

Kurt Riley, Governor
Raymond J. Concho, Jr., 1st Lt. Governor
Bernard E. Lewis, 2nd Lt. Governor
Davy D. Malie, Tribal Secretary
Elliott Sanchez, Jr., Tribal Interpreter



25 Pinsbaari Drive
P. O. Box 309
Acoma, NM 87034
Telephone: (505)552-6604
Fax: (505)552-7204

PUEBLO OF ACOMA
OFFICE OF THE GOVERNOR

June 27, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable John Tahsuda
Acting Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

And by e-mail to consultation@bia.gov

Re: Comments on Proposed Changes to Part 151, Land-into-Trust Process

Dear Secretary Zinke and Acting Assistant Secretary Tahsuda,

The Pueblo of Acoma submits these comments in response to the Department of the Interior’s (DOI’s) December 6, 2017, Dear Tribal Leader Letter concerning the trust acquisition regulations at 25 C.F.R. Part 151 (“trust acquisition regulations” or “land-into-trust regulations”). These comments also respond to the DOI’s October 4, 2017, letter which contained draft revisions to 25 C.F.R. Part 151.11 and Part 151.12 (“October Letter”).

In 1850 when Indian Agent James Calhoun negotiated a treaty with several Pueblo Indian Tribes, Calhoun knew that the lands to be recognized as Pueblo territory were not sufficient to meet their needs. The treaty provided that boundaries would be set as soon as possible, “which shall never be diminished but may be enlarged whenever the government of the United States shall deem it advisable.” Although the treaty was never approved by Congress, in the 1850s the federal government, through the Office of the Surveyor General, did establish the boundaries of the Pueblo of Acoma Grant, a small portion of the actual lands held exclusively by Acoma Pueblo. Out of the exclusive aboriginal title area of Acoma as found by the Indian Claims Commission -over 1 million acres- the Acoma Grant comprises approximately 95,000 acres of high desert with limited water resources.

Thereafter the United States increased some Pueblos’ lands, and the United States diminished some Pueblo lands through the Pueblo Lands Act of 1924, contrary to the solemn words of 1850. Since 1924, the reacquisition of Pueblo aboriginal title lands and requesting the United States to take lands into trust status has been, and remains, a key element of the government-to-government

relationship between the Pueblos and the United States. This process has enabled the Pueblo to re-create a true homeland for its people.

Trust land provides tribal governments the ability to exercise territorial jurisdiction over their lands without interference from state and local governments. With land in trust, Tribes can decide how to use their lands: for economic development purposes or governmental and community purposes, such as for housing, health care facilities, schools, or other community development or infrastructure. It also gives Tribes a tool to protect land with historic or cultural significance. In short, it gives Tribes the ability to have a homeland where the Tribe and its people can have their own laws and be governed by them.

Acoma works with neighboring non-Indian communities to create good regional governance. For example, Cibola County, New Mexico is one of the poorest rural areas in New Mexico. Today, as a result of economic development on Acoma lands placed into trust pursuant to this process, Acoma is a significant contributor to the regional economy. It is one of the largest employers, providing jobs for its members and its neighbors. In turn, those wages then support other non-Indian businesses and local government. This has only happened because of the ability of Pueblos to request the United States to take lands into trust.

A. October Letter Draft Revisions Should Be Formally Withdrawn

As an initial comment, the DOI should formally withdraw its October Letter and the draft revisions to the land-into-trust regulations contained in that letter. The informal and unstructured offering of those draft revisions to 25 CFR Part 151 (“Part 151”) is not in line with previous rulemaking procedures used by the DOI, and does not involve the level of government-to-government consultation required for proposed amendments to such a significant rule. Over the past 25 years, the DOI has made strong efforts to make tribal consultation meaningful and timely. Generally, the DOI has engaged in a tribal input process prior to issuing draft regulatory revisions. In this case, however, the DOI simply attached its proposed revisions to Part 151 to a letter and sent them out to Tribal Leaders.

At a consultation session in October 2017, during the National Congress of American Indians (NCAI) Annual Conference, all tribal representatives but one opposed the DOI’s proposed revisions to the land-into-trust regulations and the process DOI used to develop them. The DOI retreated and began anew with its December 6, 2017, letter. As the DOI notes in the December Letter, it is more appropriate to begin this process with a broader discussion of Part 151 and the land-into-trust process than the approach taken in the DOI’s October Letter. This is a step in the right direction. But the process being used is still not consultation. Consultation is an on-going process, with the exchange of ideas, and responsive comments based on thoughtful evaluation of those ideas. Listening sessions are at best the beginning of the consultation process, and they, alone, are not the appropriate basis for considering such significant amendments to regulations that are absolutely critical to Indian country. To ensure true government-to-government consultation, the DOI should take a step back, formally withdraw the October Letter, and, initiate government-

to-government consultation. Without such a withdrawal, there can be no genuine discussion about the issues and policies because the DOI's views and positions are still on the table, albeit in the background.

