

**Comments of the National Congress of American Indians
on the Regulations Governing the Department of Interior's Procedures
for Acquisition of Title to Land in Trust for the Benefit of Tribes and Indians**

June 15, 2001

I. Introduction - On January 16, 2001, the Department of Interior issued a final rule regarding acquisition of title to land in trust for Indian tribes and individual Indians. (66 Fed. Reg. 3452). On April 16, 2001, the Department extended the effective date for the final rule and issued a notice seeking public comments on "whether the final rule should be amended in whole or in part or withdrawn in whole or in part." (66 Fed. Reg. 19403).

Interior's authority for taking land into trust, found in Section 5 of the Indian Reorganization Act (IRA), is a vitally important power that the Department possesses to aid the long-term recovery and survival of Indian Nations. After engaging in the extensive rulemaking process to this date and reviewing the final rule and finding it to be a generally balanced approach to taking land into trust, the National Congress of American Indians urges the Secretary not to amend or withdraw the rule, but to make the final rule effective at the end of the current extension period on August 13, 2001. An NCAI resolution on this matter follows section II.

The rule should be made effective because it advances three fundamental principles.

First, the rule carries out the purposes of the IRA and recognizes the critical role land restoration must play in fostering tribal self-sufficiency. Congress in the IRA intended the Secretary to take land into trust to help tribes that had lost so much under the former federal policy of allotment. The rule would advance this purpose, by providing a mechanism for taking land into trust on-reservation and off-reservation, consistent with the principle of the IRA that tribes must have lands that can be used effectively to improve the conditions of our people.

Second, the final rule implements clear standards for taking lands into trust. This addresses an issue of concern to all interested parties. All parties benefit from knowing the standards the Department will use in evaluating trust land requests. One of the key virtues of the final rule is the clarity of its standards – which provide guidance to the Department in the exercise of its authority, and ensure basic fairness to interested parties in connection with the trust application process.

Third, the final rule facilitates fair consideration of appropriate factors and a timely decision on trust land applications. The final rule contains a process to address the interests of all parties. It specifies the issues that must be addressed in connection with the trust land process, and assures that the viewpoints of state and local governments are heard and given due consideration. At the same time, the rule requires the Department to act upon completed trust land applications within a specified time, thus addressing one of the greatest frustrations of tribes under the current regulations – the failure of the Department to act in a timely manner. In short, the rule provides a process that is fair, which will facilitate informed and timely decisionmaking.

II. General Considerations - At the outset, we would like to briefly address a few considerations regarding the rulemaking process in general and offer some suggestions for a cooperative process to address concerns that have been raised regarding the rule.

1) The rule change was initiated by the prior Administration in response to state and local government concerns, and was not initiated or desired by tribal government leadership. We want to make clear that the development of the land acquisition regulations was never intended to favor Indian tribes. The process began as early as 1996 when the Department came under criticism by state and local governments for the BIA's handling of land to trust applications. As evidenced by the draft rule published on April 12, 1999, (64 Fed. Reg. 17574), the prior Administration intended to shift the balance towards state and local governments by restricting the types of land acquisitions considered to be "on-reservation" and dramatically raising the bar for "off-reservation" acquisitions. Indian tribes were never consulted during the development of the draft rule, and upon publication the draft rule was vehemently and universally opposed by Indian tribes across the country.

Following the publication of the draft rule, the Department held consultations with tribes, states, local governments, and others and received hundreds of substantive comments from all parties. The resulting rule achieved a balancing of viewpoints that is reflected in the fact that neither the tribes nor the states received all they wanted in the final rule. NCAI advocated that the land to trust regulations must embody the three principles cited above and because the final rule does in significant respect advance these three fundamental principles, NCAI supports the final rule. We would note that the final rule maintains the restrictions that states and local governments supported in the draft rule.¹ We would also note that the addition of standards was supported by states and local governments, and that they did not oppose the addition of time frames.

In sum, the states and local governments received what they most sought in the final rule, and tribal governments received at least some consideration of their fundamental principles. NCAI supports the final rule as a generally balanced outcome and because we have no desire to repeat the exhaustive process that led to this final rule. We believe it would be unfair to reopen the process at this point.

2) The Secretary of Interior retains the authority to reject any trust land acquisition that would harm a local government or local community. It is important to recognize that land issues require case by case balancing of the benefits and costs unique to a particular location and community. Because of this, the new regulations list general factors that the Secretary must weigh, but leave the Secretary discretion to reject any particular land transaction where there are harmful effects to the local community. The regulations cannot be expected to anticipate every situation that might arise, but they do provide an ample forum for local communities to raise opposition to a particular acquisition, and they reinforce the Secretary's statutory authority to reject any acquisition that would harm a local community.

¹See, Comments of the National Association of Attorneys General, November 12, 1999.

3) Most land to trust transactions are not controversial. What is often misunderstood is that the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is also necessary for consolidation of fractionated and allotted Indian lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health care clinics that serve both Indian and non-Indian communities, and land for Indian schools.

4) The standards are procedurally fair to both tribes and states. The National Governors Association and several State Attorneys General submitted previous comments on the final rule to the Secretary. Both sets of comments argue against the standards in the final rule because of the evidentiary standards. Their argument that there is no evidentiary standard for the tribal applicant is clearly wrong. The Administrative Procedures Act §556(d) imposes the initial burden of proof on the applicant and requires “reliable, probative, and substantial evidence.” They argue that, once a showing is made that a trust land acquisition will meet one of the purposes specified in the rule, it is unfair to require state and local governments to show that the negative impact is “clear and demonstrable and supported in the record.” We believe that this standard is entirely appropriate.

The final rule properly provides that an application that meets the purposes of the IRA shall be granted. An exception is provided with respect to applications that would do significant or substantial harm. But such harm must be real, and demonstrated in the record. Allowing anything less would mean that a trust land acquisition that would advance the purposes of Congress could be defeated based on a negative impact that is illusory or speculative. If that was the case, any trust land application could be defeated by any opposition, even an opposition lacking any factual foundation. Surely Congress did not intend the beneficial purposes of Indian land restoration to be lost based on wholly unsubstantiated concerns. Requiring a showing of negative impact on the record simply means that if a trust land application is to be denied, the denial must be based on established facts. Basic fairness requires no less.

5) The process for states and local governments to review the request should be refined during the implementation process. §151.5(a) of the final rule provides that states and local governments will receive a detailed notification of a pending land to trust application. §151.5(c) of the final rule provides that the complete land to trust application will be available for review at the local BIA agency or area office, subject only to restrictions on disclosure required by federal law. The National Governors Association and the State Attorneys General have raised concerns about their ability to review the complete land to trust application in a timely manner under this provision. In general, we agree that interested parties should be able to request copies of the documentation. However, because the vast majority of land to trust applications garner little interest and the documents can be extremely lengthy, it would be a wasteful burden on the Bureau of Indian Affairs to require the agency to automatically send copies of the documents. It would be a better use of the BIA’s limited time and resources to send the documentation upon request.

We do not believe that changes to the final rule are necessary to address this concern. The Freedom of Information Act provides the authority for any interested party to request documents from the Bureau of Indian Affairs, and the recent Supreme Court decision in Interior v. Klamath Water Users has underscored that tribal documents submitted to the federal government are subject to disclosure. We believe that the Department should address this issue during the implementation process by consulting with tribal, state and local governments and then providing appropriate instructions to BIA officials involved in processing of land to trust.

6) The Tribal Land Acquisition Area Provision is authorized under the IRA, and serves a useful administrative function for those tribes which have the least lands. Some commentators argue that the Tribal Land Acquisition provision has no legal authority and should be deleted. This concern has no merit. The TLAA provision is plainly based on the same legal authority – section 5 of the IRA – as the other portions of the rule. Section 5 of the IRA authorizes the Secretary to acquire land either on or off reservation equally. The TLAA provision does nothing more than establish a procedure under which certain off-reservation acquisitions would be considered under the on-reservation procedures, and judged according to the on-reservation standards. Clearly there is no violation of the statute.

The final regulations place the heaviest burden for land acquisition on those tribes who no longer have a reservation and have little or no trust land, because any acquisition will be considered under the stringent off-reservation standards. The TLAA provision attempts to ameliorate this slightly, but in essence the TLAA provision provides only a measure of administrative convenience. The procedures and standards for establishing a TLAA are essentially similar to the procedures and standards for an off-reservation acquisition, so the provision is merely an aid in processing the multiple number of acquisitions that may be necessary to build an adequate land base for a tribe that has little or no land.

