James E. Marino
Attorney at Law
1026 Camino del Rio
Santa Barbara, CA 93110
Tel./FAX (805) 967-5141
jmarinolaw@hotmail.com

9 February 2015

Dear Supervisor Wolf,

I have reviewed the Proposed Resolution concerning fee-to-trust transfers of privately owned land into federal Indian trust status.

I and my clients agree in principle with the recitations in the proposed resolution in particular the need to reform the process, the federal Indian policy, laws and implementing rules.

As evidenced by the attached memorandum from former County Administrator Wallar, EXHIBIT 1, it has always been the policy of the California Association of County Governments [CSAC] and this County that any intergovernmental agreement between the County and any Indian tribe be legally binding (i.e., enforceable in a court of law).

Accordingly, the words legally enforceable should be included before the words "intergovernmental agreements" in the last paragraph of resolutions proposed. This is also consistent with the reasoning of the U.S. Supreme Court in the 1998 case of Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., [523 U.S. 752] and such enforceability must be a part of any proposed "Carcieri fix" [See Carcieri v. Salazar 555 U.S. 379].

The Board is now aware that the fee to trust process as implemented by the Pacific Regional Offices of the Bureau of Indian Affairs [B.I.A.] is badly flawed and has been described as a mere rubber-stamping process. [Pepperdine Law Review, Vol. 40 – Issue 1 (2012).]

Unfortunately the process is worse than that as evidenced by the Inspector General's investigative report of the fee to trust "consortium" process used by the Pacific Region B.I.A. demonstrating bias and prejudice in the decision making process where B.I.A. employees are paid by the tribes to process fee to trust

applications. In addition to being paid by the tribes seeking to bring land into trust, the tribes involved are also involved in the personnel evaluations of job performance of these B.I.A. employees, and even the power to give them cash bonuses [STAR AWARDS] for the accommodating methods they use in processing fee to trust applications in the Pacific Region.

The Board is also well aware of the recent attempt by the Santa Ynez Chumash to acquire control of over 14,000 acres of land in the Santa Ynez Valley unlawfully by claiming it was once a reservation and therefore the Indian Consolidation Act gave them the right to consolidate land within the arbitrary boundary of a tribal land consolidation plan and bring it into trust. That proposal was accepted by Amy Dutschke, the Pacific Regional director, even though it was clear that the Act [25 U.S.C. 2201 et.seq.] did not apply and was an Act to authorize Indian tribes to reacquire and consolidate parcels of land that had once been a part of an established reservation.

As can be seen from the highlighted facts in the attached Investigative Report [EXHIBIT 2] the Pacific Regional B.I.A. has only one goal and that is to allow and approve any and all applications to transfer fee land by any Indian tribe into trust status. Such a policy and practice completely evades the impartial analysis of fee to trust application required by 25 Code of Federal Regulations 151.10 and 151.11 and is a denial of the Constitutional due process rights of affected governments, communities and citizens.

It is also a violation of the directive sent to Regional Directors from the Acting Secretary in 2008, a copy of which is attached as EXHIBIT 3 and the highlighted provisions incorporated are herein by reference.

I suggest the Board make it clear in it's resolution that the intention of any intergovernmental is that it be legally binding in a court of law. Without that important caveat, such an "agreement" is essentially worthless.

Very truly yours,

James E. Marino

EXHIBIT 1

Memo from Chandra Wallar to the U.S. House of Representatives, Natural Resources making clear the County will require a legally enforceable nature in any intergovernmental agreement with the Chumash consistent with CSAC and NACO policies.

County of Santa Barbara, California Comments of Hearing:

Request for Inclusion in Official Record

United States House of Representatives Committee on Natural Resources Subcommittee of Indian and Alaska Native Affairs

August 2, 2012 Oversight Hearing on Indian Lands: Exploring Resolution to Disputes Concerning Indian Tribes, State and Local Governments, Private Land Owners over Land Use and Development

Submitted By: Chandra L. Wallar, County Executive Officer, Santa Barbara County

Chairman Young and Ranking Member Lujan, on behalf of the County of Santa Barbara, I want to thank you for the opportunity to submit written testimony for the Subcommittee's oversight hearing regarding [illegible]

The County of Santa Barbara Board of Supervisors has adopted a legislative policy which formally supports government-to-government relations and recognizes the role and unique interests of tribes, states, counties, and other local governments to protect all members of their communities and to provide governmental services and infrastructure beneficial to all. In addition, the County recognizes and respects the tribal right of self-governance, to provide for tribal members and to preserve traditional tribal culture and heritage. In similar fashion, the County recognizes and promotes its own self-governance to provide for the health, safety, and general welfare of all members of our communities. The County supports the full involvement of local jurisdictions and all community members on issues and activities which may generate public health, safety or the environmental impacts.

