Cowlitz Indian Tribe

June 29, 2018

John Tahsuda
Principal Deputy Assistant Secretary-Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: The Cowlitz Indian Tribe Comments on Potential Revisions to the Fee-to-Trust Regulations at 25 C.F.R. Part 151

Dear Principal Deputy Assistant Secretary Tahsuda:

These comments are submitted on behalf of the Cowlitz Indian Tribe, in response to the Department's Tribal Leader Letter dated December 6, 2017, announcing tribal consultation sessions and requesting comments in response to a list of ten questions regarding potential revisions to the Department's trust acquisition regulati ons at 25 C.F.R. Part 151. The Cowlitz Indian Tribe concurs in the comments prepared by the National Congress of American Indians (NCAI) and incorporates these by reference. However, Cowlitz wishes to make additional more specific comments, and these are provided below. It is not entirely clear to us whether the Department has withdrawn its October consultation draft, and the Department's ten questions continue to be particularly focused on off-reservation acquisitions. Accordingly, in addition to answering the ten questions, Cowlitz' comments refer back to the October proposals in connection with some of the questions relating to off-reservation acquisitions.

The Cowlitz Indian Tribe joins NCAI in urging the Department to suspend any proposed changes to the Part 151 regulations until such time as the newly confirmed Assistant Secretary-Indian Affairs is able to consult with tribes, fully consider tribal input, and determine whether regulatory changes are really in the best interests of tribes. Cowlitz also notes that Indian Country still does not benefit from having an appointed Deputy Solicitor for Indian Affairs. There is no need to rush this initiative, which tribes have not requested and have uniformly opposed in the consultation sessions, and which has the potential to impose profound negative consequences on tribes across the country, when the Department does not yet have all its primary political appointees for Indian affairs in place.

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INTRODUCTION AND BACKGROUND

To put these comments in context, a brief review of the Cowlitz Indian Tribe's history is necessary. The Cowlitz Indian Tribe (Tribe or Cowlitz) lost its land in the mid-1800s after the Tribe refused to sign a treaty that would have forced the Tribe to relocate far from its historical territory to share a reservation with a historical enemy. Without reserving any land at all for the Cowlitz' use, and without congressional authorization, the federal government opened the Tribe's lands to non-Indian settlement in the 1860s. After many years of unsuccessfully trying to regain some its land, and after many years of the federal government's poor treatment of the tribe based on its landless status, in 1975 the Tribe submitted to the Department's administrative acknowledgement process. Twenty five years later, in 2000, the Department issued a determination formally recognizing the Cowlitz Indian Tribe, restoring it to federal recognition and allowing it to begin the process of establishing a reservation. After the Secretary upheld that initial decision in a final acknowledgement determination in 2002, Cowlitz immediately applied to have land taken in trust pursuant to the authority in the Indian Reorganization Act of 1934 (IRA), under the fee-to-trust regulations in 25 C.F.R. Part 151. Because the Tribe was newly recognized and landless, its application necessarily requested the trust acquisition of land that was considered "off-reservation" under the regulations. Seven years later, in 2009, while the Cowlitz Tribe's application was still pending with BIA, after extensive NEPA analysis and a lengthy administrative review, the Supreme Court issued the *Carcieri* decision, which fundamentally changed the way Interior and the courts had interpreted the IRA for the previous 75 years. As a result, the Department spent another year and a half developing its interpretation of the *Carcieri* decision's "under federal jurisdiction" standard and applying it to the Cowlitz Tribe, finally issuing a Record of Decision to acquire 157 acres of land in trust for the Tribe in December 2010. After several years of litigation and a remand back to Interior, in 2013 the Department issued a new decision to accept the Cowlitz land in trust. After further litigation, the Department finally acquired the land in trust for the Tribe in March 2015. All litigation was finally resolved in the Department's and the Tribe's favor in 2017, when the Supreme Court declined to review the D.C. Circuit Court's decision confirming that the Secretary had authority to acquire land in trust for Cowlitz. *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell, et al*., 75 F.Supp.3d 387 (D.D.C. 2014), *aff'd,* 830 F.3d 552 (D.C. Cir. 2016), *cert. denied*, *Citizens Against Reservation Shopping v. Zinke*, No. 16-572, 2017 WL 1199528, at *1 (U.S. April 3, 2017).