Moreover, the TLAA serves an important federal interest in promoting continuous blocks of tribal lands and decreasing conflicts caused by checkerboard jurisdiction patterns. The TLAA process would also allow state, local and tribal governments to engage in long-term land use planning. At the same time, the TLAA provision is limited – as it does not apply to all tribes, and it requires a nexus between the tribal population and its location on the one hand and the area of the TLAA on the other. The procedures and standards for obtaining approval of a TLAA are rigorous – and include full participation by state and local governments. The TLAA is limited in effect – as it does not purport to create any reservation status for any tribe. In short, the TLAA provision is an authorized and beneficial provision, establishing a useful administrative approach for dealing with those tribes which have the least lands.

7) The final rule properly encourages local consultation without abandoning the federal-tribal relationship. Some commentators have suggested that the regulations include a provision requiring consultation, negotiations, or even agreements between tribes and state or local governments on trust land applications. Tribal leaders have also discussed the development of a consultation process, knowing that this is often the best course for resolving issues and moving forward in a manner that builds stronger community relations.

NCAI views the final rule as already containing sufficient incentives for negotiations and agreements between tribes and state and local governments. The rule contains an expansive list of issues that must be addressed by tribes in connection with their trust land applications – ranging from environmental issues to zoning to the provision of utilities. In many circumstances, development of an effective application, which adequately addresses the required issues, will as a practical matter mean that the tribe will consult with the state and local governments. Indeed, it is clear that under the final rule, a tribe that consults with state and local governments will often be in a position to submit a stronger trust land application.

At the same time, requiring particular forms of consultation or agreements as a formal matter could undermine the rule. First, a formal consultation requirement, unless strictly limited by time, would undermine one of the most significant advances in the final rule – the imposition of a fixed time requirement for agency action. Second, a formal consultation or agreement requirement could become an effective veto. NCAI is extremely concerned that a requirement in the rule mandating consultation or agreements with local governments would simply become a mechanism for stopping all trust land applications. Tribes are all too familiar with required agreements – in the context of the Indian Gaming Regulatory Act and the Native American Housing and Self-Determination Act – and the experience has been most frustrating. In far too many cases, opponents use these kinds of mechanisms not to seek fair accommodation, but rather to impose their will on the tribes by failing to negotiate and thereby creating an impasse.

Acquiring land in trust is a part of a unique federal relationship with Indian tribes under the U.S. Constitution that has been delegated exclusively to the Secretary. The final rule appropriately provides that state and local governments may be heard, and their views considered, in the process. But to go beyond that, and to require state and local concurrence, would undermine the role of the federal government in Indian affairs in a manner not authorized by Congress.

8) A Task Force to facilitate a dialogue on trust land acquisition matters would be beneficial. The process of revisiting the trust land acquisition regulations has been ongoing for some years. The Department, as well as the tribes, states, and local governments, share an interest in seeing the process come to an end. There needs to be certainty regarding the procedures and standards for taking land into trust. The final rule provides a fair process that will facilitate informed and timely decisionmaking under meaningful standards. It is time for the Department to move forward and make the final rule effective.

At the same time, we recognize that in matters of this kind, there is always room for improvement. Trust land acquisition has many components, with many legal and policy issues involved as well as national, regional, and local perspectives. There are also practical considerations concerning implementation of the trust land acquisition process. As we see it, on all of these matters, additional communication would be beneficial – both in terms of seeking a common understanding of the issues, and ultimately finding ways to improve the trust land acquisition process. For this reason, NCAI would support the creation of a Task Force of Tribes, States, the Department, and other interested parties to work toward a long term consensus on issues regarding taking land into trust. We urge the Department to facilitate the creation of such a Task Force once the final rule has become effective.

III. The intent of the IRA is the basis for the rule.²

The final rule implements section 5 of the IRA, and accordingly must be informed by, and give effect to, the language and purposes of the IRA. The IRA was a landmark measure, designed to stop the terrible decline of tribal life in the United States caused by the allotment policy, and to replace allotment with a policy fostering an increased measure of tribal self-government and self-sufficiency. In the context of land, this meant calling a halt to the breakup of tribal landholdings, and providing a mechanism (including that provided in section 5) to help restore some of the land lost by tribes to trust status. The premise of the IRA was that the federal government, through the allotment policy, was largely responsible for the abiding poverty and despair throughout Indian country, and that only by enabling tribal governments to become self-governing on economically sustainable lands, could the life of the Indians be significantly improved. While the IRA had many facets, the restoration of land was central to its vision of increased tribal self-sufficiency.

The long history of Indian land losses is well known. From the very first days of the Republic, Indian tribes gave up large areas of land to the United States, which in return assumed the duty of protecting the tribes in those retained. See Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943). But despite the government's trust obligation to protect Indian landholdings, tribes continued to suffer devastating land losses at the Government's hands. This was particularly so during the Indian allotment era, when over two-thirds of tribal lands passed out of Indian ownership, leaving thousands of Indian people homeless and the remainder living on the poorest of their former lands. Between 1887, when the General Allotment Act was enacted, and 1934, Indian land holdings were reduced by 90 million acres, leaving but 48 million acres in Indian hands. Allotment further reduced the value of Indian lands by at least 85 percent, with the most valuable land passing into non-Indian ownership. To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 Before the Senate Comm. on Indian Affairs, 73rd Cong., 2d Sess., 30-31 (1934) (hereafter "Senate Hearings")(testimony of Commissioner of Indian Affairs John Collier). The destruction of tribal economies, institutions, culture and communities followed directly from the decimation of the tribal land base.

Congress was aware of these problems and fully intended to reverse these tribal land losses when it enacted the Indian Reorganization Act, 25 U.S.C. §§461-479. Congressman Howard, the Chairman of the House Committee on Indian Affairs and co-sponsor of the bill that was enacted as the IRA, described the "staggering" losses of Indian lands and condemned prior federal Indian policy as "a form of legalized misappropriation of the Indian estate" for which the United States Government was "morally responsible." 78 Cong. Rec. 11,727-28, 11,732 (1934). On the floor of the House on the day the bill was passed, he provided a comprehensive explanation of the Act's purposes and its historic context:

² NCAI would like to thank Bill Perry of Sonosky, Chambers, Sachse, Endreson & Perry for his assistance in drafting the sections on background and legal analysis of the IRA and the Trust Land Acquisition Rule.

It is no longer necessary to indulge in theoretical arguments for or against the allotment idea. The cold fact of what has happened to the Indians and their lands under that act conclusively proves that allotment was a costly tragedy both to the Indians and to the Government. The Indians themselves were not consulted in the passage of this act, and once it was enacted they feared and opposed it. Allotment was literally forced upon them against their wishes both in the adoption of the act and in its subsequent application to the various reservations.

The allotment act, so far from being a means of civilizing the Indians, soon became a perfect tool for the capture of Indian lands. As soon as the Indians had begun to receive their unrestricted patents, they flocked in great numbers to the real-estate agents and the land seekers and parted with their deeds for small sums of ready cash. Or if the original allottee had died before his trust period expired and if he had numerous heirs, lineal and collateral, as was usually the case, it became necessary to sell the land in order to partition the estate. As if this method of capturing Indian lands were not working fast enough, the Government adopted the further policy of disposing of the so-called "surplus" lands of the allotted reservations. This act of February 8, 1887 (24 Stat. 388), provided the future means for the opening to sale and entry of so-called "surplus" lands left over after all the individual members of the tribe had received allotments.

As I have before stated, the figures on the loss of Indian lands out of Indian ownership in the past 47 years are indeed staggering. Whether or not the original area of the Indian lands was excessive, the land was theirs, under titles guaranteed by treaties and law; and when the Government of the United States set up a land policy which, in effect, became a form of legalized misappropriation of the Indian estate, the Government became morally responsible for the damage that has resulted to the Indians from its faithless guardianship. The land seekers who acquired the Indian lands naturally took the best first, so that which remains is in general the least valuable part of the original Indian estate.

. . . The Indians of many tribes have lost practically every square foot of land they owned. Many reservations have in Indian ownership a mere fragment of the original land, and all the remaining allotted reservations are badly checkerboarded. This process will proceed inexorably on the remaining allotted reservations and, indeed, on the unallotted reservations.

