



Quinault Indian Nation

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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, DC 20240

Dear Deputy Assistant Secretary Tahsuda:

The Quinault Indian Nation ("Quinault") submits the following comments regarding the proposed amendments to 25 C.F.R. §§ 151.11 – 151.12.

QUINAULT INDIAN NATION HISTORICAL BACKGROUND

Quinault is a federally-recognized Indian tribe and signatory to the Treaty of Olympia (1856), in which we ceded our claims to millions of acres of land in exchange for the promise of peace and the protection of a permanent homeland reserved for our exclusive use and occupancy. In 1873, President Ulysses S. Grant issued an Executive Order to set aside over 200,000 acres as the Quinault Indian Reservation for the "Quinaielt, Quillehute, Hoh, Quite, and other tribes of fish-eating Indians on the Pacific coast" (I Kapp. 923-24, November 4, 1873). The Reservation is located in the southwest corner of the Olympic Peninsula of Washington State.

The Quinault Reservation was almost completely allotted into generally 80-acre parcels under the General Allotment Act (1887). Only a very few areas were reserved for other governmental purposes. By 1933, virtually all the land within the boundaries of the Quinault Reservation was distributed to individuals in 2,340 allotments. Instead of a single property that could be managed in perpetuity to provide a secure homeland, protect important fish and wildlife resources, and establish a stable economic base for the Quinault people, the Quinault Reservation was fractured into over two thousand individual parcels. The United States held title to these allotments in trust for Indian beneficiaries and assumed a fiduciary responsibility to manage them for Indian beneficiaries. Over time, however, approximately 1/3 of the allotments were fee-patented and trust protections were removed, while ownership of many others became fractionated with title held as undivided interests held in fee or trust status

Historically, many Indians entitled to receive an allotment on the Quinault Reservation had already established homes or filed homestead claims for off-Reservation parcels, several of which were subsequently converted into public domain allotments. There were villages and homesites in nearly all of the river drainages south of the Reservation for about 40 miles to Grays Harbor, all of which are within the Nation's aboriginal territory. Many of those that were formerly public domain allotments were eventually transferred to fee status. The Nation has acquired a number of former allotments outright, and has acquired partial interests in others. Some have been acquired in trust status, and others are still held in fee. Accordingly, Quinault has significant interests in lands that are off-Reservation but well within its aboriginal territory. The Nation anticipates transferring those lands held in fee status to trust at some point in the future. Thus, the subject of the proposed amendments is of keen interest.

GENERAL COMMENTS

Through enactment of the Indian Reorganization Act of 1934 ("IRA"), Congress repudiated the harmful practices it authorized in the General Allotment Act that resulted in a large-scale transfer of trust land out of Indian ownership. It established the discretionary authority of the Secretary of Interior to "acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, *within or without existing reservations, including trust or otherwise restricted allotments*, whether the allottee be living or deceased, for the purpose of providing land for Indians." 25 U.S.C. § 465 (Emphasis added). As the Court explained in *Mescalero Apaches Tribe v. Jones*, 411 U.S. 145, 151 (1973), the IRA "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment [and] gave the Secretary of the Interior power to create new reservations"

Unfortunately, the proposed amendments contradict the long-standing policies set forth in the IRA, and confound the authority given to the Department by creating a two-step decision making process. The amendments impose criteria that Congress did not intend to be part of the process provided by the IRA and exceed the statutory authority granted to the Secretary in the IRA, thereby greatly undermining the IRA's simple, but critical purpose of providing land for Indian use. These criteria and the processes established by the proposed amendments will have the effect of impeding or even curtailing the ability of tribes to consolidate their homelands and undertake sorely needed opportunities for economic development.

The proposed amendments to 25 C.F.R. §§ 151.11 – 151.12 establish a bifurcated decision making process for gaming acquisitions and interject inappropriate considerations to the acquisition of off-reservation lands for non-gaming purposes. This process would have the real potential to make the acquisition of off-reservation land into trust status practically impossible. The decision making process will be divorced from the development of a fully-developed record, thereby politicizing the process to the detriment of tribal governments. The proposed amendments also replicate criteria already covered by 25 C.F.R. Pt. 292 for off-reservation gaming acquisitions and interject inappropriate considerations to the acquisition of off-reservation lands for non-gaming purposes.

