

HYDABURG COOPERATIVE ASSOCIATION



PO Box 349
HYDABURG, ALASKA 99922
Phone: (907)285-3665 or 3666
FAX: (907)285-3541
Website: hydaburgtribe.org

RECEIVED

FEB 13 2018

DCN: 1A00007019
Executive Secretariat - Indian Affairs (ESIA)

VIA EMAIL (Consultation@bia.gov)

MAILED FIRST CLASS TO:

Honorable John Tahsuda III
Acting Assistant Secretary for Indian Affairs
ATTN: Fee to Trust Consultation
Office of Regulatory Affairs and Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240

RE: Written Comments in Response to Request for Comments on Consultation Draft of Proposed Amendments to Land Acquisition Regulations, 25 CFR Part 151, Related to Off-Reservation Fee to Trust Applications

Dear Acting Assistant Secretary Tahsuda:

On behalf of the Hydaburg Cooperative Association (“HCA”), a federally recognized Indian tribe, and the Haida Corporation (“Haida”), an Alaska Native Village Corporation, both located in Hydaburg, Alaska, we write to provide you with written comments, in response to your requests issued October 4, 2017 and December 6, 2017, related to a proposal to amend the regulations for applications to put off-reservation lands into trust for the benefit of a tribe.

On October 4, you issued a letter to tribal leaders initiating consultation on proposed amendments to 25 CFR Part 151 – Fee to Trust Acquisition Regulations. More specifically, the Department proposes to amend Sections 151.11 – Off Reservation Acquisitions – to create a two-step review and decision process that requires additional information and separates gaming from non-gaming applications. In seeking written comments, you posed several questions to tribes to assist you in further development of the Department’s proposed amendments. This letter represents our joint response to your request, including answers to your questions and additional comments on the proposal.

Background

The HCA is a federally recognized Indian tribe possessing sovereign status and powers by virtue of such recognition. HCA was organized - pursuant to the 1936 Alaska amendments of the Indian Reorganization Act - on April 18, 1938, when it adopted its constitution and bylaws.

The Haida Corporation is a sustainable, Haida-owned, Alaska Native Village Corporation, which makes a vital difference in the lives of our present, and future shareholders, while promoting culture and heritage. The Haida Corporation conducts business development and stewards resources, which include ancestral lands and sacred sites. Formed because of the Alaska Native Claims Settlement Act, Haida holds several thousand acres of land in fee, for business, natural resource protection and use, and economic development purposes.

Both HCA and Haida are located in Hydaburg, Alaska, on Prince of Wales Island in southeastern Alaska. As stewards of the Haida people's traditions, cultures, subsistence way of life, ancestral lands, and sacred sites, we have worked together – and in close cooperation with our partner the City of Hydaburg – to evaluate our best opportunities for placing certain culturally important Haida lands into trust for the benefit of the HCA and the Haida people.

Answers to Posed Questions

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

The land into trust program, as contemplated in the Indian Reorganization Act, is supposed to support reclaiming lands for tribal communities, tribal self-determination and self-sufficiency. When the IRA was originally enacted in 1934 Alaska was then a territory of the United States. And while the IRA did not originally apply to the territories, 25 U.S.C. § 473, there were certain exceptions for the Territory of Alaska.

In 1936, Congress extended several additional provisions of the IRA to the Territory of Alaska, including Sec. 5, and also expanded the ability of "groups of Indians in Alaska not recognized prior to May 1, 1936 [the date of enactment]" to organize, adopt constitutions and bylaws and receive charters of incorporation. 49 Stat. 1250. The IRA was extended to the State of Alaska to ensure the Alaska Native tribes were treated equally and fairly with the tribes in the Lower 48.

This equity should be retained in the considerations for any changes in the fee to trust regulations.

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

The HCA and Haida have no information to share on this question.

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

The Department should only disapprove off-reservation trust acquisition applications if the application is in violation of, or doesn't comply with, federal law. Otherwise, pursuant to the Indian canons of construction, the federal laws and regulations authorizing "off-reservation" acquisitions must be interpreted to the benefit of the Indian tribe.