78 Cong. Rec. 11,727-28 (1934) (statement of Rep. Howard).³

Congress also found that the allotment era policies caused the destruction of tribal institutions and the imposition of unwarranted control by the Bureau of Indian Affairs, as well as massive poverty and despair among Indian people. Congressman Howard explained the impact to the House:

Although many thousands of Indians are living in tribal status on the various reservations, their own native tribal institutions have very largely disintegrated or been openly suppressed, and the entire management of Indian affairs has been more and more concentrated in the hands of the Federal Indian Service. The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy – absolutism built up on the most rigid bureaucratic lines, irresponsible to the Indians and to the public; shackled by obsolete laws; resistant to change, reform, or progress; which, over a century, has handled the Indians without understanding or sympathy, which as used methods of repression and suppression unparalleled in the modern world outside of Czarist Russia and the Belgian Congo.

78 Cong. Rec. 11,729.

Indian poverty is reaching an ever lower level. The survey of typical Indian income, which I have previously mentioned briefly, was made during the past winter on reservations in South Dakota, North Dakota, California, Kansas, Montana, and Oklahoma. The average income of \$48 per year mentioned did not include oil

³ Congressman Howard also correctly predicted that Indian lands would continue to be lost as an “inevitable” result of the heirship system. 78 Cong. Rec. 11,728. Commissioner of Indian Affairs John Collier also explained, in hearings held before the House Committee on Indian Affairs in 1934, that these land losses were compounded by secretarial action under which Indians were illegally forced to accept fee patents, following which their lands were quickly mortgaged, taxed, and sold to non-Indians. See Readjustment of Indian Affairs: Hearings on H.R. 7902 before the Committee on Indian Affairs, House of Representatives, 73rd Cong., 2nd Sess. at 52 (1934)(hereafter “House Hearings”). Those losses had not been corrected, id., although they were found illegal by the courts, see United States v. Benewah County, 290 F. 628, 630-32 (9th Cir. 1923), and condemned by Congress, see Act of February 26, 1927, ch. 215, 44 Stat. 1247 (codified at 25 U.S.C. 352a-b).

and mineral royalties paid to a handful of individuals. This per capita income includes not only wages and lease rentals, but the market value of goods produced or consumed. And this income is higher than it would be in normal years, because of unusually favorable employment opportunities in the numerous emergency projects under way in the Indian country.

This poverty contributes largely to the excessive death rate among the Indians, which, in the case of tuberculosis, a disease closely associated with undernourishment, is more than seven times the death rate from tuberculosis among the whole population.

Id. at 11,728-29.

President Franklin D. Roosevelt, in a statement strongly supporting the IRA, shared these concerns:

The continued application of the allotment laws, under which Indian wards have lost more than two thirds of their reservation lands, while the costs of Federal administration of these lands have steadily mounted, must be terminated.

Indians throughout the country have been stirred to a new hope. They say they stand at the end of the old trail. Certainly, the figures of impoverishment and disease point to their impending extinction, as a race, unless basic changes in their conditions of life are effected.

* * *

The Wheeler-Howard bill offers the basis for such cooperation. It allows the Indian people to take an active and responsible part in the solution of their own problems.

I hope the principles enunciated by the Wheeler-Howard bill will be approved by the present session of the Congress.

Letter from President Franklin D. Roosevelt to Burton K. Wheeler, United States Senate (Apr. 28, 1934), reprinted in S. Rep. No. 73-1080, at 3-4 (1934).

Congress and the President saw the IRA as a means not simply of halting the prior federal policies that had so destroyed Indian communities and Indian economies, but reversing the

course that led to those losses.⁴ The IRA is one of the most important pieces of Indian legislation in American history. It made a change in federal Indian policy intended “to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.” Morton v. Mancari, 417 U.S. 535, 542 (1974). By the Act, Congress sought to revitalize and strengthen the institutions of tribal government, see Morton, 417 U.S. at 543, Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5 (1987), Fisher v. District Court, 424 U.S. 382, 387 (1976), and “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism” so that a “tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people,” Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-52 (1973) – principles which have served as the foundation for federal Indian policy in the modern era of Tribal Self-Determination. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 & n. 10 (1980).

Restoration of land to tribal ownership was central to the overall purposes of the IRA. Congress consistently recognized that the restoration of tribal land bases by taking land into trust was essential to tribal self-determination. As Congressman Howard succinctly stated during the House consideration of the measure, “[l]and reform and in [sic] a measure home rule for the Indians are the essential and basic features of this bill.” 78 Cong. Rec. 11,729 (1934).

The IRA contained a number of provisions to implement land reform. The Act halted allotment, 25 U.S.C. § 461, extended indefinitely the trust status of tribal and Indian land, 25 U.S.C. § 462, and, most significantly, vested the Secretary of the Interior with broad authority to acquire lands and any interests in lands, in trust for tribes and Indians, “within or without existing reservations,” as well as authority “to proclaim new Indian reservations,” 25 U.S.C. § 467. Congress authorized placement of tribal and individual Indian land into trust, based on a finding that fee simple ownership of lands by Indians was inadequate to achieve federal policies for “encouraging the preservation of Indian communities” or providing the Indians “with the benefits intended.” United States v. John, 437 U.S. 634, 646 (1978). Congressman Howard described these land reform measures:

Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially. . . .

I have already said that there are more than 100,000 landless Indians in America today, and in addition many of the reservations are so riddled by alienation that their economic use for Indian grazing is impossible. This program would permit the

⁴ As the Supreme Court recently noted, the IRA dramatically shifted federal Indian policy. Cass County v. Leech Lake Band, 524 U.S. ___, 141 L. Ed. 2d 90, 96 (1998).

purchase of land for many bands and groups of landless Indians and would permit progress toward the consolidation of badly checkerboarded Indian reservations, as well as provide additional agricultural land to supplement stock grazing or forestry operations. Considering the magnitude of the losses of Indian land brought about by the past 50 years of incompetent Federal guardianship, the purchase program here proposed is indeed a very modest restitution; and it is moreover an investment that will many times repay itself by taking Indians off the relief and ration rolls.

78 Cong. Rec. 11,730 (1934).

The objective of the IRA's land reform was restitution for the severe damage done to the Indians as a result of what Congressman Howard termed the United States' "faithless guardianship." Summarizing "the ultimate goals of the policy embodied in this bill," Congressman Howard explained:

It seeks in the long run to build up Indian land holdings until there is sufficient land for all Indians who will beneficially use it.

It seeks the functional and tribal organization of the Indians so as to make the Indians the principal agents in their own economic and racial salvation

* * *

In carrying out this program, the Indian Service will become the adviser of the Indians rather than their ruler. The Federal Government will continue its guardianship of the Indians, but the guardianship envisaged by the new policy will constantly strengthen the Indians, rather than weakening them.

. . . This Congress, by adopting this bill, can make a partial restitution to the Indians for a whole century of wrongs and of broken faith, and even more important – for this bill looks not to the past but to the future – can release the creative energies of the Indians in order that they may learn to take a normal and natural place in the American community.

Id. at 11732.

As this history reflects, a primary objective of the IRA was the restoration of lands to tribal

ownership as a means of promoting tribal-self determination.⁵ The IRA reflected a fundamental shift in federal Indian policy – away from the devastating policy of allotment, in favor of a new policy of promoting the governmental, cultural and economic advancement of tribes, with land acquisition as an important component of the new policy.

IV. Trust land acquisition is vitally important today.

This historical perspective – including both the devastating consequences of tribal land losses and the intent of Congress in the IRA – provides strong support for taking land into trust for tribes. Despite this, opponents sometimes raise the question – why should land be taken into trust today? While there are many reasons, one part of the answer is that tribes need trust land today for many of the same reasons they did when the IRA was enacted. We would encourage the Secretary to spend some time reviewing maps of allotted and fractionated Indian reservations. In addition, tribes today need lands taken into trust to move toward the goals of tribal self-government and self-sufficiency, which form the core of the Self-Determination policy.

The devastating consequences of allotment on Indian country are unfortunately all too present today. The Department is well aware of this with respect to its own dealings with a range of Indian issues, including the management of Indian trust lands and trust funds – where the problems of fractionated heirship arising from allotment remain essentially intractable.