Involvement of the local government, general public and technical consultants in matters pertaining to future land use and potential development is critical to the overall review of any project. This broad involvement provides thoughtful compliance with Community Plans and the County's General Plan. Failure to fully engage a diverse group of stakeholders in project development, and review, impairs the ability of a local government to seek appropriate mitigation and/or provide critical public services in an orderly fashion which may have long term deleterious impacts on a region as a whole.

The County of Santa Barbara continuously works with the California State Association of Counties (CSAC) as well as the National Association of Counties (NACo) to collectively improve upon processes to develop and continue government-to-government relationships between federal, tribal, state, and local governments. It should be recognized that the County of Santa

Barbara's position on the need for stakeholder and local government involvement is by no means unique. Both CSAC and NACo adopted policies consistent with that of the County of Santa Barbara in public engagement and stakeholder involvement as well as the following areas:

- Projects that impact off reservation land require review and approvals by the local jurisdiction to construct improvements consistent with state law and local ordinances including the California Environmental Quality Act.
- Tribal government mitigation of all off reservation impacts caused by projects for services including but not limited to traffic, law enforcement, fire, parks and recreation, roads, flood control, transit and other public infrastructure
- Projects will be subject to a local jurisdiction's health and safety laws and guidelines including but not limited to water, sewer, fire inspection, fire protection, ambulance service, food inspection, and law enforcement.

The County has continuously supported the CSAC and NACo policy positions stating that judicially enforceable agreements between counties and tribal governments be required to ensure that potential impacts resulting from projects are fully analyzed and mitigated to the satisfaction of the surrounding local governments in the long term. Such agreements ensure that tribal and local governments can fulfill their primary mandate; ensuring the health and safety of those we serve. Without such agreements, and the ability to fully mitigate local impacts of a tribal government's business and development activities, local government's ability to in fact ensure the health and safety of residents is severely compromised.

In addition it is important to note that, as a result of the severe economic issues facing the State of California, a critical mechanism providing local government with funding to mitigate the impacts of tribal development and business activities, the State Special Distribution Fund (SDF), has diminished by over 50%. This places both the health and safety of all in jeopardy. Santa Barbara County has lost over $760,000 used annually to sustain fire and law enforcements services as well as maintenance of transportation infrastructure to mitigate the impacts of tribal businesses including gaming. County policy is that private and public projects must mitigate the impacts of their development on public infrastructure and services. Mitigation is achieved through conditioning of the project to complete infrastructure improvements and/or payment of impact fees.

During the hearing, your committee respectfully posed multiple questions to the testifying witnesses to gain a thorough understanding of the Santa Barbara County land use process and the ability of the Santa Ynez Band of the Chumash Indians to access the land use process.

Additional questions were proffered on the nature and disposition of the cooperative agreement mentioned by the Tribe. I would like to provide you with the County's perspective on these key issue areas.

Land Use

Regarding the land use issues and the 6.9 acre parcel recently taken into trust by the Bureau of Indian Affairs (BIA) on behalf of the Tribe, the County of Santa Barbara did not appeal the BIA's decision. The County Board of Supervisors considered this item in open session on July 10, 2012, receiving testimony from 46 individuals both for and against an appeal, and voted not to appeal.

The 6.9 acres includes a 2.13 acre western portion of the property which is zoned for recreational uses. The remaining 6 parcels totaling 4.77 acres are zoned C-2/MU allowing commercial and commercial/residential mixed uses under the local Santa Ynez Community Plan. Therefore, a museum/cultural center and retail commercial uses are allowed in the C-2/MU zone district with approval of a Development Plan by the local Planning Commission. The steps in the process for all County residents begin with submittal of a complete application. After staff review of project scope and determination of environmental impacts and consistency with Community and County General Plan the project moves to the County Planning Commission for a public hearing and decision on approval of the project, including appropriate conditions for mitigating impacts. The Planning Commission's action can be appealed to the Board of Supervisors within 10 days of their action. If appealed, a public hearing would be scheduled at the Board of Supervisors. The County of Santa Barbara Planning Development has not received a project application for a project in question on the 6.9 acres owned by the Santa Ynez Band of the Chumash Indians.

The 1,400 acres that the Tribe desires to take into trust and referenced during the Subcommittee hearing is currently zoned AG-II-100 (Agriculture, with a minimum parcel size of 100 acres). This land is also in a multi-year Agricultural Preserve contract which limits the uses on the property to agricultural uses. Agricultural preserve contracts require the application and renewal of the property owner over a ten or twenty year period in exchange for reduced property taxes.