B. Comments on DOI's December Letter

In its December 6, 2017 letter, the DOI asked a series of questions to prompt tribal comments. These questions appear to be framed so as to constrain the issues to be considered and the focus of any discussions. First, the questions presuppose a need to change the existing regulations and process. Second, the changes appear to take a certain direction, implying that DOI, without regard to what Tribal leaders may propose, has already decided the direction it intends to move on this critical matter. While DOI representatives state that many of these questions came from tribal leaders, and not representatives of California counties, no information was provided (despite multiple requests) as to which tribal leaders were pushing for changes implied by the way the questions are framed. The following are our comments to the DOI's December letter.

- i. The objective of the land-into-trust program should be to efficiently facilitate the acquisition of tribal homelands as intended by Congress when enacting the Indian Reorganization Act and other land acquisition statutes such as tribal land settlement or restoration acts.**

Congress has authorized the Secretary of Interior ("Secretary") to place land into trust for the benefit of a tribe in over fifty separate statutes.¹ The DOI uses the Part 151 process to administer

¹ Indian Financing Act of 1974, 25 U.S.C. §§ 1466, 1495; Indian Land Consolidation Act, 25 U.S.C. § 2202; Pub. L. No. 106-462, Title I, § 103(6), 114 Stat. 2002, 25 U.S.C. § 2216(c) (2000) (originally enacted as Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Title II, § 217); Rocky Boy's Indian Reservation, Mont., Pub. L. No. 85-773, Aug. 27, 1958, 72 Stat. 931 (formerly 25 U.S.C. § 465); Payson Band, Yavapai-Apache Indian Reservation, Pub. L. No. 92-470, Oct. 6, 1972, 86 Stat. 783 (formerly 25 U.S.C. § 465); 25 U.S.C. § 5322(a)(3); Federal Property and Administrative Services Act, 40 U.S.C. § 523(a)-(b), Pub. L. No. 107-217 § 1, Aug. 21, 2002, 116 Stat. 1083 (formerly 40 U.S.C. § 483(a)(1)-(2)); Oklahoma Indian Welfare Act, 25 U.S.C. § 5201, June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (formerly 25 U.S.C. § 501); Shoshone Tribe: Distribution of Judgment Fund Act, July 27, 1939, ch. 387, § 4, 53 Stat. 1129 (formerly 25 U.S.C. § 574); Cheyenne River Sioux Tribe, Pub. L. No. 88-418, Aug. 11, 1964, 78 Stat. 389; Yakima Tribes, July 28, 1955, ch. 423, § 1, 69 Stat. 392; Pub. L. No. 88-540, § 1, Aug. 31, 1964, 78 Stat. 747; Pub. L. No. 100-581, title II, § 213, Nov. 1, 1988, 102 Stat. 2941; Pub. L. No. 101-301, § 1(a)(3), (b), May 24, 1990, 104 Stat. 206 (formerly 25 U.S.C. § 608); Seminole Indian Reservation, Act July 20, 1956, ch. 645, 70 Stat. 581 (formerly 25 U.S.C. § 465); Isolated Tracts Act, Pub. L. No. 88-196, Dec. 11, 1963, 77 Stat. 349, amended by Pub. L. No. 91-115, Nov. 10, 1969, 83 Stat. 190; Spokane Indian Reservation, Wash., Pub. L. No. 90-335, § 1(a)-(e), June 10, 1968, 82 Stat. 174, as amended by Pub. L. No. 93-286, May 21, 1974, 88 Stat. 142 (formerly 25 U.S.C. § 487); Swinomish Indian Reservation, Pub. L. No. 90-534, § 3, Sept. 28, 1968, 82 Stat. 884 (formerly 25 U.S.C. § 610b); Menominee Restoration Act, Pub. L. No. 93-197, Dec. 22, 1973, 87 Stat. 770, 772-3 (formerly 25 U.S.C. §§ 903-903g); Texas Band of Kickapoo Act, Pub. L. No. 97-429, § 5, Jan. 8, 1983, 92 Stat. 2270 (formerly 25 U.S.C. § 1300b-14); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, Oct. 10, 1980, 94 Stat. 1785 (formerly 25 U.S.C. §§ 1721-35); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, §§ 3(a) and 7(d), Nov. 18, 1977, 91 Stat. 1415 (formerly 25 U.S.C. §§ 711a and 711e(d)); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, Sept. 30, 1978, 92 Stat. 813 (formerly 25 U.S.C. §§ 1701-16); Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97-399, §§ 1-10, Dec. 31, 1982, 96 Stat. 2012 (formerly 25