In sum, the Cowlitz Tribe waited ***over eight years*** for a Departmental decision on its application to acquire "off-reservation" land in trust, and ***a full thirteen years*** before the Department finally acquired that "off-reservation" land in trust as a reservation for the Cowlitz Tribe -- a tribe that had been landless for 150 years, including thirteen years after it had been federally recognized. This experience, amazingly, is not all that different from the experience of other landless and land-poor tribes who have no alternative but to acquire off-reservation land in trust for governmental and economic development purposes -- and more basically, to exercise basic sovereign powers of self-determination and self-governance. The Department must carefully

consider the impacts on these tribes and should not go forward with any proposal to make changes to the current regulations to further increase the already heavy administrative burden and delays attendant to acquiring "off-reservation" land in trust for landless and land-poor tribes. We provide more specific comments in response to the Department's ten questions below.

Question 1

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

The Department has both a legal and moral obligation to prioritize acquiring land in trust for *all* tribes -- not just tribes with large, checker-boarded reservations -- and to do so in a way that is neither unduly burdensome nor overly restrictive. The Department's objective should be to meet those obligations in good faith. Indeed, the Department has a special obligation to assist landless tribes.

Legal Obligation. In the IRA, Congress instructed the Secretary to acquire land in trust for Indian tribes, and it did so without making a distinction between land acquired on-reservation or off-reservation. Further, Congress explicitly made clear that the purposes of the IRA include the promotion of economic development for Indians. The Department's initial fee-to-trust proposals (circulated on October 4, 2017), which would make acquiring off-reservation land ever more difficult and impose artificial distinctions between land acquired for economic development as opposed to land acquired for other purposes, are entirely unsupported by the plain language of the statute or its legislative history.

The IRA was enacted to address the disastrous consequences of earlier federal policies designed to open Indian lands to non-Indian settlement by providing support for tribal governments, tribal economic development, and the acquisition of land for Indians. *See* Felix S. Cohen, Handbook of Federal Indian Law, § 1.05 (2005 ed.); *see also Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 75 F.Supp.3d 387, 392 (D.D.C. 2014), *aff'd*, 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied*, No. 16-572, 2017 WL 1199528 (U.S. Apr. 3, 2017) (citing *Morton v. Mancari*, 417 U.S. 535, 542, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)) ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Michigan Gambling Opposition v. Kempthorne (MICHGO)*, 525 F. 3d 23, 31 (D.C. Cir. 2008) (under the IRA, "the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes.").

Moral Obligation. The Department's October proposals and its continued focus on off-reservation acquisitions ignore the factual reality that most tribes in the United States do not possess reservations within which there is available fee land to be acquired through the on-reservation acquisition process. The Cowlitz Tribe is not unique -- there continue to be many land-poor tribes that as a result of historical circumstances either have very small or diminished reservations, that

have no reservation or land base at all, or that have insufficient land to support their economic and governmental needs. The IRA was enacted to benefit these land-poor tribes, as the sponsors made clear. *See* 78 Cong. Rec. 11,123 (June 12, 1934) (IRA is to provide land for Indians who are anxious to make a living on such land; "there are many Indians who have no lands whatsoever, and are unable to make a living.") (Rep. Wheeler, IRA co-sponsor); 78 Cong. Rec. 11,727 (June 15, 1934) (IRA intended "to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it.") (Rep. Howard, IRA co-sponsor); S. Rep. No. 1080, at 1-2 (1934) (one of the purposes of the IRA is to provide for the acquisition of land for Indians, now landless, who are eager to make a living on such land). The Department's proposals fail to comport with these clear expressions of intent by the IRA's framers, or with the statutory language. Instead, they risk creating "second class" tribes that are unable to obtain trust land to support tribal self-determination and self-governance efforts -- an approach that is entirely inconsistent with the Department's obligations to all tribes.