Under current zoning, the property can be developed with agricultural uses, including grazing and cultivated agriculture, without any planning permits. There are a number of conditionally permitted uses on agriculturally zoned land, including country clubs, golf courses, and schools. A permit for these land uses would be processed as described above for Development Plans.

In order to change the land use from agriculture to another use, such as the development of housing on the 500 acres, referenced in the Subcommittee hearing, the owner of the property

would request that the County initiate a General Plan Amendment. The Planning Commission would consider an application and determine whether or not it should be processed. The Commission would consider factors such as public benefit of the proposed use, consistency with County Plans and policies, and compliance with the site's agricultural preserve contract. The Commission's recommendation is forwarded to the Board of Supervisors for the final decision. It is important to note that, as of this date, the County has not received a project submission for the 1,400 acres in question.

This process allows local government to review potential impacts of a development which may need to be thoroughly analyzed and mitigated. The impacts may include sheriff and fire services, traffic and circulation as well as the continued viability of agriculture on a given property or surrounding properties. Ensuring that impacts are addressed in a manner which preserves the health and safety of any community, as well as the present and future quality of life, is at the foundation of local government.

The Cooperative Agreement

The County Executive Office received a draft cooperative agreement from the Santa Ynez Band of the Chumash Indians on June 1, 2011. For your reference, the draft agreement is attached to this correspondence. During the Subcommittee hearing, it was stated that this agreement was delivered to the County "over 370 days ago with no response." Given the parameters of the federal fee to trust process, it is premature to initiate an agreement prior to submittal of a formal application from the Santa Ynez Band of the Chumash Indians. This was stated to the tribal representative following receipt of the agreement. Furthermore, it is my belief, this proposal is lacking specific details on development plans for the 1,400 acres and the resulting impacts upon which both parties could thoughtfully consider or discuss appropriate mitigation.

As noted above, the County of Santa Barbara supports government-to-government relations and recognizes the role and unique interests of tribes, states, counties, and other local governments to protect all members of their communities and to provide governmental services and infrastructure beneficial to all. In addition, the County recognizes and respects the tribal right of self-governance to provide for tribal members and to preserve traditional tribal culture and heritage. In similar fashion, the County recognizes and promotes self-governance by counties to provide for the health, safety, and general welfare of all members of our communities. As a local government we welcome the opportunity to work collaboratively with the Tribe and engage those potentially impacted by future development in order to facilitate sound land use decisions that benefit all. Any process that does not provide for involvement of all stakeholders, including that of the representative local government does not provide sound long term land use decisions nor transparency in government decision-making.

Thank you again for the opportunity to submit written testimony for the Subcommittee's oversight hearing regarding [illegible]

Attachments

- Draft Cooperative Agreement
- County of Santa Barbara adopted Legislative Platform

EXHIBIT 2

Investigative report of the Inspector General regarding the conflicts and improper practices of the Pacific Region B.I.A. using a "consortium agreement" to process fee to trust applications and approve all such applications for consortium tribes.

OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

May 7, 2013

D.W. Cranford
P.O. Box 794
Plymouth, CA 95669

Re:08-FOI-00012

Dear Mr. Cranford:

This is in response to your facsimile dated November 29, 2007, which was received by the Office of Inspector General (OIG) on the same date, in which you ask for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. You ask for a copy of the following records:

1. All reports related to the OIG investigation into a land in trust consortium operating in the BIA Pacific Regional Office. This investigation is referenced in a July 2006 GAO Report06-781 at page 20.

2. Any records or documents related to the use of Tribal Priority Allocation Funds to fund the consortium.

3. All attachments or other documents related to the requested report or related to the OIG investigation into the land in trust consortium operating in the BIA Pacific Regional Office.

4. A list of all government agencies or their personnel that have received a copy of the requested report.

5. All responses from any government agencies or their personnel receiving the report.

A search was conducted and report number PI-PI-06-0091-I was found to be responsive to parts one, two and three of your request. There are 109 pages responsive to the aforementioned parts of your request. Twelve pages are being withheld in their entirety, 53 pages contain some information that is being withheld; and 38 pages are being released in their entirety and six are being referred to Bureau of Indian Affairs.

In regards to part four of your request, on October 6, 2006 OIG penned a Management Advisory for the Associate Deputy Secretary which summarized the results of our investigation. This was the only personnel outside the OIG that received a copy of the investigation. In our advisory, we stated that the Associate Deputy Secretary had 90 days from the date or receipt in which to provide a written response; we have not yet received a response.