While the proposed amendments are proffered as time and cost savings measures for the benefit of tribes, they appear to be part of an intentional effort to provide the Department with unfettered authority to deny off-reservation applications that it deems too politically controversial or

inconvenient. If adopted, they would give reign to the prejudices and unfounded fears of state and local governments and non-Indian communities, and abdicate the United States' trust responsibility to protect and promote tribal sovereignty and self-government and self-sufficiency.

SPECIFIC COMMENTS

1. Subsection 151.11 (a)(1).

This subsection sets forth the required elements of an off-reservation acquisition for gaming purposes. This entire subsection is unnecessary because parts of it are addressed by §151.11 in its present form, and parts of it are duplicative of the requirements of 25 C.F.R. Pt. 292. Specifically, subsections (a)(ii) (statutory authority for the acquisition) and (iii) (the need for the land) are addressed in the current version of §151.11(a), which requires an applicant tribe to submit the same information mandated by §151.10 (a) and (b) for an on-reservation acquisition.

Subsection (a)(1)(i) regarding a tribe's historic or modern connections to the land is currently required by 25 C.F.R. § 292.17 (i), and subsection (a)(1)(iv) regarding the location of the land is addressed by 25 CFR 292.16 (d) and 292.17(g). The information requested by § 151.11 (a)(1)(vii) (anticipated economic benefit to the tribal applicant) is required in greater detail by 25 CFR § 292.17 (a)-(d), and the information requested by §151.11 (a)(1)(viii) (anticipated economic benefit to the local community) is required by 25 CFR § 292.18 (c). Likewise, the information required by subsection (a)(1)(ix) (tribal employment data) is required by 25 CFR § 292.17 (b), and the criterion set forth in subsection (a)(1)(x) (the expected on-reservation benefits of off-reservation gaming) is required by 25 CFR § 292.17 (a)-(d).¹

While there is some overlap between the decisions to be made under Parts 151 and 292, they serve different purposes. First, a tribe may already be the beneficial owner of trust land that was acquired after the enactment of the Indian Gaming Regulatory Act ("IGRA") that has not, heretofore, been used for gaming purposes. A so called two-part determination under 25 U.S.C. § 2719(b)(1)(a) would be required before the tribe could conduct gaming on such previously-acquired trust land, but compliance with Part 151 would not be required, precisely because the land has already been taken into trust. In contrast, a tribe may desire to conduct gaming on land that is not currently held in trust, meaning that both a two-part determination under 25 C.F.R. Pt. 292, Subpart C, and a trust acquisition decision pursuant to Part 151 are necessary. Moreover, the Part 151 decision making process is entirely a federal decision, whereas the Governor of the state in which the land is located must concur in the two-part determination conducted pursuant to Part 292. Thus, because they serve separate though

¹ All of the factors that would be evaluated under the proposed amendments are currently evaluated as part of either the trust land acquisition process under 25 C.F.R. Part 151 or the off-reservation gaming regulations under 25 C.F.R. Part 292, but only after the preparation of an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA"), which supplies valuable information that informs that evaluation.

related purposes, and are subject to different approval requirements, there is a need for both Parts 151 and 292. The Department should preserve the integrity of each process.

The Department's practice since the enactment of IGRA has been to make the two part-determination first, and only if the Governor concurs therein is the tribe's concomitant Part 151 application considered. The rigorous review is conducted under Part 292, and if the application is successful under that process, including by gaining the Governor's concurrence, the review under Part 151 is abbreviated because all of the relevant factors have already been considered. The Department has not explained how it will implement the two regulatory processes if it adopts the proposed amendments, but by making the two-part determination factors part of the trust acquisition criteria, a tribal applicant could be required to submit the same information twice and undergo two rigorous regulatory processes.²

