



**OFFICE OF THE GOVERNOR**

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BILL ANOATUBBY  
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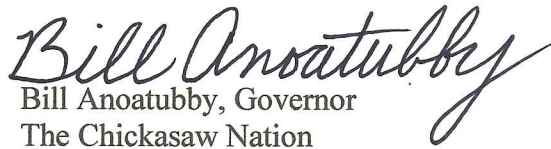
Mr. John Tahsuda, III, Principal Deputy  
Assistant Secretary – Indian Affairs  
Bureau of Indian Affairs  
Department of the Interior  
1849 C. Street NW  
MS-4004-MIB  
Washington, DC 20240

Dear Mr. Tahsuda:

Included with this letter are the Chickasaw Nation's comments in response to the Department of the Interior's Dear Tribal Leader Letter dated December 6, 2017 requesting feedback on issues concerning land acquisition regulations at 25 CFR Part 151.

Thank you for your consideration of our comments. If you have any questions, please contact Mr. Bill Lance, secretary, department of commerce at (580) 421-9500.

Sincerely,

  
Bill Anoatubby, Governor  
The Chickasaw Nation

BJA: rhl

**COMMENTS OF THE CHICKASAW NATION  
REGARDING THE FEE-TO-TRUST REGULATIONS  
CONSULTATION TOPICS**

The Chickasaw Nation (the “Nation”) is pleased to submit the following comments in response to the Department of the Interior’s (“Department”) Dear Tribal Leader Letter (“Letter”) dated December 6, 2017, requesting feedback on issues concerning the land acquisition regulations at 25 C.F.R. Part 151. The Nation commends the Department for its decision to postpone regulatory changes and shift its focus to understanding the broader issues surrounding the land in trust process. We hope the comments below prove helpful in your deliberations on how to best move forward on issues concerning trust land acquisitions.

Before turning to the specific questions raised in your Letter, we wish to emphasize several key points at the outset. First, the Nation opposes any revisions that would increase the burdens for tribal governments requesting off-reservation acquisitions as such changes would be contrary to the Department’s trust responsibility to tribal governments and the Department’s commitment to promoting self-determination and strong tribal economies. The trust acquisition process is already cumbersome, slow, and expensive. The addition of new standards and/or review processes would only increase costs and delays associated with the process, as well as the Department’s own administrative burdens.

Second, the Nation opposes any changes that would disrupt the balance set forth in the current regulations between the Secretary’s fiduciary duty to place land into trust for tribal governments and the need to take into consideration the interests of state and local governments. The current regulations already provide a fair opportunity for state and local voices to provide insight and input into the Department’s decision. Any amendments intended to accord greater weight or deference to state and local interests would be contrary to the Department’s trust responsibility and the Congressional intent of the Indian Reorganization Act (“IRA”).

Finally, the Nation strongly opposes any effort to reinstate the Department’s policy of delaying land acquisitions for thirty days, which would not only invite litigation but also encourage adverse parties to challenge Department decisions simply for the purpose of delaying the final acquisition. An otherwise approved trust application could potentially languish for years while the litigation plays out, thereby thwarting the ability of tribal governments to enjoy the full benefit of laws enacted by the Congress.

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

The objectives of the Department’s land-into-trust program should be consistent with those for which the IRA was enacted: 1) to halt the federal policy of allotment and assimilation; 2) to reverse the negative impact of allotment policies; and 3) to secure for all Indian tribes a land base on which to engage in economic development and self-determination. The Secretary acts as trustee for tribal governments when carrying out its responsibilities under Part 151, and should, accordingly, be working to remove any barriers to trust land acquisitions and strengthen internal processes, functions, and capacities.

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

Although the application process for on-reservation trust acquisitions may be fraught with delays and irregularities, the process is familiar and the system works, albeit slowly. Moreover, the current regulatory framework provides the flexibility for tribal governments to work with BIA officials to cure deficiencies or provide additional data or clarifications. We do not believe any regulatory changes are needed insofar as 25 C.F.R. Part 151 is concerned; however, we would recommend providing more training opportunities for BIA staff in the local and regional offices who play a key role in the timing and processing of trust applications.

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

The Secretary has a fiduciary duty to place land into trust for tribal governments where the application is submitted in accordance with the Part 151 regulations. Subject to the recommendations below, the Nation believes the current regulatory procedures adequately address the fee-to-trust acquisition process.

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

The Nation believes that the existing regulatory criteria provide a sufficient process for approving or disapproving off-reservation trust acquisitions. As noted above, the current regulations strike a balance between on the one hand, the Secretary's duty as trustee to take land into trust on behalf of tribal governments, and on the other hand, the need to consider comments from state and local governments. The current 151 regulations include multiple opportunities for input from state and local governments, other tribal governments, and the public, which provides a sufficient basis for making the necessary determination under 25 C.F.R. § 151.11.