Concerning part five of your request; we conducted a search of our indices, but found no documents responsive to these parts of your request. There is no obligation for the OIG to create or compile a record to satisfy a FOIA request. The FOIA only applies to records in the bureau's possession and control as of the date the bureau begins its search for responsive records.

Deletions have been made of information that is exempt from release under the provisions of 5 U.S.C. §§ 552 (b)(5), (b)(6), and (b)(7)(C). These sections exempt from disclosure items that pertain to: (1) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency; (2) personnel and other similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (3) records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy. Exemption (b)(5) was used after consultation with the Department of the Interior's Office of the Solicitor to protect deliberative information which was gathered by the OIG investigators. Exemptions (b)(6) and (b)(7)(C) were used to protect the names of the witnesses interviewed and the information obtained during the investigation.

In addition, the material is exempt from release under the provisions of 5 U.S.C. § 552a(k)(2)of the Privacy Act, pertaining to investigatory material compiled for law enforcement purposes.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you disagree with this response, you may appeal the decision by writing to the following no later than 30 workdays after the date of the final response:

FOIA Appeals Officer
U.S. Department of the Interior
1849 C Street, NW
MS-6556
Washington, DC 20240

The FOIA Appeal Officer's facsimile number is 202-208-6677. Your appeal should be filed in accordance with the regulations set out in 43 C.F.R. §§ 2.57-2.64, a copy of which is enclosed.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to

handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: https://ogis.archives.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

However, should you need to contact me, my telephone number is 703-487-5322, and the facsimile number is 703-487-5406.

Sincerely,

Tara Walker
Program Analyst

Enclosure

All redactions are based on FOIA exemptions (b)(6) and (b)(7)(C) unless marked otherwise.

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, DC 20240

NOV 28 2005

Memorandum

To: Secretary

From: Earl E. Devaney
Inspector General

Subject: California Fee To Trust Consortium

The Office of Inspector General (OIG) was recently provided a copy of an unsigned Memorandum of Understanding (MOU) between the Bureau of Indian Affairs Pacific Regional Office (BIA-PRO) and "California Fee To Trust Consortium Tribes." The MOU describes a process by which the BIA-PRO "re-programs" Tribal Priority Allocation (TPA) funds back to BIA-PRO to hire employees dedicated to processing Consortium members' fee to trust applications.

In addition to some profound conflict of interest concerns, the description contained in the MOU suggests the very real potential that BIA-PRO is improperly augmenting its appropriations with funds earmarked for distribution to tribes.

The MOU cites 25 U.S.C. §123c as authority for this "Project." Our initial review of this statute finds no authority for BIA to receive funds from tribes – for this, or any other, reason. We are left with the view that BIA-PRO is providing preferential treatment to tribes who "contribute" to BIA-PRO a minimum of $3,000 per year for three consecutive years.

While the OIG Office of Investigations has opened an investigation, I would request that you review the genesis, legal authority and propriety of this "Project," and, if appropriate, suspend the "Project" pending the results of our investigation.

I would appreciate being kept apprised of any findings you may make or actions you take. I would also appreciate it if you would direct BIA-PRO to secure and protect all documents related to this matter until OIG investigators review them.

All redactions are 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C) of the FOIA

Office of Inspector General
Office of Investigations
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee To Trust Consortium	PI-06-0091-I
	Related File(s)
Case Location	**Report Date**
Sacramento, California	December 2, 2005
Report Subject	
Investigative Plan	

BASIS FOR INVESTIGATION

On November 10, 2005, DOI Office of Inspector General received an unsigned Memorandum of Understanding (MOU) between the Bureau of Indian Affairs Pacific Regional Office (BIA-PRO) and "California Fee To Trust Consortium Tribes." The MOU describes a process by which the BIA-PRO "re-programs" Tribal Priority Allocation (TPA) funds back to BIA-PRO to hire employees dedicated to processing Consortium members' fee-to-trust applications.

On its face, this MOU presents profound conflict of interest concerns along with suggesting that BIA-PRO is improperly augmenting its appropriations with funds earmarked for distribution to tribes.

The MOU cites 25 U.S.C. 123c as authority for re-programming these TPA funds in this manner; however, initial review of this statute finds no authority for the BIA to receive funds from tribes – for this, or any other, reason.