Subsection 151.11 (a)(1)(v) requires that a tribe submit information about whether the proposed acquisition will facilitate the consolidation of tribal land holdings and reduce checkerboard patterns of jurisdiction. These criteria are relevant (though not controlling) factors in the context of on-reservation acquisitions, but are irrelevant and therefore inappropriate in the case of an off-reservation acquisition.³ These criteria address the aftermath of the loss of land within the boundaries of a reservation through the allotment process, through both the sale of so-called surplus lands within an undiminished reservation, and the expiration of the trust period mandated by the applicable allotment statute, and the alienation resulting from policies of supervised sales during the termination era. Thus, by definition, this information is irrelevant and inappropriate in the context of an off-reservation application, and the request for it is simply nonsensical and suggests either a profound ignorance of Indian legal history by the Department or an intentional attempt to establish convoluted criteria through which it can summarily deny the off-reservation trust land applications it views as problematic. That is because the acquisition of land outside of the reservation boundary will rarely facilitate the consolidation of tribal land holdings and never reduce checkerboard jurisdiction for the very reason that the land proposed for acquisition is not within a reservation.

Finally, subsection 151.11 (a)(1)(ix) requires information about cooperative efforts to mitigate impacts to the local community, including copies of intergovernmental agreements between the tribe and state and local governments, and in the absence of such agreements, an explanation as why no cooperative mitigation efforts or agreements exist. First, information regarding impacts on the local community is already required, but with more specificity, by 25 CFR § 292.18 (a)-(e). Second, the mere mention of the possible need for an intergovernmental agreement or, alternatively, the need for the tribe to explain the absence of

² The possible need to undergo two regulatory processes assumes that the tribe makes it through the initial review, but for the reasons discussed below, it appears doubtful that a tribal applicant can ever expect to survive the initial decision to made pursuant to proposed new subsection 151.11 (c).

³ The consolidation of tribal land holdings and the reduction of checkerboard jurisdiction should count as positive factors in a proposed on-reservation acquisition, but should not be considered negative factors if the acquisition does not accomplish these ends. The reacquisition of land within a reservation that was lost through allotment fulfills Congress' goal in the IRA of helping restore to tribal lands that were lost through allotment and presents the strongest case for trust acquisition without regard to considerations of land consolidation or checkerboard jurisdiction.

such an agreement, gives state and local governments unwarranted leverage, putting them in a position to demand extravagant mitigation measures and exorbitant impact payments, or even worse, to exercise a virtual veto over the proposed trust acquisition by refusing to enter into such an agreement.

As discussed in more detail below regarding proposed subsection 151.11 (c), this is particularly problematic because, under the proposed amendments, the tribe would be forced to offer mitigation measures and enter into an agreement without the benefit of the preparation of an EA or EIS. Moreover, the BIA would be considering the tribe's explanation for the lack of such an agreement in the absence of an EA or EIS, and would therefore have no record upon which to determine whether the tribe has offered reasonable mitigation measures or made a good faith effort to enter into a fair intergovernmental agreement. The requirement of proposed subsection 151.11 (a)(1)(ix), particularly in light of the initial decision proposed by subsection 151.11 (c), places tribal trust applicants in an untenable position and appears to be a contrivance to allow the Department to summarily deny off-reservation gaming trust acquisition applications without the benefit of a fully developed record. Decision making of this nature is *per se* arbitrary and capricious and it is inconceivable that our trustee has proposed such a biased decision making process that so clearly favors the interests of state and local governments above tribal interests.

2. Subsection 151.11 (a)(2).

Proposed new subsections 151.11 (a)(2)(i)-(iv) are largely duplicative of the current criteria set forth in § 151.11, and thus add virtually nothing to the regulatory process. Like §151.11 (a)(1)(v), § 151.11 (a)(2)(v) requires that a tribe submit information about whether the proposed acquisition will facilitate the consolidation of tribal land holdings and reduce checkerboard patterns of jurisdiction. For all of the same reasons that these criteria are irrelevant and inappropriate with regard to off-reservation gaming acquisitions, they are equally irrelevant and inappropriate with regard to non-gaming off-reservation acquisitions.