tribal requests for the Secretary to place land into trust on behalf of a particular tribe under authority delegated by a given statute. The majority of trust land applications cite to the Secretary's authority under the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, ("IRA"), and for the Pueblos, the Pueblo Lands Act of 1924 is sometimes cited as well. For Pueblos, the Part 151 process may be required for acquisitions pursuant to the Pueblo Lands Act of 1924 that are outside the boundaries of a Pueblo's grant as determined by the Surveyor General.

I am very concerned that the DOI asks about the advantages of operating on land that is in trust given the legal history of the Pueblos that resulted in the 1924 Act, and the well-known and demonstrated success of the IRA, the success of the Indian Self-Determination, Education and Assistance Act, and the wide range of examples of tribal strength and recovery – all related to and often dependent on the ability to exercise tribal jurisdiction and self-governance on tribal trust

U.S.C. §§ 1741-49); Pub. L. No. 97- 459, 96 Stat. 2515; Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, Oct. 18, 1983, 97 Stat. 851 (formerly 25 U.S.C. §§ 1751-60); Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481, § 7, Oct. 17, 1984, 98 Stat. 2253, as amended by Pub. L. No. 105-256, § 5, Oct. 14, 1998, 112 Stat. 1897 (formerly 25 U.S.C. § 714e); White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, March 24, 1986, 100 Stat. 61; Ysleta del Sur Pueblo and Alabama and Coshatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, title II, §§ 203(a) and 206, Aug. 18, 1987, 101 Stat. 670 (formerly 25 U.S.C. §§ 733(a) and 736); Navajo and Hopi Indian Relocation Amendments Act, Pub. L. No. 93-531, § 1, Dec. 22, 1974, 88 Stat. 1716, as amended by Pub. L. No. 96-305, July 8, 1980, 94 Stat. 929 and Publ. L. No. 100-666, Nov. 16, 1988, 102 Stat. 3929 (formerly 25 U.S.C. §§ 640d- 640d-31); Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, § 1-12, June 21, 1989, 103 Stat. 83 (formerly 25 U.S.C. §§ 1773-73j); Coquille Restoration Act, Pub. L. No. 101-42, §§ 3(e) and 5, June 28, 1989, 103 Stat. 92 as amended by Pub. L. No. 104-208, div. B, title V, § 501, Sept. 30, 1996, 110 Stat. 3009-537 (formerly 25 U.S.C. §§ 715a and 715c); Ponca Restoration Act, Pub. L. No. 101-484, § 4(c), Oct. 31, 1990, 104 Stat. 1167-8 (formerly 25 U.S.C. § 983b); Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, Nov. 3, 1990, 104 Stat. 1292 (formerly 25 U.S.C. §§ 1774-74h); Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, § 1-13, Nov. 2, 1994, 108 Stat. 4632 (formerly 25 U.S.C. § 1776-76k); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 1-10, Oct. 19, 1994, 108 Stat. 3501 (formerly 25 U.S.C. §§ 1775-75h); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub L. No. 103-324, §6, Sept. 21, 1994, 108 Stat. 2158 (formerly 25 U.S.C. § 1300k-4); Auburn Indian Restoration Act, Pub. L. No. 103-434, title II, §§ 202(e) and 204, Oct. 31, 1994, 108 Stat. 4533-4 (formerly 25 U.S.C. §§ 1300l(e) and 1300l-2); Paskenta Band Restoration Act, Pub. L. No. 103-454, title III, §§ 303(e) and 305, Nov. 2, 1994, 108 Stat. 4793-4 (formerly 25 U.S.C. §§ 1300m-1(e) and 1300m-3); Act to Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, §6, Sept. 21, 1994, 108 Stat. 2154 (formerly 25 U.S.C. § 1300j-5); Miccosukee Settlement Act of 1997, Pub. L. No. 105-83, title VII, §§ 701-07, Nov. 14, 1997, 111 Stat. 1624 (formerly 25 U.S.C. §§ 1750-50e); Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, Dec. 15, 1997, 111 Stat. 2652; Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, Pub. L. No. 106-568, title VI, §§ 601-10, Dec. 27, 2000, 114 Stat. 2906 (formerly 25 U.S.C. § 1778-78h); Cherokee, Choctaw, And Chickasaw Nations Claims Settlement Act, Pub. L. No. 107-331, title VI, § 601-09, Dec. 13, 2002, 116 Stat. 2845 (formerly 25 U.S.C. §§ 1779-79g); Graton Rancheria Restoration Act, Pub. L. No. 106-568, title XIV, § 1405, Dec. 27, 2000, 114 Stat. 2940 (formerly 25 U.S.C. § 1300n-3); Shawnee Tribe Status Act of 2000, Pub. L. No. 106-568, title VII, § 707, Dec. 27, 2000, 114 Stat. 2915 as amended by Pub. L. No. 109-59, title X, § 10213, Aug. 10, 2005, 119 Stat. 1939 (formerly 25 U.S.C. § 1041e); Santo Domingo Pueblo Claims Settlement Act of 2000, Pub. L. No. 106-425, §§ 1-7, Nov. 1, 2000, 114 Stat. 1890, as added Pub. L. No. 106-434, § 3, Nov. 6, 2000, 114 Stat. 1913 (formerly 25 U.S.C. §§ 1777-77e); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7, Apr. 3, 1980, 94 Stat. 320 as amended by Pub. L. No. 109-126, § 4, Dec. 7, 2005, 119 Stat. 2547 (formerly 25 U.S.C. § 766); Pueblo de San Ildefonso Claims Settlement Act of 2005, Pub. L. No. 109-286, §§ 1-18, Sept. 27, 2006, 120 Stat. 1218 (formerly 25 U.S.C. §§ 1780-80p).