In a similar manner, the problems for the tribes caused by allotment have by no means been alleviated. While a few tribes have made notable advances, it remains the case that nationwide, Indian tribes today continue to face conditions that are far worse than any other group of Americans. By whatever measure – income, unemployment, housing, crime, welfare dependence, sickness, mortality, or education – the standard of living for Indians is far below what it should be, and far below what all other Americans enjoy. These ongoing deficits in Indian country were underscored by Senator McCain a few years ago:

Indian families live below the poverty line at rates nearly three times the national average. Nearly one of every three Native

⁵ Although the IRA has been in effect for more than 65 years, to date only a small fraction of the lands lost due to allotment have been returned to tribal ownership. 64 Fed Reg. at 17577 (citing Felix S. Cohen's, Handbook of Federal Indian Law 138 (1982 ed.); BIA's Annual Report for Indian Land, 1996). Indian land losses have continued since passage of the Act. For example, a very substantial amount of Indian trust lands passed out of Indian ownership in the early 1950s, during the Termination Era, when Commissioner of Indian Affairs Dillon Meyer advocated for, and administratively implemented of policy tantamount to illegal "forced fee patents." See Felix S. Cohen, "The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy," 62 Yale L.J. 348 (1953). And the legacy of the allotment policy, which has deeply fractionated heirship of trust lands, means that for most tribes, far more Indian land passes out of trust than into trust each year.

Americans lives below the poverty line. One-half of all Indian children on reservations under the age of 6 are living in poverty.

On average Indian families earn less than two thirds the incomes of non-Indian families. As these statistics indicate, poverty in Indian country is an everyday reality that pervades every aspect of Indian life. In this country we pride ourselves on our ability to provide homes for our loved ones. But in Indian country a good, safe home is a rare commodity.

There are approximately 90,000 Indian families in Indian country who are homeless or underhoused. Nearly one in five Indian homes on the reservation are classified as severely overcrowded. One third are overcrowded. One out of every five Indian homes lacks adequate plumbing facilities. Simple conveniences that the rest of us take for granted remain out of the grasp of many Indian families.

Indians suffer from diabetes at 2 ½ times the national rate. Indian children suffer the awful effects of fetal alcohol syndrome at rates far exceeding the national average. Perhaps most shocking of all, Indian youth between the age of 5 and 14 years of age commit suicide at twice the national rate. The suicide rate for Indians between the ages of 15 and 24 is nearly three times the national rate.

141 Cong. Rec. S11881 (August 8, 1995)(Statement of Sen. McCain). Senator McCain's statement is strikingly reminiscent of Congressman Howard's description of deplorable conditions in Indian country during the debate on the IRA some 60 years earlier. See pages 5-6 above. The fundamental point is that the conditions that gave rise to the IRA and the need for Indian trust land acquisitions are still with us today.

Moreover, taking land into trust not only furthers the unfulfilled purposes of the IRA, but also advances the policy of self-determination that has guided every Administration for the last 30 years. Building on the principles articulated in the IRA, the Self-Determination policy seeks to promote local tribal solutions to tribal issues, by giving tribes the option of assuming tribal administration of programs formerly run by the federal government, and by fostering tribal economic self-sufficiency. The Self-Determination policy was an initiative of President Nixon, who outlined the policy in his seminal message to Congress in 1970. As President Nixon stated:

The first Americans - the Indians – are the most deprived and most isolated minority group in our nation....

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands, and denied the opportunity to control their own destiny....

... The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

The American Indians – Message from the President of the United States, H. Doc. 91-363, – Cong. Rec. H 6438 (July 8, 1970). President Nixon’s message advanced the principle that tribes should have the opportunity to run their own programs and schools, free from the dictates of the federal bureaucracy. The message also stressed the importance of economic advancement of tribes, stating that it is “critically important that the federal government support and encourage efforts which help Indians develop their own economic infrastructure.” *Id.* at H 6440. ⁶

These goals of tribal governmental self-determination and economic self-sufficiency have been carried forward in the years since President Nixon’s Message - and every President since Nixon has reaffirmed the importance of the Self-Determination policy. Moreover, Congress has expressly reinforced the principle that providing a viable tribal land base remains a significant part of current federal Indian policy. Thus, in an effort to address the need of tribes to secure interests in lands that became fractionated through allotment, Congress enacted the Indian Land Consolidation Act in 1983. 25 U.S.C. §§2201 *et seq.* As part of that Act, Congress provided that the authority of the Secretary to take lands into trust under section 5 of the IRA applies to “all tribes.” 25 U.S.C. 2202. In addition, just this past year, in adopting significant amendments to the Indian Land Consolidation Act, Congress expressed that it is the policy of the United States to

- (4) to promote tribal self-sufficiency and self-determination; and
- (5) to reverse the effects of the allotment policy on Indian tribes.

Public Law 106-462, 114 Stat. 1991, section 102. As these provisions reflect, land acquisition remains an important feature of the Self-Determination policy.

Taking land into trust not only furthers the purposes of the IRA and the Self-Determination policy, it also advances important tribal interests. Tribes need land in trust for a wide range of beneficial purposes – the overwhelming majority of which, contrary to popular myth, have nothing to do with gaming. Among other things, tribes seek to have lands taken into trust to protect or promote their historic, cultural, self-government, economic and conservation interests in lands.

Historical interest. Tribes have strong historic ties to certain lands where their ancestors lived and undertook traditional cultural and religious practices, including hunting, fishing and

⁶As Congress expressed in the Indian Self-Determination Act, “the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.” 25 U.S.C. 450a(b).

gathering, as well as ceremonial uses. These may be lands where the tribe lived in aboriginal times, or lands that were part of a former reservation. Restoring such lands to trust status is important to preserve the link with the historic past and to assure that the lands are properly acknowledged and preserved as part of the permanent homeland of the Tribe.

Cultural interest. Tribes have a strong interest in areas where religious or burial sites are located. Protection of these sites through trust ownership is an important tribal value.

Self-government interest. Tribes today carry out a broad range of services for their members in the exercise of the Self-Determination policy. Tribes run schools and health clinics, administer housing for the needy, and provide court, law enforcement, and numerous other key governmental services. Much of the land taken into trust for tribes directly furthers these and other Self-Determination functions, by providing appropriate sites for tribal schools and other tribal facilities. Certainly tribes have an important interest in trust ownership of the land where tribal schools, clinics and tribal government offices are located.

Economic interest. As noted above, the IRA and the Self-Determination policy both support the acquisition of trust lands to provide a viable land base for tribes. Taking land into trust can provide an opportunity to address the economic needs of the tribes.

Conservation interest. Many tribes have a special connection to the lands and natural resources that extends from traditional times. Today, this often manifests itself in tribal efforts to protect their resources from the pressures of outside development. In such instances, taking land into trust provides a mechanism for tribes to protect their lands in the interests of conservation.

Many of the trust land applications of tribes are not opposed by any party. To the contrary, in many instances, the benefits of having the land taken into trust are recognized by all concerned. Trust land acquisition furthers the purpose of the IRA, providing a partial remedy to the historic loss of lands caused by the allotment policy. At the same time, trust land acquisition advances the current policy of Self-Determination, by providing tribes with lands they need for a broad range of beneficial uses. In short, a confluence of historic, legal, and policy considerations supports taking land into trust for tribes today.

V. The final rule, as published on January 16, 2001, should become effective.

A. The structure of the final rule conforms with the intent of the IRA. The final rule provides a mechanism for taking land into trust, consistent with the thrust of the IRA that trust land acquisition is necessary to remedy the losses suffered by tribes. The new rule addresses on-reservation acquisitions, in part to enable tribes to consolidate their on-reservation lands in economically useful blocks – one of the purposes stressed in the history of the IRA. The new rule addresses off-reservation acquisitions, consistent with the recognition in the IRA legislative history that many tribes had land losses that left them without viable opportunities on-reservation. And the new rule establishes a mechanism for Tribal Land Acquisition Areas, to provide a means for tribes with the smallest remaining land bases (or no land base at all) to

be afforded the benefits of the on-reservation provisions – reflecting the concerns in the IRA history with those tribes that had lost the most. In short, the rule frames the issue in much the same way the IRA’s legislative history describes it – that the adverse impact of allotment was felt by different tribes in various ways, and that land restoration is a central feature for addressing those broad-ranging and diverse impacts.

B. The standards in the final rule are balanced and reasonable. One of the most significant features of the final rule is that it provides clear standards regarding the acquisition of lands in trust. Standards are important to ensure basic fairness to all interested parties, by providing notice of the basis on which trust land decisions will be made. Everyone is entitled to know, in advance, the criteria under which their submissions will be evaluated. In addition, standards provide guidance to the Department – to assure that decisions on trust land applications are made in a reasonable and consistent manner. Further, standards provide support for the Secretary’s decisionmaking – which will be invaluable in connection with judicial review of the Secretary’s decisions.

The standards contained in the final rule fulfill these purposes. Those standards provide notice to the parties and guidance to the Secretary. Moreover, those standards provide a common sense approach to trust land acquisition – providing a framework for taking land into trust to advance the purposes of the IRA and Self-Determination, while at the same time providing a basis for declining to take land into trust in appropriate circumstances.