The Department also appears to ignore the fact that most federal programs designed to assist Indian tribes are tied to trust and reservation lands -- without an adequate land base, tribes cannot benefit from federal programs designed to help tribes improve their economic and social well-being. The objective of the land land-into-trust program should be to facilitate the timely acquisition of land in trust to promote tribal self-determination and self-sufficiency, both on- and off-reservation, without the imposition of unnecessary and expensive regulatory burdens that serve no reasonable purpose other than to create a chilling effect on tribal efforts to rebuild their land bases.

Question 2

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

The Cowlitz Tribe does not have a great deal of experience with the on-reservation process, because as described above, the Tribe was landless for more than 150 years before the Department acquired the Tribe's current land in trust as its reservation through the off-reservation process in 2015. Most land-poor tribes have only limited opportunities to take advantage of the on-reservation process for acquiring land in trust, because they do not have fee land available within or contiguous to their existing reservations. Landless tribes cannot benefit from the on-reservation process at all, because any trust acquisition for a tribe without an existing reservation is considered off-reservation. This underscores the importance of ensuring that the land-into-trust regulations are implemented in a way that benefits all tribes, including the many tribes with small reservations or no reservations at all.

Questions 3 and 4

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

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

The Department should preserve regulatory certainty by continuing to use the existing criteria already enumerated in 25 C.F.R. § 151.11 to determine whether to approve or disapprove off-reservation trust applications. As illustrated by the Cowlitz Tribe's experience, pursuing an off-reservation trust application already is costly and extremely time consuming under the current regulations, and takes many years (in our case thirteen years) to complete. These regulations have been honed over three decades, and provide a functional and knowable framework for making reasonable decisions, although those decisions can be slow in coming. But repeated efforts to keep modifying the regulations -- to keep changing the rules -- causes significant hardship for applicant tribes, ***and is inconsistent with this Administration's pledge to reduce regulatory burdens***.

The Department has questioned the adequacy of the current criteria in addressing the concerns of local communities. Yet the current criteria already provide a strenuous process for considering the concerns of local communities regarding a tribe's trust application -- even though there is nothing in the plain language of the IRA that requires such consideration. Pursuant to 25 C.F.R. §151.11(b), as the distance between the tribe's current reservation and the parcel to be acquired increases, the Secretary already gives greater weight to the concerns identified by local communities. Additionally, 25 C.F. R. §151.11(d) provides that upon receipt of a tribe's application, the Secretary must notify state and local governments with regulatory jurisdiction over the land to be acquired, and the state and local governments then have 30 days in which to provide written comments. These requirements already provide a reasonable mechanism to address the concerns of local communities.

We do believe it is important, where possible, for tribes and local governments to work together in pursuit of the common goal of improving our shared communities. Many tribes and local communities already enter into memoranda of understanding regarding off-reservation trust acquisitions. But in some situations those cooperative agreements are not possible, and the Department's primary responsibility is the trust responsibility it owes to the tribes. There is no reasonable legal or policy justification for essentially providing local governments with a veto over off-reservation land acquisitions, especially in the case of landless tribes which have limited leeway as to where their initial reservations may be located. *See also* Response to Question 9 below.

Further, in its proposed draft revision of Section 151.11 from late 2017, the Department suggested adding an analysis of "whether the acquisition will facilitate the consolidation of the Tribe's land holdings and reduce checkerboard patterns of jurisdiction." Not only is this consideration irrelevant to trust acquisitions for tribes like Cowlitz, which have only a small reservation, if this consideration is elevated to a "criterion" for off-reservation acquisitions, it will undermine the ability of tribes with large populations located at some distance from any existing trust land from being able to acquire land from which to provide services to those members. (The Department must remember that the diaspora of tribal members for landless and land-poor tribes

historically has been caused in no small part by the federal government's own actions in failing to set aside and protect adequate tribal land bases). As explained above, many tribes have no land base or do not have an adequate land base to meet the basic needs of tribal members, such as housing or healthcare. And as further noted above (*see* Response to Question 1), the legislative history of the IRA makes clear that one of the primary purposes of the IRA was to obtain land for landless Indians. *See, e.g.*, 78 Cong. Rec. 11,123 (June 12, 1934) (IRA is to provide land for Indians who are anxious to make a living on such land); S. Rep. No. 1080, at 1-2 (1934) (one of the purposes of the IRA is to "provide for the acquisition, through purchase, of land for Indians, now landless…"); *see also* Cohen, Handbook of Federal Indian Law, at 84 (1942). In line with the purposes of the IRA, it is vital that the Department give great weight to a tribe's specific circumstances and need for off-reservation land, particularly when on-reservation acquisitions are simply not an option.