lands. Of course, Indian Country still suffers and includes some of the most impoverished, remote, and underserved populations in the country. The placement of land in trust for tribes, however, has been a success story. Through the provisions of the Pueblo Lands Act, several Pueblos have reacquired lands that they had held since time immemorial. The Pueblos also rely on the Indian Reorganization Act of 1934 (“IRA”) as both statutes sought to reverse decades of Tribal loss of lands.

To date, Congress has not changed this fundamental purpose of the IRA nor has the Supreme Court held that the statute exceeds Congress’ authority – despite numerous challenges asserting that land should not be placed into trust on behalf of tribes under the Secretary's authority.² No statutory authority or court opinion has changed the long-standing objective of the IRA. It remains, and an Indian Tribe’s ability to place land in trust has been a critical tool for us to govern and use our lands for the benefit of our communities, which oftentimes results in benefits for our neighbors also.

The DOI’s objectives with its land-into-trust program should clearly be to carry out and achieve the objective of these federal laws - to rehabilitate the Indian’s economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism. The DOI’s objectives with its land-into-trust program should also be to carry out the objectives of the other statutes. The DOI’s objectives should be to promote tribal self-determination, self-governance and self-sufficiency. The DOI should be working to accomplish the fulfillment of its trust responsibility to tribes. With this, the DOI should also be working with tribes to eradicate the negative disparities in economic, health and social conditions found in Indian Country as compared with mainstream America. The acquisition of land in trust helps in this effort because tribes can use trust lands for economic and community development projects that raise the quality of life for their members, and surrounding non-Indian communities.

ii. Generally, the land-into-trust process should be made more efficient.

All aspects of the land-into-trust process could be made more efficient. The DOI is slow to act on all land-into-trust applications. Often the staffing limitations (both Realty and Solicitor staff) at the Agency and Regional level result in unnecessary delays. I recommend that the DOI dedicate more resources and personnel in both the Realty and Solicitor’s office at the Agency and Regional levels. Further, we recommend that the DOI look closely at the land-into-trust process and develop reasonable timeframes for completing the bureaucratic functions necessary to making the final decision. Further, the DOI should establish a timeframe for reaching a final decision. Such defined

² See generally, *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016), cert. denied sub nom. *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433, 197 L. Ed. 2d 660 (2017); *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Dir., Bureau of Indian Affairs*, 32 IBIA 309, 312 (1998); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016) *aff'd sub nom. Stand Up for California! v. United States Dep't of Interior*, No. 16-5327, 2018 WL 385220 (D.C. Cir. Jan. 12, 2018).

timeframes will provide guidance to the DOI staff in their work and to the tribal applicant regarding the progress of its application.

iii. The Department should not distinguish between on-reservation and off-reservation applications.