1. On-reservation standard. For on-reservation acquisitions, the final rule provides that if an application to have land taken into trust is complete, the Secretary “will” take the land into trust “if we [the Secretary] determine that the application facilitates tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection...” Section 151.10(a). But the regulations go on to provide that, even if this standard is met, the Secretary “may” not take land into trust if doing so “will result in severe negative impact to the environment or severe harm to local government.” Such harm must be “clear and demonstrable and supported in the record.” Section 151.10(b).

This is an eminently reasonable standard. It provides that if a trust land application meets a specified beneficial purpose (purposes which comport with the history of the IRA), then the application will be granted, unless it will do significant harm. As a practical matter this makes sense. For example, the Standing Rock Sioux Tribe is a tribe with over 10,000 members and a large reservation in North and South Dakota. More than two-thirds of the Tribe’s Reservation trust lands were lost to allotment early in this century. Another 56,000 acres – the best remaining lands of the Reservation– was lost when land along the Missouri River was flooded for the Oahe Dam in the late 1950's. Standing Rock is today a relatively poor tribe economically. Its land acquisitions are largely for two purposes – to consolidate land so it can be used in a reasonable manner for grazing purposes, and to provide land for housing for its people. As the new rule indicates, these are positive uses, consistent with the underlying policy of promoting tribal self-determination and economic progress. In these circumstances, it is reasonable for the Secretary to take lands into trust for the tribe, and that is the basic approach taken in the new rule.

At the same time, the new rule suggests that there can be various circumstances where a

negative decision would be appropriate on-reservation – such as if the Tribe wanted to take land into trust for a toxic waste site, near an endangered species habitat. To support such a determination, an appropriate showing is required by the rule, so that the harm must be demonstrable in the record. But, in the absence of such a showing, it makes sense to take land into trust on-reservation, where doing so will fulfill one of the beneficial purposes identified in the rule.

2. Off-reservation standard. The off-reservation standard is somewhat more complex. As a threshold matter, a tribe seeking to have land taken into trust off-reservation must meet a significant burden of providing documentation addressing a wide range of potential impacts – regarding jurisdiction, zoning, taxes, utilities and more. Once the Tribe meets that requirement and an application is complete, the final rule provides that the Department “will” accept land into trust off-reservation if 1) the acquisition will “facilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection,” and 2) the Department determines that the benefits to the tribe outweigh “any demonstrable harm to the local community.” Section 151.14(a). Even if this standard is met, the Department may disapprove an application if it would cause 1) “severe negative impacts to the environment,” 2) “significant harm to the local community,” shown by “clear” evidence in the record, or 3) the BIA to be unable to fulfill law enforcement or other responsibilities. Section 151.14(b). Beyond this, the final rule provides that the location of an off-reservation parcel is a factor in the Department’s determination. If the parcel to be acquired is in a different state than the tribe’s reservation, the tribe’s justification will be subject to “greater scrutiny.” The greater the distance of such a parcel from the tribe’s reservation, the more the benefits to the tribe will be subjected to “greater scrutiny.” Section 151.14(b)(2). And, the greater the distance of such a parcel from the tribe’s reservation, the more the concerns expressed by state and local governments will be “given greater weight.” Section 151.14(b)(3).

This standard for off-reservation acquisitions provides a basic balancing test for determining whether to approve trust land applications. Like the on-reservation standard, this standard starts with the basic question – will the application fulfill one of the basic purposes of the tribal self-determination, economic development etc? If so, the issue then shifts to whether the benefits to the tribe are outweighed by harm to others. Under the final rule, a variety of specific matters, including environmental concerns, law enforcement and the distance from the reservation, are part of the consideration. Significantly, the final rule requires that opposition to a trust land application be based on evidence and facts demonstrated in the record. This ensures that the Secretary will determine whether local opposition (if it exists) is based on defined considerations, or is merely a pretext, as sometimes occurs.

Off-reservation acquisitions are important for tribes which historically lost significant amounts of land, and have an insufficient remaining land base. In sum, properly construed – and, in particular, affording due weight to the importance of land to tribes as reflected in the IRA – the standard in the final rule provides a clear and fair basis for addressing land acquisitions off-reservation.

3. Tribal Land Acquisition Area standard. The final rule contains a third standard – for the approval of Tribal Land Acquisition Areas. In making its determinations on Tribal Land

Acquisition Areas, the BIA will look to a number of factors. Section 151.23. First, if Congress has directed the Secretary to take land into trust for a particular tribe (without directing which parcels of land), that is a factor strengthening the application for approval of a Tribal Land Acquisition Area. Second, there must be a reasonable connection between the amount of land the tribe proposes for a Tribal Land Acquisition Area and the basic needs of the tribe. Third, the connection of the tribe to the lands is a factor. Lands to which the Tribe has a strong cultural, historic or legal connection will be more likely to be granted Tribal Land Acquisition Area status. And fourth, the impact of jurisdictional changes will be considered. This includes matters such as law enforcement, water, sewer and garbage services, as well as the more general notion that the “adverse impacts on local governments and communities are reasonable compared to the benefits flowing to the applicant.” Section 151.21(e)(3). Again, if due consideration is given to the tribal interest in land – and the TLAA standard expressly acknowledges the importance of the cultural, historic and legal connection of tribes to the lands under consideration – this standard should produce fair results.

In short, all three standards in the final rule are clear and reasonable, and provide a fair basis for the Secretary’s decisionmaking.

C. The final rule provides a fair process to assure that all interests are considered. The final rule provides opportunities for all concerned parties to be heard. State and local governments receive notice and an opportunity to comment prior to the Secretary’s decision, and may seek judicial review prior to land going into trust. The procedures established in the final rule assure full and fair consideration of all viewpoints.

In the on-reservation context, an application must cover matters including the tribe’s need for the land, intent with respect to use, title information, documentation to comply with NEPA, hazardous substances documentation and more. Section 151.9. Once an application is received, the Department notifies the affected state and local governments, who then have 30 days to comment. After preliminary title work is done, and the package is complete, the Department makes its determination on whether to take the land into trust. The Department then defers its action, and publishes a notice in the federal register – giving any affected party 30 days to seek judicial review of the Department’s decision. 151.5(c)(2). These procedures are broadly participatory – specifically providing notice and an opportunity to comment to state and local governments, as well as providing for judicial review.

In the off-reservation context, the process is even more detailed. The final rule requires a tribe seeking to have land taken into trust provide the Department with documentation regarding a wide range of matters, including a) why the tribe needs the land and why its current land base is insufficient, b) how the land has been used and will be used in the future, c) a business plan for proposed economic uses, d) details regarding location in relation to the reservation and other factors, e) the impact of taking land into trust on the local tax rolls, f) zoning issues, g) law enforcement, h) fire and emergency medical services, i) traffic, j) sanitation and trash, k) utilities, l) any existing cooperative agreements, and m) any provisions for the tribe to make payments in lieu of taxes. Section 151.12 . Again, notice is provided to affected state and

local governments, but in this connection, they are afforded a 60 period to comment ⁷ and another notice is provided following a determination, to give parties 30 days to seek judicial review, prior to the land actually being taken into trust.

These requirements assure that all points of view and all issues will be fully considered in connection with each trust land application. State and local governments are full players in the process, and no land may be taken into trust without giving them both an opportunity to comment in detail and an opportunity to seek judicial relief if the Secretary disagrees with their comments.

D. The final rule provides a timeline for Department action on trust land applications.

Many tribes have experienced long, frustrating delays in the fee-to-trust process. The new rule includes a deadline designed to make the process move forward more quickly. The rule provides that once an application to have land taken into trust is complete, the BIA shall issue a decision on the application “within 120 working days after issuance of the notice of a complete application.” Section 151.5(f)(2). While perhaps more could be done to expedite the trust land acquisition process, this provision does for the first time fix a required deadline. Imposing a deadline on the BIA’s decision to accept land into trust is a significant step forward – as all parties are entitled to a decision within a specified period, and undue administrative delay will no longer be the norm.

E. The final rule takes a balanced approach. As described above, there is much to recommend the final rule - which overall provides a reasonable framework for taking land into trust for tribes. At the same time, it remains the case that the final rule did not incorporate some of the important points advocated by tribes in comments regarding the proposed rule.