Subsection 151.11 (a)(2)(vii) requires the submission of information regarding the anticipated economic benefits to the local community. Congress did not authorize the Secretary to acquire land in trust for tribes so that it would benefit local communities, but rather to restore tribal homelands, revitalize tribal governments and tribal economic life. Economic benefits to the local community are irrelevant. The emphasis should be on benefits to the tribal applicant and whether any adverse impacts on the local community are mitigated (the determination of which is conducted through the NEPA process), but there should be no consideration of or requirement of benefits to the local community. Furthermore, this requirement exceeds the scope of the authority given by Congress to the Secretary to take land into trust.

3. Subsection 151.11 (c).

The most significant change that the proposed amendments would effect is the bifurcation of the decision making process with regard to off-reservation acquisitions. As discussed above, subsection 151.11(a)(1)(xi) of the proposed amendment requires a tribal applicant to submit

information regarding possible negative impacts on the local community and efforts to mitigate those impacts, including any inter-governmental agreements, or alternatively, an explanation why there are no such agreements. Subsection 151.11 (c) of the proposed amendment would require the BIA to evaluate these (and other) aspects of the proposal as an “initial review,” which could lead to the denial of the application before the preparation of an EA or EIS.

The conduct of this “initial review” and the probable denial of the application before the preparation of an EA or EIS is problematic. The preparation of a well-documented EA or EIS (or mitigated finding of no significant impact (FONSI)) is critical to any trust land application because it helps to objectively identify benefits, negative impacts, and appropriate mitigation measures for identified adverse impacts. Without the use of objective information to identify legitimate negative impacts and appropriate mitigation measures, states and local governments are free to assert or exaggerate impacts in order to either unreasonably oppose trust acquisitions or extort exorbitant mitigation measures, including grossly inflated impact payments, through inter-governmental agreements. Moreover, without the benefit of a fully developed record that includes the preparation of an EA or EIS, the Department is not able to make a reasoned and reasonable determination as to whether the proposed acquisition will cause negative impacts to the state or local government, and relatedly, whether the tribe has offered adequate and enforceable mitigation measures. Similarly, the Department will be unable to objectively determine whether the state or local government has made unreasonable demands upon the tribe or is simply fabricating or exaggerating negative impacts with no intent of accepting reasonable mitigation measures in order to exercise an effective veto over the tribe’s acquisition and subsequent use of the land.

The BIA’s attempt to characterize the “initial review” requirement as saving tribes time and money is a cynical misrepresentation of the practical impact of this ill-conceived proposed change in the process. The initial review will very likely lead to the wholesale rejection of off-reservation trust applications, especially those for gaming purposes. It will only save time and money because it will always lead to the summary denial of tribal off-reservation acquisitions based on an incomplete and legally inadequate record. The lost opportunity costs and the costs associated with appealing these unwarranted denials will far outweigh the purported cost savings that will accrue from the arbitrary and capricious decisions that will result from this inherently substandard initial review process.

4. Subsection 151.12 (c)(2)(iii)

Through subsection 151.12 (c)(2)(iii), the Department proposes to reinstate the thirty (30) day waiting period before it will take the land in trust following a positive decision. This waiting period is unnecessary given the decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209 (2012). In that decision, the Supreme Court decided that the Quiet Title Act did not apply to actions challenging a decision by the Department and did not prevent land from being taken out of trust status if the Department’s decision to acquire the land was reversed on appeal under the Administrative Procedures Act (“APA”). The six year statute of limitations contained in 28 U.S.C. §2401 applies to challenges to agency action under the APA, meaning that a litigant can challenge the

Department's action taking the land into trust for six (6) years. Thus, there is no need to delay the action to take the land into trust once the final decision has been reached.

For all the reasons set forth above, the Quinault Nation opposes the proposed amendments and urges the Department to withdraw the proposal and return to the task of reviewing the many tribal fee-to-trust applications pending before the Department.