Even if this statute is determined to provide authority for this "Project," the MOU is rife with conflict of interest issues. The main areas of concerns with this MOU are the following:

1) Certain BIA governmental employees will be designated as "Consortium fee-to-trust staff" and henceforth, will not be allowed to work on "non-consortium purposes." Tribes which are not members of the Consortium are not eligible to access to these designated consortium-staff, whereas, tribal members of the Consortium remain entitled to equal access to "non-consortium staff and resources" provided by the BIA.

2) The tribes may participate in the Consortium by contributing a minimum of $3,000. Accordingly, the tribes may contribute more than $3,000 if they so desire. Do the tribes who contribute more than $3,000 receive a higher level of service, commiserate with the amount of their contribution, from the consortium staff (BIA governmental employees)?

3) The MOU defines a Fee-To-Trust Consortium Oversight Committee (hereinafter the "Committee") as being made up of nine (9) elected Tribal Officials representing their respective region.

Reporting Official/Title	Signature
[redacted], Special Agent	

Distribution: Original – Case File Copy - SAC/SIU Office Copy – HQ Other:

This Committee will have "direct participation" with the process for selecting the consortium staff (BIA governmental employees) for filling the consortium positions. This participation "may include, but may not be limited to, the development of positions descriptions, and interviewing prospective candidates." Additionally, the "Committee has the authority to make recommendations to the BIA regarding the filling of open positions." In other words, this Committee made up entirely of Tribal Officials (non-governmental employees) will have direct participation with writing position descriptions, interviewing and selection of BIA governmental employees who will be charged with the duty of adjudicating the fee-to-trust applications submitted by the tribes.

Furthermore, under this MOU, the participating tribes of the consortium "may submit documentation to the Committee and PRO-LRS concerning the performance of" the consortium staff who will be adjudicating the participating tribes' fee-to-trust applications. This documentation shall be given "due consideration with respect to conducting employee performance evaluations." Based upon these tribal recommendations, the Committee shall decide upon whether the BIA governmental employees will receive an "incentive or star awards."

INVESTIGATIVE PLAN

[redacted]

Office of Inspector General
Office of Investigations
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I
	Related File(s)
Case Location Sacramento, California	Report Date January 24, 2006
Report Subject Amy Dutschke Interview	

DETAILS

On January 18, 2006, Special Agents [redacted] and [redacted] interviewed Amy Dutschke, Deputy Regional Director, Bureau of Indian Affairs (BIA), Pacific Region Office (PRO), in her Sacramento, California, office from 0800 to 1115 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). Dutschke offered the following information:

In 2000, BIA-PRO had "over 300" fee-to-trust (FTT) applications backlogged. It was not a primary responsibility of any BIA-PRO employee to process these applications, but rather a low priority, collateral duty of those employees working within the real estate division. Indeed, it was considered a "big deal" when an application was processed and adjudicated. The California tribes were unhappy about this large backlog, therefore BIA-PRO met with the Californian tribes several times in an attempt to figure out a solution to this issue. As a result of these meetings, former BIA-PRO Regional Director Ron Jaeger and Dutschke "worked with the tribes" in creating the MOU.

No one person drafted the MOU, but rather it was drafted by a "conglomerate" of persons from the tribes and BIA-PRO. Tribal counsel participated in drafting the MOU, whereas the Department of the Interior's Office of the Solicitor (SOL) was not consulted in drafting the MOU, nor were they asked to review the final MOU draft. Dutschke does not believe the possibility of having SOL review the document "ever came up" during BIA-PRO's discussions about the MOU.

In 2004, BIA-PRO sent a copy of their MOU to the BIA Midwest Regional Office (BIA-MRO) for their considered use. BIA-MRO had the Field Solicitor review the MOU, which resulted in several modifications to the document. When asked why BIA-PRO did not request a copy of the modified MOU, in order to review the SOL's comments, Dutschke stated she was unaware that BIA-MRO requested such a review.

Under the MOU, tribes may elect to "re-direct" Tribal Priority Allocation (TPA) funds that are earmarked for the individual tribes to the FTT program. Each California tribe has the option of joining the FTT consortium; the minimum TPA donation is $3000 per year, whereas there is no maximum donation.

Reporting Official/Title	Signature
[redacted]	

Distribution: Original – Case File Copy - SAC/SIU Office Copy – HQ Other:

The re-directed TPA funds are used to hire BIA federal, full-time employees who are designated as "consortium staff." Their sole duties and responsibilities are to review and process tribal FTT applications that are submitted by FTT consortium member tribes (tribes which have re-directed TPA funds into the program). In addition to processing Notices of Application to the public, the consortium staff reviews the FTT applications' title status (Realty Specialists) and conducts environmental reviews of the involved properties (Environmental Specialists). Additionally, Realty Specialists review the applications for compliance with the criteria listed under Title 25 of the Code of Federal Regulations, section 151 (25 CFR 151), and make recommendations whether the applications satisfy these criteria. Finally, once the review process is completed, the consortium staff makes a recommendation to the adjudicating official whether they believe the application should be accepted into trust or not; according to Dutschke, "generally, these recommendations are favorable."