In summary, the Cowlitz Tribe opposes the addition of any further criteria, as these serve no reasonable policy function and appear intended to have a chilling effect on the acquisition of off-reservation land in trust. The current criteria provide a more than adequate basis for the Department to make a decision on whether to approve or disapprove an off-reservation application.

Question 5 a, b, and c

Should different criteria and/or procedures be used in processing off-reservation applications based on:

a. Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?

The existing fee-to-trust regulations require tribes seeking to acquire off-reservation land in trust for business purposes to provide a business plan that specifies the anticipated economic benefit associated with the proposed use. 25 C.F.R. § 151.11(c). The Cowlitz Tribe complied with this requirement when it prepared its fee-to-trust application, and we spent substantial resources to formulate the Tribe's business plan. There is no reason to impose additional requirements beyond what is already in the existing regulations, and nothing in the plain language of the IRA justifies distinguishing between economic development and non-economic development purposes for off-reservation trust acquisitions. The IRA was enacted to provide support for tribal governments, tribal economic development, and the acquisition of land for Indians. *See* Cohen, § 1.05 (2005 ed.), and the Department's implementation of the statute must be conducted within that framework. In fact, imposition of additional or different burdens on applications for off-reservation land because the land will be used for economic development appears to be antithetical to the purpose of the statute. *See* 78 Cong. Rec. 11,123 (June 12, 1934) (IRA is to provide land for Indians who are anxious to make a living on such land); 78 Cong. Rec. 11,727 (June 15, 1934) (same); S. Rep. No. 1080, at 1-2 (1934) (same); *see also Confederated Tribes of Grand Ronde*, 75 F.Supp.3d at 392 ("The overriding purpose of [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); *Confederated Tribes of*

Grand Ronde, 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied*, No. 16-572, 2017 WL 1199528 (U.S. Apr. 3, 2017) (citing Pub. L. No. 383, 48 Stat. 984, 984 (1934)) (Congress enacted the IRA to "conserve and develop Indian lands and resources"); *MICHGO*, 525 F. 3d at 31 (Secretary's IRA authority is "to further economic development and self-governance among the Tribes."). The regulatory goal should be to facilitate the acquisition of trust land to promote tribal self-government and economic self-sufficiency -- not to frustrate those statutory goals with additional red tape. It also seems antithetical to this Administration's focus on economic development and job creation.

Furthermore, land that will be used for economic development purposes is often already subject to additional requirements related to that development (for example, Section 20 of the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2719) and the 25 C.F.R. Part 292 regulations (for gaming), or the 25 CFR Part 162 leasing regulations, or 25 U.S.C. § 81 and the 25 C.F.R. Part 84 regulations (for contracts that encumber tribal land for more than 7 years) -- so imposing additional regulatory hurdles as part of the fee-to-trust process would only further impede tribes from being able to acquire and use their lands for economic development purposes without undue government interference and regulation. Imposing these additional regulatory burdens would be inconsistent with the Department's stated approach to working with tribes -- respecting tribal sovereignty and allowing tribes to use their lands without the government "getting in the way." *See* Letter from James Cason, Acting Deputy Secretary of Interior to Jacqueline Pata, Executive Director, NCAI (May 5, 2017); Remarks by James Cason at NCAI, Mid-Year Conference, The Federal Trust Responsibility to Tribal Lands and Resources (June 13, 2017).

For all these reasons, it is inappropriate for the Department to impose additional or different requirements or procedures for Tribal off-reservation fee-to-trust applications for economic development purposes.