1) Contiguous lands. In comments to the Department on the proposed rule, Indian tribes strongly and universally supported treating contiguous lands in the same manner as on-reservation lands. Consolidating tribal landholdings, through the trust acquisition of contiguous lands, makes sense from the standpoint of the IRA’s purpose of promoting the economic revitalization of the tribes. For many tribes – particularly those that have only limited land bases today – the only viable option for restoring a tribal homeland in a practical manner is through the acquisition of contiguous lands. Despite the importance of contiguous lands to the restoration efforts of many tribes – and despite the fact that the current regulations provide for contiguous lands to be treated in the same manner as on-reservation lands – the final rule provides less favorable treatment to contiguous lands.

2) Alaska tribes. NCAI strongly urged the Department to support the right of Alaska tribes to participate to the same extent as other tribes, in the trust land process. Although the preamble indicates that the Department will revisit this matter over the

⁷ The process for approval of Tribal Land Acquisition Areas is much like that for particular off-reservation parcels.

next three years, the final rule itself does not apply the trust land process to Alaska tribes.

3) Former Reservation and Treaty Rights lands. NCAI urged the Department to afford special consideration in the trust acquisition process to off-reservation lands as to which the tribe has a special ongoing interest. The Tribal connection with lands is typically a strong and enduring one. Tribes have aboriginal homelands which may contain important historical, cultural or religious sites. Some tribes have former reservations, as to which the tribe may have a range of interests. Many tribes have Treaty rights that protect their ongoing right to hunt, fish or gather on particular lands. Some tribes have current Indian communities where tribal members have long lived, but which were not protected by a treaty or formal reservation. In each such situation, the tribe has a heightened interest in the lands in question. Apart from the context of the Tribal Land Acquisition Areas, the final rule does not expressly recognize the importance of certain off-reservation lands to tribes.

4) The burden of addressing potential issues. NCAI urged the Department to reduce the undue burden on tribes in connection with the trust land application process in three ways. First, we sought clarification that tribes would not be required to submit information that is clearly not pertinent to a particular application – like information on utility services, where the trust land is to be used as a bison range. Second, we sought language providing that tribes would be required to address the full range of issues – including jurisdiction, land use, zoning, law enforcement, utilities, sanitation and traffic – only to the extent those matters were in controversy in the particular application. Requiring tribes to address issues not in controversy is burdensome and inefficient. Third, we sought to limit the burden on tribes to submit information uniquely in the custody of other parties – like the impact on local governments. The final rule did not accept the tribes’ position on these points.

Despite these not insignificant shortcomings, NCAI supports making the final rule effective. That is so for several reasons. First, the trust land acquisition issue has been the subject of extensive scrutiny by the Department over the last few years, and it is time for the process to come to a close. Tribes want an end to the existing uncertainty about the applicable standards and procedures, so that the Department can begin to move forward expeditiously with trust land applications. Tribes need certainty regarding the final rule to enable them to plan effectively for their futures with respect to land acquisition. Second, the process leading to these regulations was not only lengthy, but also comprehensive. All sides had a full opportunity to be heard, and the final rule takes into consideration all viewpoints. While neither side finds the rule entirely satisfactory, the final rule is characterized by balance – between the purposes of the IRA and Self-Determination which support tribal land acquisition, and the right of all parties to have their interests heard and considered in the decisionmaking process. Third, the fundamental priority for NCAI is ensuring that the trust land acquisition process moves forward based on the three principles outlined in the introduction to these comments – 1) that the purposes of the IRA are carried out, 2) that there are fair standards, and 3) that there is a reasonable process and fixed timelines for taking land into trust. The final rule advances these principles, as we discuss above. For these reasons, we urge the Department to make the final rule effective.

VI. The legal arguments of opponents of the final rule should be rejected.

We have reviewed many of the comments submitted to the Department during the comment period prior to the issuance of the final rule, as well as comments submitted to the Department after it announced that it was delaying implementation of the final rule. The adverse comments form two basic categories. First, there are comments regarding specific provisions of the final rule. As noted above, the fact that state and local governments – like tribes – did not find every aspect of the final rule to their liking underscores the balance achieved by the final rule. We have addressed a number of the adverse comments in this category above.⁸ Second, there are some comments attacking the legal basis for the final rule. We address those arguments next.

A. Section 5 of The IRA does not violate the non-delegation doctrine.

The state attorneys general suggest that the Secretary may lack authority to acquire land in trust on the theory that Section 5 of the IRA is an unconstitutional delegation of legislative power, citing South Dakota v. U.S. Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995). State AG letter, p. 2. The nondelegation doctrine argument is without merit for a number of reasons.

First, the Eighth Circuit's decision in South Dakota was subsequently vacated by the Supreme Court, 519 U.S. 919 (1996) and so has no force or effect. Other courts to consider section 5 of the IRA have rejected challenges to the Secretary's authority to acquire land under the act, including a challenge based on the nondelegation doctrine. United States v. Roberts, 185 F.3d 1125, 1136-37 (10th Cir. 1999), cert. denied, 120 S.Ct. 1960 (2000).⁹ The Supreme Court, while not directly addressing the nondelegation issue in this context, has relied on the Secretary's authority under section 5 of the IRA in a manner that would make no sense if the provision was invalid under that doctrine. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 146, 157-58 (1973).

Moreover, the Eighth Circuit's opinion in South Dakota was simply wrong. The controlling precedent, (overlooked by the Eighth Circuit), is the Supreme Court's decision in United

⁸ One comment by the State Attorneys General concerned the relationship between the part 151 rule and section 20 of the Indian Gaming Regulatory Act. State AG letter, pp. 10-11. The letter suggests that it is important that there be an understanding that compliance with the part 151 rule and with section 20 of IGRA are separate matters. We agree with that comment. At the same time, in connection with gaming on after-acquired lands, the law already requires compliance with section 20 of IGRA independent of part 151. No change is needed in the final rule to accomplish that result.

⁹ See also Chase v. McMasters, 573 F.2d 1011 (8th Cir.), cert. denied, 439 U.S. 965 (1978), (rejecting a city's claim that the Secretary lacked authority to accept land into trust that was already owned by an individual Indian in fee); State of Florida v. United States Dep't of the Interior, 768 F.2d 1248, 1252 (11th Cir. 1985); City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 162 (D.D.C. 1980); City of Tacoma v. Andrus, 457 F. Supp. 342, 345-46 (D.D.C. 1978); accord United States v. 29 Acres of Land, 809 F.2d 544, 545 (8th Cir. 1987); Langley v. Edwards, 872 F. Supp. 1531, 1536 n. 5 (W.D.La. 1995).

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States v. Mazurie, 419 U.S. 544 (1975). In Mazurie, the Supreme Court upheld a statute which delegated to Indian tribes the power to prohibit or regulate alcoholic beverages in Indian country, violations of which are enforced by federal criminal law, 18 U.S.C. §§ 1154, 1161. In so holding, the Court considered and rejected an argument that the statute was an invalid delegation of legislative power under Panama Refining Company v. Ryan, 293 U.S. 388 (1935). The Court reasoned that the limitations imposed by the nondelegation doctrine "are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," and found that the Indian tribes possessed such independent authority sufficient to support a delegation of Congress' powers under the Indian Commerce Clause. Mazurie, 419 U.S. at 556-58.¹⁰

Under Mazurie, the nondelegation doctrine has no application to section 5 of the IRA because the Executive branch has independent constitutional authority in Indian affairs.¹¹ Congress has historically delegated to the Secretary broad discretionary authority over matters involving Indians, and this authority has uniformly been upheld by the Supreme Court.¹² The Supreme Court has further recognized that it is the Executive branch, through the Secretary of the Interior, which bears primary responsibility for fulfilling the United States' trust obligations to Indians. United States v. Creek Nation, 295 U.S. 103, 109, 110 (1935); Cramer v. United States, 261 U.S. 219, 227 (1923); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919). The Court has also repeatedly upheld the President's authority to create Indian reservations by Executive order, see Arizona v. California, 373 U.S. 546, 598 (1963); United States v. Midwest Oil Co., 236 U.S. 459, 470 (1915), treating executive order reservations in the same way as those established by treaty, see United States v. Dion, 476 U.S. 734, 745 n. 8 (1986); Antoine v. Washington, 420 U.S. 194, 197-98 (1975); United States v. Pelican, 232 U.S. 444, 445 (1914); Ex parte Wilson, 140 U.S. 575, 576-77 (1891). In sum, Mazurie makes clear that Section 5 of the IRA does not violate the nondelegation doctrine, as it is merely a statute authorizing the Secretary of the Interior - an Executive branch official with broad recognized authority in Indian affairs wholly apart from the IRA - to acquire land for Indians.