Often Tribal communities are rural in character, and isolated from economic centers where members have to go to seek employment. In other instances, there are no “on-reservation” land into trust acquisitions available for a Tribe. Yet the need to provide for the community is just as great - jobs, health care, housing and other critical services are still important.

Federal statutes do not distinguish between "on-reservation" and "off-reservation" trust land. That language arose from the enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, with regard to what trust land would be eligible for gaming purposes.³ In fact, the text of the IRA and associated Congressional reports indicate that the IRA "seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council . . ." 78 Cong.Rec. 11125. . The IRA was specifically intended to put tribal decisions, including decisions about trust land acquisitions, into the hands of tribes without second-guessing by the Department. *Id.* Today, Indian Tribes are more capable than ever to make those types of informed decisions and the Department should defer to tribal expertise and process all applications in the same manner regardless of location or purpose.

Indeed, the notion that "economic development" applications should be cordoned off from "non-economic development" applications is directly in contrast with the purpose of the IRA and modern jurisprudence which rejects distinction between governmental and proprietary activity. "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152, *citing* H.R.Rep.No.1804. Congress *intended* the land acquisitions to facilitate all types of tribal economic development. The erosion of this central fundamental purpose is outside Congressional intent and if there any revisions at all to Part 151, this is what should be rectified. The DOI should not engage in the politics and rhetoric around gaming applications and simply process these applications in a uniform and efficient manner that meets the statutory requirements of the IRA or other authorizing statute and complies with other applicable federal law – as intended by Congress. If there is no proposed change in use of the property, then the DOI should ensure that a Categorical Exclusion to NEPA requirements is adopted and efficiently applied.

iv. Memoranda of Understanding and/or Cooperative Agreements should not be required in a land-into-trust application.

The IRA does not require the cooperation of state and local governments, nor does it give them a role in the land-into-trust process. This approach is consistent with the federal trust responsibility

³ We note that Section 2719(c) of the Indian Gaming Regulatory Act states, “Nothing in this section shall affect or diminish the authority or responsibility of the Secretary to take land into trust.” The DOI should not be injecting gaming concerns into the Part 151 process, nor should it be conflating the Part 292 process with the Part 151 process.

to protect Tribes from over-reaching state governments. To require cooperative agreements outside of the NEPA process, as DOI has proposed, creates a "pay-to-play" scenario whereby tribes simply seeking to increase their land base for a variety of reasons will be forced into unfavorable agreements with state and/or local governments in exchange for their support or neutrality on a land-into-trust application. Given the checker-boarding effect of the Pueblo Lands Act of 1924 and the Dawes Act, many reservations have non-tribal fee land within their borders and it is simply good governance for the governments with jurisdiction over or around those parcels to work together for the provision of public health and safety services such as water, fire, emergency services and law enforcement. Tribes often reach such agreements with their surrounding state and local jurisdictions over tribal land held both in trust and in fee or restricted status. Importantly, however, these are agreements appropriately reached by contracting parties on equal footing to obtain a certain desired result in the interest of both parties. To require these types of agreements to be included in the land-into-trust process would place a tribe on unequal footing and subject it to either acquiescing to the demands of the other jurisdiction or being forced to not growing their land base for any number of reasons. Such a requirement could essentially give state and local governments veto power over the tribal land-into-trust decision process, at odds with the intent of the IRA and the concept of tribal self-determination.

This point has been made repeatedly by tribal leaders and representatives at listening sessions and in previous comments. DOI has responded by stating that the language of the regulation is not intended to *require* an MOU with local governments. But the effect surely is to require an MOU. For any off-reservation land-into-trust acquisition, Interior is required to give consideration to impacts on state and local governments, and an MOU is viewed as proof that there is an agreement to deal with impacts. Thus, it creates a more easily defensible record and position for BIA if the acquisition is challenged in court. What makes it easier for the agency soon becomes an iron-clad rule.

The way the regulation is structured, the MOU provision will operate as a bottleneck on land-into-trust acquisitions, and will give significant, inappropriate leverage to state and local governments. Ultimately, where there is a positive relationship with the local government entities, such an MOU will evolve naturally out of that relationship, but if the concept is in the regulation then those recalcitrant entities will see it as a veto. If DOI puts such language into the regulation, it will encourage the anti-tribal elements to think that they have a veto (a hostage situation). Where a tribe has an MOU, it can include that in its application on a voluntary basis.

v. The United States trust responsibility and fiduciary duty flows only to tribes – not to public citizens, state or local governments.