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

There is no legal justification, nor any policy reason, to differentiate between off-reservation trust applications that are for gaming purposes and off-reservation trust applications that are for other forms of economic development. Congress already has spoken to this issue by including rules for when newly acquired land can be used for gaming in Section 20 of IGRA, and the Department has regulations that implement IGRA Section 20 in 25 C.F.R. Part 292. The Cowlitz Tribe complied with these additional IGRA requirements in order to use its trust land for gaming purposes, and there is no need to add requirements that distinguish gaming applications to the fee-to-trust process. Conflating the IRA's fee-to-trust process with IGRA's gaming requirements can only serve to make the regulatory process even more byzantine and complicated, more expensive, and more time consuming. Not only is this idea completely unsupported by the plain language of either the IRA or IGRA, it is antithetical to the Administration's pledge to streamline federal regulatory requirements. We strongly oppose adding additional regulatory requirements for off-reservation land into trust applications for gaming, and urge the Department to abandon this idea.

c. Whether the application involves no change in use?

Again, there is no reason to use different criteria or procedures for processing off-reservation applications where no change in use is involved, as the existing regulatory requirements in 25 C.F.R. Part 151 already take this into account. The Part 151 regulations require that Tribes submitting fee-to-trust applications comply with the National Environmental Policy Act (NEPA), 25 C.F.R.§ 151.10(h), 151.11(a), and the BIA's NEPA Guidebook and the Departmental Manual provide for a categorical exclusion for approvals of conveyances or transfers of interests in land where no change in land use is planned. 59 IAM 3-H, § 4; 516 DM 10.5.I. In effect, BIA has already determined (in consultation with CEQ and after public notice and comment) that on- and off-reservation trust acquisitions where no change in land use is planned will not have a significant effect on the quality of the human environment, so no analysis of such impacts in an Environmental Assessment (EA) or Environmental Impact Statement (EIS) is required. The other components of the fee-to-trust regulations remain applicable to off-reservation applications where no change in use is planned, and there is no reason to change those requirements, as the NEPA compliance requirement is the regulatory provision that is directly relevant to whether there is a change in use of the land.

Question 6

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

Any Indian tribe can acquire off-reservation land in fee anywhere in the United States. A subsequent decision to submit an application to have the land taken in trust by the United States for its benefit is based on multiple factors that depend on the intended use of the land. For instance, if a tribe intends the off-reservation land to be used to conduct gaming activities under IGRA, the land will have to qualify as "Indian lands" over which the tribe exercises government authority. This will require the land to be held in trust status. We do not believe that a general inquiry into the advantages and disadvantages of placing land into trust is either useful or relevant. That inquiry will be made by an applicant tribe before it decides to submit a trust application for a particular parcel, and if it decides that placing that parcel of land into trust is in its best interest, that decision should not be second-guessed by other entities.

Question 7

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

It is entirely inappropriate to impose new rules on a tribe that already has relied on the existing rules in formulating its application. Applicant tribes should be given the option to complete the application process under the regulations as they existed when the application was filed, or to proceed under any newly amended regulations. We encourage the Department to use the process in

25 C.F.R. § 83.7 of the newly revised Part 83 regulations (Procedures for Establishing that an American Indian Group Exists as an Indian Tribe) as a model for this purpose. Better yet, we urge the Department to abandon its efforts to amend the Part 151 regulations altogether, and instead give tribes the benefit of continued regulatory stability.

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?

The IRA does not empower the Secretary to "recognize and balance the concerns of state and local jurisdictions" in acquiring land for tribes, as Congress provided no such direction, either in the text of the statute or in the legislative history of the IRA. Nor does the IRA contemplate a role for public comments in the trust acquisition process. Rather, under the IRA, "the Secretary is to exercise his powers in order to further economic development and self-governance among the Tribes." *MICHGO*, 525 F. 3d at 31 (D.C. Cir. 2008).

While the Secretary may exercise discretion under IRA Section 5, this discretion is limited by the text and purposes of the statute:

> Congress has decided under what circumstances land should be taken into trust and has delegated to the Secretary of the Interior the task of deciding when this power should be used… Because Congress has given guidelines to the Secretary regarding when land can be taken in trust, the primary responsibility for choosing land to be taken in trust still lies with Congress. ***The Secretary is not empowered to act outside of the guidelines expressed by Congress***.

Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 698 (9th Cir. 1997) (emphasis added). Unlike some other statutes that "direct agencies to act in the 'public interest,' *MICHGO*, 525 F.3d at 31, quoting *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), the IRA "authorizes the Secretary to acquire land 'for the purpose of providing land for Indians.'" *Id.*, quoting 25 U.S.C. 5108; *see also South Dakota v. Dept. of the Interior*, 423 F.3d 790, 797 (8th Cir. 2005) ("the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust").