Moreover, even in non-Indian cases, the nondelegation doctrine, while not totally moribund,

¹⁰The Supreme Court reaffirmed Mazurie in Loving v. United States, 517 U.S. 748, 772 (1996), where the Court noted that the nondelegation doctrine does not apply to statutes which delegate power to an official or entity that "itself possesses independent authority over the subject matter," or where the delegated power is otherwise "interlinked with duties already assigned" to the Executive branch. Loving, 517 at 772 (quoting Mazurie, 419 U.S. at 556); accord United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-322 (1936).

¹¹U.S. Const. art. II, §2, cl. 1-2 (President's treaty and war-making powers); U.S. Const. art. II, § 3 (President's power and duty to "take Care that the Laws be faithfully executed.") See Morton v. Mancari, 417 U.S. 535, 552 (1974); Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

¹² See, e.g., 25 U.S.C. §§ 2, 9, 81; Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 691 (1979).

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is certainly a narrowly circumscribed doctrine. The Supreme Court has invoked the doctrine only twice in the past century to invalidate federal statutes, both in 1935. Moreover, as it has recently explained, the Court has “since upheld, without exception, delegations under standards phrased in sweeping terms.” Loving, 517 U.S. at 771. These have included, for example, statutes in which the only guidance on the exercise of delegated authority is that the actions serve “the public interest.” See Whitman v. American Trucking Association, ___ U.S. ___, Slip Op. at 14 (2001).

Thus, even assuming that the nondelegation doctrine applied to an exercise of Executive authority by the Secretary in Indian affairs (a context where it has never been applied apart from the later-vacated South Dakota opinion), it is clear that Section 5 would meet the nondelegation doctrine test. Acquisitions authorized by Section 5 may only occur by “purchase, relinquishment, gift, exchange, or assignment,” which Congress directed be made “for the purpose of providing land for Indians ... pursuant to this Act.” 25 U.S.C. §465. As noted by the Supreme Court, the purposes of the IRA are “to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,” Mancari, 417 U.S. at 542; Fisher v. District Court, 424 U.S. 382, 387 (1976), to restore stability to Indian communities, United States v. John, 437 U.S. 634, 645-46 (1978), and to promote Indian economic development. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5 (1987); Mescalero Apache Tribe, 411 U.S. at 151-52.

Those purposes are further reflected in the IRA’s legislative history. As discussed above, Congress knew the history of the Indian land losses, and fully intended to reverse the policy that had produced those losses. In adopting the Act, Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved unless tribes had adequate lands. Thus, Congress in Section 5 was acting, and intended to act, well within its traditional role of according the Secretary broad authority in the field of Indian affairs – in this case power to acquire land for Indians to fulfill the purposes of the IRA. In sum, when examined in the context of the Supreme Court’s nondelegation doctrine precedent, it is clear that Section 5 of the IRA (if it falls within the nondelegation doctrine at all) contains an intelligible principle to guide the Secretary’s decisionmaking.¹³

¹³ We note that no statute has ever been held to violate the nondelegation doctrine more than 65 years after it was enacted – or where the consequences of such a holding would be so extreme. Section 5 has been the basis for the various Secretaries, over the course of many years, acquiring lands in trust for many tribes across the country. If, contrary to the weight of precedent and authority discussed above, section 5 was held to violate the nondelegation doctrine, the validity of those many trust acquisitions might be subject to considerable uncertainty. The Department, we trust, would not wish to construe section 5 to create such an unsettled situation.

B. The IRA does not limit tribal land acquisitions to landless tribes. Certain comments argue that land acquisitions under section 5 of the IRA should be limited to acquisitions for “landless and virtually landless” Indians, and other very limited purposes. NGA letter, p. 2, State AG letter, pp. 1-5.¹⁴ Such a construction of section 5 is fundamentally inconsistent with the language of the Act, its broad purposes as reflected in the legislative history, the longstanding administrative construction of section 5, later Congressional action regarding trust land acquisitions, and all judicial rulings on the subject.

The language of section 5 is broad and clear. The Secretary is authorized to acquire “any interest in lands, water rights, or surface rights to lands, within or without existing reservations... for the purpose of providing land for Indians.” Title to land acquired under the IRA “shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired...” 25 U.S.C. 476. Nothing in the language of this section, or any other provision of the IRA, limits trust land acquisitions to “landless” Indians. That phrase does not appear in the Act at all – and the NGA and attorney generals’ letters tellingly make no reference to the language of the Act in making their argument on this point. The absence of any language in the Act limiting land acquisitions to “landless” Indians is fatal to their argument in this regard.

Further, portions of the text of section 5, and related provisions of the IRA, would be rendered meaningless if section 5 was construed to be limited to “landless” Indians. First, section 5 addresses not just the purchase but also the “exchange” of lands. Of course, there can be no “exchange” of Indian lands, with respect to an Indian or tribe that is “landless.” Second, section 5 authorizes the acquisition of lands “within or without existing reservations.” There can be no trust acquisitions “within” a reservation for a “landless” tribe, since a tribe with an existing reservation is, by definition, not “landless.” Third, section 5 provides that the funds authorized under that section shall not be used to purchase lands for the Navajo Indians, outside of the Navajo Reservation, in the event certain legislation concerning Navajo lands, that was pending at the same time as the IRA, was enacted. If section 5 only applied to “landless” Indians, there would have been no need for this Navajo language – since the Navajo already had an extensive Reservation land base, and were not “landless.” Fourth, in section 7 of the IRA, the Secretary is authorized, with respect to lands acquired under section 5 or otherwise, to proclaim new reservations “or to add such lands to existing reservations.” 25 U.S.C. 467. If section 5 was limited to acquisitions for “landless” tribes, there could never be an addition of land to an “existing reservation,” since no landless tribe would have an existing reservation. As these text-based examples reflect, the authority of the Secretary to acquire land under section 5 is not limited to “landless” tribes or Indians.

¹⁴ The State Attorneys General also argue that the purposes of trust land acquisition should be narrowed, although they do not suggest how. State AG letter, p. 6. We suggest that the history of the IRA, described in this section, shows that no such limitation was intended. Rather, section 5 was intended to provide a means for tribes to move toward greater economic self-sufficiency – a purpose that is advanced by the beneficial purposes contained in the final rule.

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To be sure, there are some references in the legislative history of the IRA to “landless” Indians, as noted in the letter from the state attorneys general. But those references can not overcome the absence of any text in the Act regarding “landless” Indians, and in any event must be read in context. The legislative history of the IRA focuses on the adverse impacts on the Indian tribes of the allotment policy, and the need to make significant changes to better the lives of the Indians. With respect to land, allotment led to the massive Indian losses, which in turn resulted in two major problems identified in the legislative history – a growing number of totally destitute “landless” Indians, and the lack of viable economic uses for the remaining trust lands. As the Department summarized the land issues in its statement supporting the IRA as introduced:

Two major problems have developed in the administration of the allotment system. The first is the creation of an every-increasing class of landless Indians through the alienation and dissipation of their chief capital asset. The second is the break-up of restricted lands into units unfit for economic use.

Senate Hearings, p. 26. These twin themes – helping the landless Indians, and assuring sufficient lands to ameliorate the economic plight of all Indians – were repeated throughout the legislative history. Commissioner of Indian Affairs John Collier, the Department’s spokesman on the bill, described in Senate hearings the effects of allotment in these terms:

It [allotment] has rendered about a hundred thousand Indians totally landless; they have not a scrap of earth that is their own. It has rendered whole tribes totally landless...; and, in addition to that the effect of the law [the General Allotment Act] has been to put the Indian allotted lands into a hopelessly checkerboarded condition. The loss of Indian land, under the act [the General Allotment Act] does not take place at the outer edges of the reservation, but all through it; so that allotted reservations are checkerboarded with white ownership, and in many of them the Indian land is a mere dot amid a white area of white owned land...

In a nutshell, the remaining Indian land under allotment has been put into a condition where it cannot be effectively used...

The bill takes its origin from the absolute necessity of in some way correcting the trend of the allotment, stopping the loss of the remaining Indian lands, making it possible to bring the remaining lands into usable blocks so that they can be effectively and economically operated. That is the purpose of the bill.

Senate Hearings, pp. 30-31. As this passage reflects, the underlying concern was with both landless Indians and those who had land but, as a result of allotment, could not make productive use of it.