The consortium staff act as facilitators in reviewing the FTT applications; they work closely with the tribes by informing them if the application is insufficient in a specific area and making recommendations to the tribes as to what they need to do in order to receive a favorable recommendation. As a general rule, the tribe members confer with BIA about the application prior to submitting an application. A premium service is "definitely" being provided to consortium FTT applications; according to Dutschke, "it is expected," and the "whole purpose" is to ensure these applications receive a favorable recommendation. Dutschke would not refer to the consortium staff as "ministerial" or "paper pushers."

Once the applications receive a favorable recommendation, the consortium staff prepares the proposed Notice of Decision for signature by the respective adjudicating official. Generally, an area superintendent is the adjudicating official for "on-reservation" applications, the regional director is the adjudicating official for "contiguous" applications, and BIA Washington Central Office (WCO) is the adjudicating official for "off-reservation" and gaming applications. The BIA-PRO consortium staff processes off-reservation and gaming applications; however, these applications are ultimately forwarded to WCO for adjudication. Once adjudication is made, this decision may be appealed to the Interior Board of Indian Appeals.

BIA has a "re-occurring request" before Congress for "realty money." In 2000, BIA's congressional appropriations included $323,000 for the hiring of five Full Time Equivalent (FTE), GS-5 positions to assist with the backlog of FTT applications. This money was divided amongst all PRO tribes as individual "shares." Based upon the determined share amounts for each of the tribes participating in the FTT consortium, $175,000 was directed to the funding of the consortium staff. The total share amounts for all the tribes that are not members of the consortium ($98,000) was directed to the BIA-PRO's region-wide realty fund, to the benefit of all tribes in BIA-PRO (including consortium tribes). The remaining share amounts, totaling $50,000, were directed to the California Trust Reform Consortium for use by their member tribes.

The California Trust Reform Consortium was created "around 1998" and includes seven tribes. This consortium was created in order to organize resistance to the transfer of Indian property, money, and services from BIA to the Office of Special Trustee (OST). In this consortium, TPA funds are similarly used to hire four federal BIA employees; approval for this TPA staff funding is located in section 139 of the 2003 Appropriations Bill.

According to Dutschke, TPA funds are in fact "appropriated funds." Under the MOU, the TPA funds are used to hire staff to perform inherently governmental functions as a "direct service" to the tribes. Tribes have the discretion to use TPA funds in any way they choose; they may choose to have the funds retained by BIA in order to have BIA perform the services on their behalf (this is mandatory for inherently

governmental functions), or they may choose to request the funds under a PL 638 contract in order to perform the services themselves. If a tribe initially elects to direct their TPA funds to BIA in order to perform a non-inherently governmental function, and then later decides to request the funds under a PL 638 contract, the BIA employees who were hired to perform the services would then be released by BIA via a Reduction in Force (RIF). Dutschke acknowledged that if the consortium tribes stop re-directing TPA funds under the FTT MOU, BIA consortium staff employees would similarly be subject to a RIF.

Supervisory Realty Specialist [redacted] creates a budget determining how the TPA funds will be utilized under the program. This budget is then presented to the Consortium Oversight Committee (hereinafter "Committee") for their approval. This all-tribal Committee is comprised of representative tribal members from various consortium tribes. The Committee usually approves the budget; however, in recent years, the Committee has been loath to approve use of TPA funds for cash awards to consortium staff.

All current FTT applications are at "some point in the process" because the consortium staff is capable of handling each application as they are received by BIA. Prior to the MOU, when there was a large backlog of applications, the applications were handled in a "first-in-first-out" (FIFO) approach. This FIFO approach is still utilized by the one realty specialist who handles all non-consortium applications.

Non-consortium applications are processed by Realty Specialist [redacted] the "most experienced realty person" in BIA-PRO. In addition to processing non-consortium applications, [redacted] reviews all consortium applications once they are completed due to her expertise and knowledge. Using the same approach that was used for all FTT applications prior to the MOU; [redacted] processes the non-consortium applications as a collateral duty, when she has time to do so.