Where Congress has intended that the Secretary "recognize and balance the concerns of state and local jurisdictions" in carrying out his responsibilities to Indians, Congress has explicitly stated as much. For example, in considering whether to permit gaming on newly acquired lands, one provision of IGRA explicitly provides for a determination *both* as to whether such gaming "would be in the best interests of the Indian tribe and its members" *and* "would not be detrimental

to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Congress also provided that such a determination must be preceded by "consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." *Id*.[1]

In contrast, nowhere does the either the text or the legislative history of the IRA even hint at such a balancing test. Instead, "the goals motivating trust acquisitions are 'rehabilitation of the Indian's economic life and development of the initiative destroyed by oppression and paternalism.'" *Carcieri v. Kempthorne*, 497 F. 3d 15, 42 (1st Cir. 2007) (*en banc*), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009)), quoting *South Dakota*, 423 F.3d. Id. at 798 (internal quotation marks and citations omitted). These goals, rather than the concerns of state and local jurisdictions, must inform the exercise of the Secretary's discretion under the IRA.

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?

Tribes and state and local governments routinely enter into intergovernmental agreements to facilitate all manner of activity both on existing and newly acquired tribal lands. These agreements address the "complexity, uncertainty, and cost of state and tribal jurisdiction in Indian country," Cohen § 6.05 (2012 ed.), and allow for the coordination of information, resources, and priorities among public health and safety departments and agencies regardless of the jurisdiction. These agreements address the economic or environmental impact regarding new development on neighboring land. Many states recognize and encourage such agreements.[2]

While these agreements often make good policy, their execution remains – by definition – the prerogative of the respective sovereign governmental signatories. For example, the Cowlitz Tribe entered into an MOU with Clark County, the local government, but opponents of the Tribe's trust acquisition brought litigation to challenge the MOU on State law grounds, and the Tribe and the County eventually had to agree to rescind the agreement. The Tribe then enacted a tribal ordinance to extend the same protections and mitigation measures that had been included in the MOU, but this illustrates the practical reasons that the Department should not incorporate specific requirements regarding cooperative agreements into the fee-to-trust process.

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[1] The Secretary similarly considers the concerns of state and local jurisdictions and the general public when undertaking federal actions, like many trust acquisitions, that implicate NEPA. 43 U.S.C. § 4321 *et seq*.

[2] *See, e.g.*, Cal. Health & Safety Code § 13863(a) ("A [fire protection] district may enter into mutual aid agreements with any federal or state agency, any city, county, city and county, special district, ***or federally recognized Indian tribe***." (emphasis added)).

We also point out that newly recognized/landless tribes establishing their first reservation are expected to locate their lands within an area in which they have both historical and modern connections. These tribes very often are trying to carve a reservation out of other jurisdictions which may not be accustomed to existing alongside a tribal government. For these reasons, it simply is not always possible for newly recognized/landless tribes to obtain agreements with local jurisdictions. The Department also needs to be aware that the premium it places on obtaining MOUs with the local community can, especially with newly recognized/landless tribes which are particularly desperate to obtain a reservation, skew the negotiation dynamics by essentially empowering local communities to make greater demands in the MOUs than may be appropriate.

Finally, we reiterate that the IRA does not contemplate the participation of state and local governments in the fee-to-trust process. It would therefore be both paternalistic and contrary to the plain language and intent of the statute for the Secretary to impose such a requirement as part of the trust acquisition process.

Question 10

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

Shorten processing time. The Department should make an effort to decrease the time that it takes for review and approval of fee-to-trust applications, particularly those that are off-reservation and for economic development, including gaming. As discussed above, the Department took eight years to process the Cowlitz Tribe's off-reservation gaming application -- that is far too long. Some of this is due to the extended time that it takes BIA to comply with NEPA, and for gaming applications, to comply with the 25 C.F.R. Part 292 regulations relating to the eligibility of land for gaming. These delays are further compounded by the significant amount of time it typically takes headquarters to make a final decision on off-reservation gaming applications after the application is submitted to headquarters by the Region, even though the Region has already fully reviewed the application and made a recommendation for approval. Indeed, even acquisitions *mandated* by other land acquisition statutes (such as land claim settlements) routinely (and inexplicably) take years to complete.