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Congressman Howard, the key House sponsor of the bill, similarly described the land provisions of the bill as addressing the needs of Indians with and without land. Indeed, in one of the very passages quoted in the letter from the attorneys general, Congressman Howard states that:

Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land....

78 Cong. Rec. 11,727 (emphasis added). Thus, the IRA was not intended to help only the landless Indians, while ignoring the plight of those Indians who had some lands, but remained suffering from the evils of the allotment policy. Rather, Congress intended to address the broader problem of land loss – in all of its manifestations.¹⁵ As he summed up the policy of the IRA, Congressman Howard noted that:

The new Indian policy [of the IRA] looks forward not only to security of the Indian lands, but to developing as rapidly as possible Indian use of Indian lands for self-support.

78 Cong. Rec. 11,730.

On the Senate side, Senator Wheeler, the primary Senate sponsor, clearly stated that the bill provided for the purchase of land for tribes whose land had been allotted to tribal members:

Senator Frazier: For instance, in North Dakota there is the Turtle Mountain Reservation that has over 3,000 Indians in two townships, and there are a number of white farms in there. It has been proposed that additional land be bought for those Indians. The Indians that are there now, of course, have allotments.... But any new land that would be bought [under the IRA] would be held in tribal possession?

The Chairman [Senator Wheeler]. Any new lands that will be bought will be held by the tribe. That further provides for it. In other words, that would not be bought and given separately to an Indian.

Senate Hearings, p. 233. This colloquy reflects Senator Wheeler's understanding that the IRA provided for the purchase of land for tribes whose reservations were allotted, where

¹⁵ For example, just after the passage quoted in the text, Congressman Howard discussed the need to address consolidation of checkerboarded reservations, and the purchase of additional land for agriculture, grazing and forestry. *Id.* All of these purposes pertained to Indians who had some land, but were impeded by the adverse impacts of allotment, from using those lands in an economically viable manner.

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reservation land remained in allotted status, and had not been totally lost. This same notion of providing lands to meet the needs of Indians – whether landless or not – was reiterated in the Senate Report on the bill, which states that: “[t]o meet the needs of landless Indians and of Indian individuals and tribes whose landholdings are insufficient for self-support, section 5 of the bill authorizes the purchase of lands by the Secretary....” Senate Report No. 1080, 73rd Cong., 2d sess., p. 2 (emphasis added).

In short, the references in the legislative history to “landless” Indians were merely a part of a larger story. Congress was certainly concerned about 100,000 Indians who were totally without lands. At the same time, Congress was concerned about the broader impact of allotment – which left Indians on allotted reservations without a viable means of support. It was this notion – that tribes needed lands to help restore a measure of economic independence – that was at the core of section 5. The argument to the contrary – that section 5, although its text did not say so, was intended to be limited to landless Indians – is not supported by a fair reading of the legislative history of the Act as a whole.

Given this text and legislative history, not surprisingly the Department itself has never construed section 5 as limited to “landless” tribes. To the contrary, the Department has, to our knowledge, always administered section 5, consistent with its terms, to apply to tribes with or without existing lands. The part 151 regulations currently in effect, which were adopted in 1980, reflect this understanding.

Nor has Congress after enactment of the IRA ever suggested that only “landless” tribes were covered. In fact, in 1983, Congress, as part of the Indian Land Consolidation Act specifically confirmed that section 5 applies to “all tribes,” including those tribes that had voted to reject the option of reorganizing their tribal government under the IRA. 25 U.S.C. §2202. In other words, Congress – after almost 50 years of the Department consistently administering section 5 to authorize taking land into trust for tribes with or without other land – made clear that section 5 applies to “all tribes.” Surely if section 5 of the IRA was limited to “landless” tribes, Congress in 1983 would not have adopted a measure indicating that it applied to “all tribes.”

Finally, the courts that have looked at this question have uniformly rejected the view that section 5 is limited to “landless” tribes. See United States v. 29 Acres of Land, 809 F.2d 544, 545 (8th Cir, 1987); Chase v. McMasters, 573 F.2d 1011, 1015-16 (8th Cir.), cert. denied, 439 U.S. 965 (1978); City of Tacoma, Washington v. Andrus, 457 F. Supp. 342, 345 (D.D.C. 1978); see also Board of County Comm’rs v. Seber, 318 U.S. 705, 712 (1943).

In short, the argument of the NGA and the state attorneys general – based solely on reading out of context certain passages from the legislative history – should be rejected. Section 5 authorizes the Secretary to take land in trust for tribes. The text of the IRA does not limit this authority to “landless” tribes – and the text is controlling. While no more is needed, the purposes of the IRA land provisions – to provide land to address the problems arising from the failed allotment policy, and to enable tribes to move to a measure of economic independence – are advanced by taking land into trust for tribes, whether landless or otherwise. The

Department, Congress and the Courts have shared a longstanding, unbroken, common understanding of this point. The final rule incorporates this common understanding and should be preserved.

C. The IRA does not provide state and local governments with a veto over trust land decisions. The Department received a number of comments urging a greater role for state and local governments in the trust land acquisition process. Some of these comments appear to misperceive the nature of the process from a legal standpoint. That is, taking land into trust for tribes is a matter of federal law, in accordance with which the Department exercises its trust responsibility to tribes. Nothing in federal law provides state and local governments with a right to veto or impose conditions on trust land applications. To the extent the comments submitted by state and local governments suggest otherwise, those comments should be rejected.

The trust land acquisition process is an important aspect of federal Indian policy. The Indian Commerce Clause vests the federal government with exclusive authority over Indian affairs. As Chief Justice John Marshall explained in the landmark opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Constitution, federal laws and treaties “provide that all intercourse” with the Indians “shall be carried on exclusively by the Government of the Union” and shall be “separated from . . . the States.” Id. at 557. See also, United States v. 43 Gallons of Whiskey, 93 U.S. 188, 194 (1876) (“Congress now has the exclusive and unfettered power to regulate commerce with the Indian Tribes, a power as broad as that to regulate commerce with foreign nations.”); United States v. Mazurie, 419 U.S. 544, 555-56 (1975); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977). Thus, the law is well established that “[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.” County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985).

The broad grant of federal power in the Indian Commerce Clause also limits state authority. As this Court stated, “[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.” McClanahan v. Arizona Tax Comm’r, 411 U.S. 164, 168 (1973) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)). The protections afforded to tribes under federal law have historically been aimed in large measure at protecting tribes from hostility from their non-Indian neighbors and the states. This was so at the time of the allotment policy. See United States v. Kagama, 118 U.S. 375, 383-84 (1886). And, even in the modern era, “state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians.” Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 678 (1974). See also, Washington v. Washington State Commercial Passenger Fishing Ass’n, 443 U.S. 658, 696 n. 36 (1979).

With this legal framework in mind, the Department is mandated to implement the federal policy of Congress in Section 5 of the IRA – to reverse the wrongs of prior federal policies and to help revitalize tribal self-government by taking land into trust for tribes.

To be sure, in determining how best to implement the policy of the IRA, we agree that the

Department should be informed regarding the concerns of state and local governments and others who may be affected by trust land decisions. But the right of state and local governments to be heard must not be confused with a right to control the merits of the Secretary's trust land decisions. For example, various state and local governments have urged that the regulations provide that no land be taken into trust absent an agreement between the tribe and local governments regarding a range of issues suggested by the local governments. This would effectively provide a veto to local governments of all trust land decisions. As this example reflects, the thrust of certain comments is to limit the Secretary's authority over trust land applications, by in effect making it subservient to the unfettered will of state and local governments. Any such approach is simply inconsistent with the Constitutionally grounded role of the federal government over Indian affairs and the specific intent of Congress in Section 5 of the IRA.

The state and local governments may properly be heard on trust land acquisitions. But their concerns cannot change the law or the government's obligations as trustee. The IRA does not say that the Secretary may take land into trust for the tribes only if no one objects or only if there is a consensus on all issues. Rather, the IRA provides a clear policy in favor of taking land into trust as a mechanism for achieving the self-determination goals of the Act and ameliorating the harm done by the federal government in taking so much from the tribes in previous times. That policy of Congress in the IRA (reaffirmed by the Self-Determination policy) – not the current political or other interests of state and local governments – must control.

Conclusion

The final rule provides a fair process that will facilitate informed and timely decisionmaking under meaningful standards consistent with the Indian Reorganization Act. On behalf of the National Congress of American Indians and the NCAI Tribal Leader Task Force on Land Recovery, we urge the Department to consider all of the comments and then to make the final rule effective at the end of the current extension period on August 13, 2001.