Consortium staff are full-time, federal employees hired under a competitive announcement. BIA initially intended to hire 12 positions under the MOU, whereas they currently have 10 positions designated under the MOU. Seven of these positions are filled, with three vacancies. The currently filled positions are identified at the following General Schedule (GS) levels:

Grade	# of employees
GS-13	1 (Supervisory Realty Specialist)
GS-12	2 (Environmental Specialist and Realty Specialist)
GS-11	1 (Realty Specialist)
GS-7/9/11	3 (one Environmental Specialist and two Realty Specialists)

Consortium staff receive mainly "on-the-job" training. Any formal training is funded by TPA funds.

As noted above, if tribes decide to stop re-directing TPA funds to the program, these federal employees would be subject to a RIF. Dutschke, however, pointed out that the "senior level" employees would not necessarily be out of a job because they would "bump" lower level employees within the Region, who, in turn, would bump other lower level employees, and so on. Accordingly, BIA would ultimately need to lay off several GS-5/7 federal employees in order to offset the loss of the TPA funding currently being used to fund the GS-13, GS-12, and GS-11 consortium staff positions.

Dutschke stated that, at the time of the MOU's inception in 2000, she and Former Director Ron Jaeger discussed the possibility of identifying these consortium positions as term positions (as opposed to FTE positions). However, it was decided by Jaeger that "he would run the risk" of not making the positions term in order to better attract highly qualified candidates. Dutschke and Jaeger both recognized that

experienced federal employees would not apply to these positions if they were announced as term positions.

Dutschke was asked if BIA-PRO notified the federal employees working as consortium staff, at the time they applied for the positions, that these jobs are funded solely by TPA monies. She stated that the announcements did not indicate that these positions were funded by TPA funds. She did acknowledge that these positions are more tenuous than other appropriated positions due to their reliance on TPA funding; however, she pointed out that, with respect to appropriated positions, "loss of appropriations happens all the time." She further acknowledged that "most or all" consortium staff, who were already federal employees prior to transferring to the consortium staff positions, did receive upgrades when they transferred to their current positions.

The all-tribal Committee is comprised of members of several different consortium tribes. They are not solely representative of the tribes contributing the most TPA funds, but rather represent tribes that have the strongest interest in the program. The Committee does not contain any federal employees; however, the purpose of the Committee is to meet with BIA and discuss relevant issue related to the program.

The Committee did review and provide input in the drafting of the initial Position Descriptions (PD's) for the consortium staff positions. The PDs were then classified by BIA's personnel office. BIA issues the announcements for vacant positions, receives applications, and produces a list of certified candidates. BIA officials select an employee from the certified list and then inform the Committee of the selection. The Committee reviews the selection and makes a favorable or unfavorable recommendation; however, the ultimate decision whether to select the applicant rests with BIA. Regarding potential conflicts if an applicant were to be from a consortium tribe, Dutschke stated the consortium staff does not include any California Indians.

Regarding the MOU's provision that "recommendations for incentive or star awards will be brought forward to the [Committee]," generally, the Committee has agreed with BIA's award proposals for consortium staff. The Committee did, however, once refuse to approve an award proposed by BIA for a consortium employee because the Committee did not want to have TPA funds used to pay the cash award. Since that time, the cash used to pay these awards has come from BIA administrative account funds.

Regarding employee performance, if the Committee has a problem with a consortium employee, they will contact Supervisory Realty Specialist [redacted] and discuss their concerns. Consortium staff are aware that the all-tribal Committee has input in their performance evaluations and potential awards. Dutschke acknowledges that there could be the perception that the tribe's input on these awards may influence an employee's judgment to favorably recommend a tribes' application. However, Dutschke claims the Committee does not perform employee evaluations or ultimately decide who receives an award, but rather are simply consulted on these matters and make recommendations. The Committee does not "sign off" on employee evaluations.

Dutschke was asked if she felt the MOU violates Executive Order 12731, Section 101(h), inasmuch as these consortium employees only perform work for one select group of tribes, to the exclusion of other tribes. According to Dutschke, consortium staff do not provide any more preferential treatment to certain tribes (i.e. consortium tribes), to the exclusion of other tribes, than the BIA agencies in Montana who perform services exclusively for one tribe. She explained that all five BIA agencies in Montana provide services exclusively to the respective tribe in their service area, to the exclusion of other tribes. According to Dutschke, the nature of how BIA is structured results in this necessity.

Dutschke does not believe the MOU results in an augmentation of funds because the BIA never received money from anyone. She did acknowledge that the authority cited in the MOU is "probably not the appropriate authority."