Allow the Regional Directors to review and approve off-reservation applications. Allowing Regional Directors to approve off-reservation applications would cut out the extended time that applications sit in headquarters before they are finally reviewed and approved. If the Department believes that off-reservation gaming acquisitions still must be reviewed in Washington, D.C., for policy and consistency reasons, we recommend that the Department make an effort to ensure that there is adequate staff and funding to expedite the review of off-reservation gaming applications.

Do not reinstate the 30-day judicial review period. We oppose amending 25 C.F.R. § 151.12 to reinstate the 30-day judicial review provision, as was proposed in the October draft amendments to the regulations, because this would most assuredly result in unnecessary delays in moving land into trust. Prior to the 2013 amendment of the regulations, Section 151.12(b) provided a 30-day period to allow an opportunity for judicial review of fee-to-trust decisions, which was thought to be necessary because prior case law had found that judicial review of such decisions was barred by the Quiet Title Act, 28 U.S.C. § 2409a. The practical effect of this provision was that once litigation was filed within the thirty-day period, Interior would impose a self-stay and would not acquire the land in trust while litigation was pending, which typically went on for years. In 2012, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that the Quiet Title Act does not bar judicial review of trust acquisitions; consequently, there was no longer a need for the 30-day judicial review provision, and the current regulations were amended accordingly to allow the immediate acquisition of land in trust after publication of a final agency decision in the Federal Register (decisions made pursuant to delegated authority are not final until administrative remedies are exhausted). The proposed draft amendments would reinstate the self-stay provision while litigation is pending, and provide that the Department will acquire the land in trust "no sooner than" 30 days after the date the decision is issued. In effect, this would allow the Department to delay its acquisition indefinitely, even if no litigation were filed, and if litigation is filed, to again engage in the self-stay policy. Not only is this completely unnecessary, because *Patchak* allows for challenges to trust acquisitions, but it will also allow opponents to delay acquisitions for years after a decision is issued, thwarting tribal investment and development. This outcome is neither consistent with the language and purpose of the IRA, nor does it streamline or improve the land in trust process.

The effect of the 30-day judicial review provision is illustrated by the Cowlitz case. The regulatory change to address *Patchak* did not occur until after the Department's second trust acquisition decision for Cowlitz was issued in 2013, and the Department did not acquire the Cowlitz Tribe's land in trust until 2015, after the federal district court's decision upholding the Department's fee-to-trust decision. Although the Department finally agreed to acquire the Tribe's land in trust before the appellate litigation was concluded, the fact that the Cowlitz land was not taken in trust for five years after the Department's initial decision illustrates that reinstating the 30-day regulatory provision will not streamline the fee-to-trust process -- it does the opposite, adding unnecessary delay and cost for Tribal applicants.

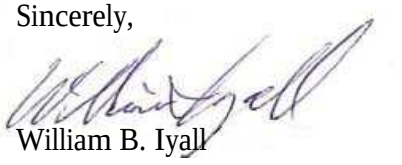
CONCLUSION

In conclusion, the Cowlitz Indian Tribe asks that the Department reconsider making any revisions to the fee-to-trust regulations, particularly the proposals that were introduced in October. This is especially true in light of the uniform opposition of tribes at the consultation sessions, and the fact that the Assistant Secretary - Indian Affairs was only confirmed yesterday by the Senate and

has not had an opportunity to consider this matter. The Department has an obligation to acquire land in trust for all tribes to promote tribal self-determination and self-sufficiency, to consider the impacts of its policies regarding off-reservation acquisitions on landless and land-poor tribes, and to implement the IRA in a way that is consistent with the statute's terms and underlying intent and does not impose additional unnecessary regulatory burdens on tribes for no discernible purpose. Any regulatory proposals being considered must meet these criteria.

The Cowlitz Indian Tribe appreciates your consideration of these comments, and requests that they be made a part of the official record for this consultation.

Sincerely,



William B. Iyall
Chairman