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July 25, 2013

Via FedEx and email: consultation@bia.gov
Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
United States Department of the Interior
1849 C Street, NW
Mail Stop 4141—MIB
Washington, DC 20240

Re: Federal Fee-to-Trust Process and BIA Proposed Rule, "Land Acquisitions and Appeals of Land Acquisition Decisions," 25 CFR Part 151, BIA-2013-0005, RIN 1076-AF15

Dear Ms. Appel:

On behalf of the California State Association of Counties (CSAC), I am writing to express our strong concerns regarding the proposed rule identified above, and the continued need for comprehensive reform of the fee-to-trust process. Established in 1895, CSAC is the unified voice on behalf of all 58 counties in California. Governed by elected county supervisors, CSAC is a non-profit corporation dedicated to representing California county governments before the federal government, administrative agencies, and the California Legislature. We appreciate this opportunity to comment on the Proposed Rule and the fee-to-trust process.

Since 1994, CSAC has sought to correct long-standing deficiencies in the fee-to-trust process that have resulted in expensive, unproductive, and unnecessary conflict between tribes and local governments. Jurisdiction over land is just as critical for counties as it is for tribes, and the loss of sovereignty results in irreparable harms to counties, including the loss of land use and regulatory authority, tax revenue, and investment in nearby development and infrastructure. The crucial role of counties demands a process that provides sufficient notice to stakeholders, clear and enforceable standards for fee-to-trust decisions, and a requirement that tribes negotiate intergovernmental agreements that mitigate adverse impacts and build relationships with affected communities.

The need for a comprehensive solution was reaffirmed recently in a quantitative analysis of all 111 fee-to-trust decisions by the Pacific Region BIA Office between 2001 and 2011.[1] The analysis found that BIA granted 100% of the proposed acquisition requests and in no case did any Section 151 factor weigh against approval of an application.[2] The analysis further found that because of the lack of clear guidance and objective criteria, Pacific Region BIA decisions avoid substantive analysis in favor of filler considerations and boilerplate language.[3] The result is a broken process in which community concerns are ignored or downplayed, applications are rubber-stamped at a 100% acceptance rate, and tribes and local governments are forced into unnecessary and unproductive conflict.[4] The problem

[1] (Kelsey J. Waples, *Extreme Rubber Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepperdine Law Review 250 (2013).
[2] Id., pp. 278.
[3] Id., pp. 286, 293, 302.
[4] Id., pp. 292, 295, 297.

appears likely to worsen in the future, given recent statements by the Department trumpeting its desire to "keep that freight train moving" and "keep restoring lands for tribes."[5]

The Proposed Rule appears intended to expedite trust approvals to the detriment of all interested parties, and to the administrative process itself. The Proposed Rule incorrectly asserts that because of the decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* (2012) 132 S.Ct. 2199 (*Patchak*), eliminating the current 30-day wait period (see Section 151.12(b)) would not effect a change in the law or affect any parties' rights under current law. In fact, as set forth below, the Proposed Rule would put local governments in a far worse position by dramatically altering the balance of equities and eliminating their ability to obtain emergency relief after a decision to accept the land in trust, but before the land achieves trust status.

The Proposed Rule fails to recognize that the facts on the ground and balance of equities changes when land achieves trust status and development commences. The Proposed Rule directs the Secretary or other BIA official to "[p]romptly acquire the land in trust" after a decision becomes final, and the BIA is encouraging tribes to begin development immediately upon acceptance of land into trust. Both of these steps appear intended to foreclose concerned parties from obtaining emergency relief, even with regard to trust decisions that are clearly inappropriate and arbitrary. Courts are less likely to order emergency relief if a tribe and its development partners have invested resources and substantially implemented a gaming or other development project. Indeed, courts may be unable to grant relief at all if tribes decline to participate in the action and claim sovereign immunity.

The Proposed Rule also contravenes protections in the Administrative Procedures Act (APA) for parties seeking emergency relief from administrative decisions. In particular, Section 705 of the APA authorizes federal courts to postpone the effective date of an agency action and to preserve status or rights pending conclusion of the review proceedings. The Proposed Rule circumvents Section 705 by pushing land transfers before an affected party can seek judicial review and allow the courts to exercise their authority to review trust transfers. Communities and local governments will be harmed because, even if successful in the litigation, their success likely will not bring back the tax revenue and other fees lost when the land went into trust, nor remove the incompatible developments that are not permitted under comprehensive local land use plans, now possible without the Proposed Rule.

The BIA's new push for immediate project implementation also appears intended to impede a court's ability to award complete relief. Litigation can take years to reach a final decision, and Senator Dianne Feinstein and others have correctly raised strong concerns about the Department's practical ability to unwind a trust decision and remove land from trust.[6] The Proposed Rule ignores these concerns, and includes no procedure for undoing a trust decision in a transparent and orderly manner.

The Department should not pretend that these harms are balanced by the proposed requirements regarding the notification of decisions and administrative appeal rights. These proposed changes are equally flawed; the Proposed Rule would require communities and local governments to make themselves known to BIA officials at every decision-making level to receive written notice of a trust land acquisition. It will be extremely difficult for anyone to sort through local and national BIA organizational charts to try to determine how, when, and by whom a particular application will be

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[5] See "Washburn Announces Plan of Attack for Patchak Plan," http://indiancountrytodaymedianetwork.com/2013/05/24/washburn-announces-plan-attack-patchak-patch-149514.

[6] See Letter from Senator Dianne Feinstein to Secretary Ken Salazar, January 31, 2013, p. 2.

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processed. BIA decision-making is far from transparent today, and the Proposed Rule would make the process even more opaque and participation more difficult in the future.

CSAC supports a new paradigm in which counties are considered meaningful and constructive stakeholders by the BIA in Indian land-related determinations. CSAC and its member counties would strongly support a revision to the Proposed Rule to provide immediate notice and full information upon filing of trust applications, establish clear and specific trust acquisition standards, create a mechanism for the BIA to consult with counties and respond to comments on trust applications, and ensure that adverse impacts are addressed through intergovernmental agreements. CSAC believes these measures represent a real and lasting solution that would reduce conflict and controversy, to the benefit of tribes and all other parties.

If the Department instead intends to proceed with the Proposed Rule's "quick fix," CSAC recommends the following changes:

- An additional regulation in Part 151 providing that, when a party has appealed a trust decision to the Interior Board of Indian Appeals, or has appeared before the Assistant Secretary - Indian Affairs, the party shall be entitled upon timely request to an automatic 30 day stay of a decision approving a trust application. This would enable the party to preserve its rights by seeking a judicial order staying the effectiveness of any approval decision pending the court's review of the validity of that decision.

- Additional provisions requiring BIA to publish trust applications on its website, provide regular updates as to the status of its review, identify the decision-makers responsible for an application, and provide contact information to allow parties to identify themselves as interested parties. Parties should be exempt from exhaustion requirements in the absence of substantial compliance with these provisions.

Thank you for considering these comments. Should you have any questions, please contact the Kiana Buss with CSAC at (916) 327-7500, ext. 566.

Sincerely,

Matthew Cate
Executive Director

cc: Members, Senate Indian Affairs Committee
Members, House Natural Resources Committee
Members, California Congressional Delegation
Gail Adams, Director of Intergovernmental Affairs, Department of the Interior