Again, the IRA does not require the DOI to consider public citizens or state and local concerns when evaluating a land-into-trust application. In fact, the IRA was passed to *protect* tribes from those very interests who – much like today – sought to keep land out of tribal ownership. The only possible place to consider citizen, state or local concerns is strictly within the NEPA review process, and there, once the environmental concerns are adequately mitigated, then the citizen, state or local jurisdiction concerns should not interfere with the fiduciary duty of the Secretary to

acquire land-into-trust on behalf of the applicant tribe. The United States trust responsibility and fiduciary duty flows only to Tribes – not to public citizens, state or local governments.

vi. Any new revisions should not apply to pending applications.

It is a well-established principle of administrative law that regulations promulgated by an agency hold the force of law for that agency. Part 151 was promulgated under the Department's federal rulemaking authority and establishes the regulatory process for exercising its trust acquisition authority under the IRA. Validly promulgated regulations have the force law and are treated the same as statutes. *Griffin v. Harris*, 571 F.2d 767, 772 (3d Cir. 1978). Further, once adopted, an agency is legally bound by its own regulations. *United States v. Nixon*, 418 U.S. 683, 695–96 (1974). The existing Part 151 regulations were appropriately adopted under the APA and applications submitted under them should be processed quickly and efficiently according to them.

C. Comments to Draft Revisions in October Letter

i. The October Letter Draft Revisions proposed two-tier review and approval process does not respect tribal self-determination and sovereignty.

There is serious concern at Acoma over the addition of a two-tier review and approval process in the October Letter Draft Revisions. Unilateral denial without conducting a complete review of the application will result in additional costs for a tribe – not less. A tribe whose application is denied in the first review will have to expend valuable resources to appeal the decision, and if it succeeds in overturning the initial decision, it will then continue proceeding through the remainder of the process. Many tribes may not have the resources to sustain the application through such delay and cost and then would be deprived of their right to homelands. We know that delay is a common tactic used by well-funded tribal land acquisition opponents and this would only serve to bolster their opposition.

Congress has recognized many times over the right of a tribe to make its own decisions in exercise of its sovereignty. If a tribe determines that placing a parcel of land into trust – no matter where located – then the Department should respect that tribe's decision and process the application with all due deliberation.

ii. Reinstatement of 30-day stay before placing land into trust will increase cost for tribes requiring them to use their "limited resources" – precisely what these revisions purport to avoid.

Finally, the repeal of the so-called "Patchak Patch" is contrary to the stated goal of the revisions – preservation of tribal resources. In 2012, the Supreme Court of the United States held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) that the law does not bar Administrative Procedure Act challenges to the DOI's determination to take land in trust even after the United States acquires title to the property. Acquiring the land-into-trust immediately allows a tribe to proceed with its development plans without undue delay. It does *not* prejudice a potential challenger from filing a lawsuit challenging the Secretary's decision as that

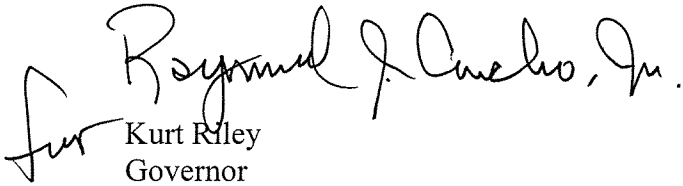
challenge can be brought for 6 years after the decision has been made. Alternatively, restating the 30-day period before placing the land-into-trust *does* prejudice a tribe which may be faced with a lawsuit brought within the 30-day period and an injunction prohibiting it from proceeding with its economic development opportunity while the challenge is litigated. Thus for the small cost of drafting a bare-bones appeal, without regard to the likelihood that there is no real basis for an appeal, an opponent can tie-up a land into trust action for several years.

Conclusion

Acoma appreciates the opportunity to comment on this most significant topic, and asks that you carefully consider your federal fiduciary responsibilities, our concerns, and Congress's intent when passing legislation to return land to tribal ownership. Acoma respectfully requests that the October Letter and its Draft Revisions to Part 151 be formally withdrawn. Further, the only revisions to Part 151 should be revisions that make the land-into-trust process more streamlined, efficient and quick for tribes. Acquiring land-into-trust for tribes should be made easier for tribes, not harder.

Sincerely,

PUEBLO OF ACOMA


Kurt Riley
Governor