**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 change in use?**

The Nation strongly opposes any revision that would allow gaming considerations to be part of the broader fee-to-trust process set out in 25 C.F.R. Part 151. The fact is that the current process already distinguishes between off-reservation gaming applications and non-gaming economic development applications. In fact, the current process distinguishes between off-reservation, on-

reservation, and former reservation gaming applications. This is accomplished by operation of the interplay between 25 C.F.R. Parts 151 and 292, the latter which comes into play only where the land acquired is to be gaming eligible. The IRA land acquisition process under 25 C.F.R. Part 151 should be kept separate and distinct from the Department's determinations involving the Indian Gaming Regulatory Act.

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

Among other benefits, trust lands are inalienable, non-taxable, and provide a developable land base on which tribal governments can conduct economic development activities and offer governmental services to its members. The acquisition of land in trust is thus essential to tribal self-determination because it increases opportunities for economic development and helps tribal governments generate revenues for governmental purposes.

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

Retroactive application of regulations is generally prohibited absent Congressional authorization. The Nation strongly objects to any proposal that would subject pending applications to any new requirements or standards that were not already in place at the time of submission. If any revisions are finalized, only those applications submitted after the effective date of those revisions should be processed under the new regulations.

Moreover, we are troubled by this proposal as it suggests that Interior may be postponing any final action on pending applications until the regulatory updates, if any, are finalized. We urge the Department to continue processing pending applications under the current standards consistent with the general principles of administrative law.

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

The current regulations appropriately balance the concerns of state and local jurisdictions and, as noted above, provide multiple opportunities for public input. Under the current regulations, the Department issues a Notice of Application notifying pertinent state and local governments of the proposed acquisition, requests written comments on the proposal, and considers those comments. All interested parties have an additional opportunity to comment on the associated environmental assessments or environmental impact statements. There is no basis or compelling regulatory need to disrupt this carefully crafted balance under the current regulations.

As for how much weight should be given to public comments, we note that the Department has a trust responsibility to tribal governments, not to state and local governments or the public more broadly. The Department's efforts should be focused on championing trust acquisitions, whether on or off the reservation, that help bolster tribal economies.

**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?**

While MOUs and other similar cooperative agreements can certainly be helpful in improving cooperation between tribal governments and state/local governments, they should not be included in the 25 C.F.R. Part 151 regulations as either a requirement or a consideration. Our primary concern is that by introducing the concept of MOUs into the land in trust regulations, states may gain leverage over the acquisition process and withhold their consent as a means of delaying or even preventing the approval of a trust acquisition. We strongly oppose any proposal that would give states and local governments the opportunity to interfere with tribal self-determination by unnecessarily stalling the fee-to-trust process.

It is important to bear in mind that not all fee-to-trust acquisitions are controversial. Under the current system, tribal governments have been successful in negotiating cooperative agreements on a voluntary, government-to-government basis. Any proposal to mandate such agreements as part of the land-in-trust process could introduce controversy and conflict into a process that has not proven to be problematic.

We further note that it is almost impossible to determine which cooperative agreements, if any, will be necessary for a particular fee-to-trust acquisition. These determinations are made on a case-by-case basis, depending on the nature and scope of the development on the proposed trust land.

As noted above, the current regulatory framework already provides a balanced approach to receiving input and considering state and local interests. We do not believe there is any basis or regulatory need to supplement the process with any additional factors or considerations.

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

The trust application process can be a very time-consuming, expensive, and burdensome process for tribal governments. We have found from experience that the process is slowed down considerably during the Department's review of NEPA and environmental documentation, such as the Environmental Assessment ("EA") or Environmental Impact Statement ("EIS"). EAs can take several months to even years to complete, and the federal review process can take even longer depending on current staff levels and expertise. Moreover, tribal governments generally bear the cost of the EAs, which range from \$125,000 to \$200,000 and over. The time and costs necessary to complete EAs works to the detriment of tribes and hinders the policies and intent of the IRA.

One of the top priorities for the Department should be streamlining the NEPA process through alternatives, such as categorical exclusions for certain trust acquisitions. Doing so would not only reduce processing times, but also minimize the compliance burden imposed by the current regulations. For a number of trust applications, the environmental analysis performed by a Phase I ESA and/or Phase II ESA would be sufficient for purposes of identifying any environmental concerns associated with the proposed trust property.

We would also recommend streamlining the review process for gaming and non-gaming trust applications. Under the current system, trust applications for gaming purposes are subject to different treatment and a higher level of scrutiny than non-gaming applications. For instance, gaming trust acquisitions require approvals not only at the local/regional level but also at the Department of Interior Headquarters, and thus undergo a more rigorous review process. Non-gaming trust applications only require approval from the local/regional offices. A more efficient approach consistent with the Department's trust responsibility, would be to treat gaming and non-gaming trust applications alike by delegating the trust authority for gaming applications to local and regional offices of the Department.

Finally, the Nation recommends that the Department shift its resources towards increasing staffing levels at headquarters and in each region to process trust land acquisitions timelier. The Department should also consider strengthening training programs of BIA realty and other staff to ensure that applications are reviewed and processed in a standardized and more predictable manner across Indian Country.

### **Conclusion**

The Nation appreciates the opportunity to comment on this important issue affecting Indian Country. We respectfully request favorable consideration of the comments raised herein and that the Department continue its efforts to consult meaningfully with tribal governments.