Questions for Consultation

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

The objective should be to adhere to Congress' directive to assist tribes in reacquiring land lost through the allotment process and to assist eligible landless and land poor tribes in acquiring a secure land base sufficient for their needs to exercise their sovereignty, self-determination and pursue goals of economic opportunity. The objective should also be to enable tribes that are economically isolated to acquire land in more economically viable areas.

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

The proposed amendments to the fee to trust process undermine the significant strides in this area made by the Department between 2009 and 2016 and will significantly impede the ability of tribes to place lands into trust for the benefit of their communities. The Department should abandon the current proposal to amend the regulations and focus on reviewing pending applications so that it can maintain or exceed the level of approvals it achieved over the last several years.

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

The Department should approve off-reservation trust acquisitions that benefit the tribal applicant. Off-reservation trust acquisitions should be rejected only if the state or local community can factually demonstrate substantial adverse impacts that the tribe cannot or will not reasonably mitigate.

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

The appropriate criteria for considering off-reservation trust acquisitions are generally contained in the present versions of 25 C.F.R. Pts. 151 and 292. The Department should consider the increased use of FONSI's, or mitigated FONSI's, when the tribe's proposed use of the land to be acquired is consistent with surrounding land uses.

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)?

The current version of 25 C.F.R. §151.11 provides the appropriate criteria for the evaluation of applications to acquire off-reservation land into trust status for non-gaming purposes.

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

The appropriate criteria for considering off-reservation trust acquisitions for gaming purposes are already generally set forth in the present versions of 25 C.F.R. §151.11 and Pt. 292, Subpart C.

- c. Whether the application involves no change in use?

The use of FONSI's should be used as often as possible where there will be no change in use.

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

This is a surprising question coming from the Department, which should be aware of the advantages of operating on trust land. The status of the land as trust property means that it is inalienable, untaxable, and generally beyond the jurisdiction and regulatory and taxation authority of state and local governments. The conduct of activities on trust lands, whether economic or governmental in nature, ensures that the sovereign nature of such activities will be respected and protected. In addition, as trustee, the United States has fiduciary responsibilities to protect the health and productivity of trust lands and the resources appurtenant thereto.

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

The proposed amendments to the Part 151 regulations should be abandoned in their entirety and all applications should be evaluated pursuant to the existing regulations. All applications filed before the publication of a final amended rule, should the Department proceed with the current misguided effort to amend Part 151, should be evaluated under Part 151 as it existed prior to the publication of the amended rule.

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 balancing of concerns necessarily implies that there are legitimate interests on both sides that the Department has the discretion to weigh. The interests on both sides of the equation will vary in each circumstance. There can be no predetermined formula explaining what interests should be weighed, or how to actually weigh and balance them against each other. The primary duty should be to promote and support tribal self-determination, sovereignty, and economic self-sufficiency. As our comments with regard to proposed §§ 151.11 (a)(1)(xi) and 151.11 (c) indicate, the preparation of an EA or EIS is necessary to the process of conducting an objective analysis of the benefits, adverse impacts, and range of reasonable mitigation measures. It is only when armed with objective information can the Department properly determine the legitimate interests that are entitled to be weighed and the differences between competing interests reconciled. Public comments may be evaluated as part of the NEPA process, provided they do not represent unfounded opinions or cultural or racial animus.

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?

See our comments on intergovernmental agreements offered above with regard to the proposed amendment of § 151.11 (a)(1)(xi). Such agreements are helpful, but they should not be required by the Part 151 regulations. To the extent that an EA or EIS identifies adverse impacts, the process already creates a significant amount of pressure on tribes to enter into such agreements, but hostile state and local governments have no incentive to do so because they already believe that they can stop trust land applications through their opposition. Requiring intergovernmental agreements in the regulations will further embolden and empower their unreasonableness and intransigence and provide undue leverage to such governments to the detriment of tribal governments.

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

The Department should abandon the current proposed amendments and prioritize use of its limited resources on reviewing pending and soon-to-be-filed applications. The Department achieved a considerable amount of success over the last eight (8) years in approving a large number of applications. It should continue this effort and build on its recent successes.

Sincerely,



Fawn R. Sharp, President
Quinault Indian Nation