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

The primary criteria should be based on the relevant federal law's purpose. For example, the IRA purpose is to restore lands for Indian tribes, promote tribal self-determination, self-

governance, and self-sufficiency. Thus, criteria that helps the Department evaluate whether these goals are being met should be sufficient.

- 5) Should different criteria and/or procedures be used in processing off-reservation applications based on:
- a. whether the application is for economic development as distinguished from non-economic development purposes (for example, tribal government buildings, or tribal health care, or tribal housing)?
 - b. whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?
 - c. whether the application involves no change in use?

It is reasonable to request and review information to support the purpose of the application and to ensure compliance with the authorizing statute. It is also reasonable to take a hard look at applications that may stretch the bounds of the law's limits – in both a legal and practical way. In addition, the type of use for the land is relevant – i.e., governmental, housing, economic development, cultural resource protection, etc. - to establish factors for consideration in the Secretary's decision-making.

There is a substantial difference between an application for a development project (whether economic or community development) and an application for cultural resources protection. Since most, if not all, applications for cultural resource protection do not involve a change in the use of the lands, those types of applications should not be subject to the level of scrutiny that an application for proposed development purpose might be subject to. Applications for which there will be no change of use are already eligible for categorical exclusions from NEPA. Applications for cultural resource protection purposes should also be eligible for exclusion from unnecessary information requirements and regulatory review processes.

Whatever the appropriate criteria, the draft proposal includes a vague "adequacy" of information requirement, which in our view is problematic. The proposed regulations would allow the Secretary (or BIA official with delegated authority) to deny a fee to trust application after the initial review if the application either fails to address or does not *adequately* address the information and analysis requirements. There is no definition of "adequate" and there is no precedent or practice by which to determine (either for the Secretary or the tribal applicant) what amount of information or level of detail is "adequate." Because the requirement is so vague, it may be a violation of due process because the applicant cannot know what is expected of them to satisfy the requirement.

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

For cultural resource protection, there are considerable advantages to having the land in trust, including jurisdictional protections, exemption from taxes, federal protection, access to certain federal grant and support programs, and unlikely loss of land ownership.

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

Pending applications should not be subject to the new revisions, without an express ability to supplement or re-submit the pending application. Typically, an application submitted under existing regulations are subject to that version of the regulations. See 25 CFR § 162.008(b)(1) (reviewing lease applications "under the regulations in effect at the time of your submission"); 25 CFR § 169.7(c)(2)(i) (will review ROW applications "under the regulations in effect at the time of

your submission"). In both these examples, the applicant has the option to resubmit an application. As currently drafted, the lack of a grandfathering provision probably results in an impermissible "retroactive" rule. Without some type of mechanism to supplement or amend a pending application, this omission could likely be a due process violation.

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 Department already gives state and local governments the opportunity to comment on proposed fee to trust applications, and under NEPA, the public is informed of the application and given an opportunity to comment as well. However, for cultural resource protection, the local governments and general public comments, while important, should not be given outsized weight or influence in the Department's decision to protect tribal cultural resources.

HCA and Haida enter into MOUs and other agreements with the City of Hydaburg to promote local support and assistance with cultural resource protection efforts.

9) Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process.

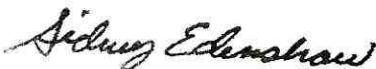
While the HCA and Haida consistently work with the City of Hydaburg to further our common interests and joint goals, we don't express an opinion on whether MOUs should be required for economic development purposes.

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

Applications for cultural resource protection purposes that will not result in a change of use – or may have minimal impactful activities, such as a cultural museum – should have a streamlined process for placing land into trust, with the minimum information necessary to transfer the land (i.e., ownership information, title insurance, categorical exclusion from NEPA).

Thank you for your consideration of our responses. We look forward to continued consultation and collaboration on this regulatory review effort.

Sincerely,



Sidney Edenshaw
President
Hydaburg Cooperative Association



Raymon Frank Guthrie
Vice President
Hydaburg Cooperative Association