for a streamlined land-into-trust process. Between April 29, 1851, and August 22, 1852, a series of eighteen treaties “of friendship and peace” were negotiated with a large number of California Indians. While eighteen treaties were made, the Senate, after the discovery of gold in California, however, refused to ratify them. The California Indians, however, upheld their end of the bargain and moved to where their reservations were supposed to be established for them—only to learn that they did not have a legal right to occupy the land and that the United States government would not defend their title to the land. Dispossessed of their promised land bases, California Indians now need a streamlined land into trust process that facilitates, rather than frustrates, the reestablishment of their homelands.

Second, a fundamental tenet of Indian self-government is the right of the Indians to make their own law and be ruled by them. In order to exercise this essential right, tribes must have territory. Without territory, tribes cannot operate as a functioning government.

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

Answer: The answer to this question depends on whether the regulations that are finally enacted promote or impede fee-to-trust transfers. The Proposed Regulations are designed to make denials faster and easier, to make approvals more difficult, and to add criteria to significantly reduce the percentage of applications that are approved. If the Proposed Regulations are promulgated without dramatic revisions intended to facilitate the approval of applications, they should not be applied to pending applications.

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. In all cases, the loss of property tax revenue is simply the price that must be paid to restore to tribes some of the land taken from them. 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 order to facilitate their relations and cooperation with those jurisdictions, since, under some circumstances, that would promote the tribes' interests.

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, indeed, help facilitate improved tribal/state/local relationships in off-reservation economic developments when they are entered into voluntarily and for the purpose of achieving mutually beneficial goals. 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 choose 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.

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.

V. CONCLUSION

As far as the Tribe 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. 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 gaming. 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 scraped and either replaced with an entirely new set of proposed regulations designed to promote the purposes of the IRA or the current Part 151 Regulations should be left as they are.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Lester J. Marston".

Lester J. Marston