EXHIBIT 3

The 2008 Memorandum from Carl Artman, Assistant Secretary of the U.S. Department of Interior to all regional directors of the B.I.A. informing them that Indian tribes owning land can develop that land following and complying with state and local laws just like all other land owners. Further that development is consistent with the Indian Reorganization Act of 1934. Lastly, the only time Indian tribal lands must be transferred into trust is if it is intended to use it for tribal gaming purposes.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

Memorandum

To: Regional Directors, Bureau of Indian Affairs
George Skibine, Office of Indian Gaming

From: Assistant Secretary Carl Artman

Date: January 3, 2008

Subject: Guidance on taking off-reservation land into trust for gaming purposes

The Department currently has pending 30 applications from Indian tribes to take off-reservation land into trust for gaming purposes as part of the 25 U.S.C. § 2719(b)(1)(A) two-part determination. Many of the applications involve land that is a considerable distance from the reservation of the applicant tribe; for example, one involves land that is 1400 miles from the tribe's reservation. Processing these applications is time-consuming and resource-intensive in an area that is constrained by a large backlog and limited human resources.

The decision whether to take land into trust, either on-reservation or off-reservation, is discretionary with the Secretary. Section 151.11 of 25 C.F.R. Part 151 sets forth the factors the Department will consider when exercising this discretionary authority with respect to "tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation." Section 151.11(b) contains two provisions of particular relevance to applications that involve land that is a considerable distance from the reservation. It states that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give:

1) greater scrutiny to the tribe's justification of anticipated benefits from the acquisition; and

2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

Part 151, however, does not further elaborate on how or why the Department is to give "greater scrutiny" and "greater weight" to these factors as the distance increases. The purpose of this guidance is to clarify how those terms are to be interpreted and applied,

particularly when considering the taking of off-reservation land into trust status for gaming purposes.

Core Principles

As background to the specific guidance that follows, it is important to restate the core principles that underlie the Part 151 regulations and that should inform the Department's interpretation of, and decisions under, those regulations. The Part 151 regulations implement the trust land acquisition authority given to the Secretary by the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465. The IRA was primarily intended to redress the effects of the discredited policy of allotment, which had sought to divide up the tribal land base among individual Indians and non-Indians, and to destroy tribal governments and tribal identity. To assist in restoring the tribal land base, the IRA gives the Secretary the authority to: 1) return "to tribal ownership the remaining surplus lands of any Indian reservation" that had been opened to sale or disposal under the public land laws; 2) consolidate Indian ownership of land holdings within reservations by acquiring and exchanging interests of both Indians and non-Indians; and 3) acquire, in his discretion, interests in lands "within or without existing reservations". The IRA contains also provisions strengthening tribal governments and facilitating their operation. The policy of the IRA, which was just the opposite of allotment, is to provide a tribal land base on which tribal communities, governed by tribal governments, could exist and flourish. Consistent with the policy, the Secretary has typically exercised discretion regarding trust land acquisition authority to take lands into trust that are within, or in close proximity to, existing reservations.

The IRA has nothing directly to do with Indian gaming. The Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701 et seq., adopted more than 50 years after the IRA, sets the parameters of Indian gaming. One requirement is that if gaming is to occur on off-reservation lands those lands must be trust lands "over which an Indian tribe exercises governmental power." The authority to acquire trust lands, however, is derived from the IRA; no trust land acquisition authority is granted to the Secretary by IGRA. The Department has taken the position that although IGRA was intended to promote the economic development of tribes by facilitating Indian gaming operations, it was not intended to encourage the establishment of Indian gaming facilities far from existing reservations. Whether land should be taken into trust far from existing reservations for gaming purposes is a decision that must be made pursuant to the Secretary's IRA authority.

Implementation of Guidance

This guidance should be implemented as follows:

1. All pending applications or those received in the future should be initially reviewed in accordance with this guidance. The initial review should precede any effort (if it is not already underway) to comply with the NEPA requirements of section 151.10(h).

2. If the initial review reveals that the application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied and the tribe promptly informed. This denial does not preclude the tribe from applying for future off-reservation acquisitions for gaming or other purposes. However, those future applications will be subject to these same guidelines.

3. A greater scrutiny of the justification of the anticipated benefits and the giving greater weight to the local concerns must still be given to all off-reservation land into trust applications, as required in 25 C.F.R. § 151.11(b). This memorandum does not diminish that responsibility, but only provides guidance for those applications that exceed a daily commutable distance from the reservation.

Greater Scrutiny of Anticipated Benefits

The guidance in this section applies to all applications, pending or yet to be received, that involve requests to take land into trust that is off-reservation. Reviewers must, in accordance with the regulations at 25 C.F.R. 151.11(b), "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" as the distance between the acquisition and the tribe's reservation increases. The reviewer should apply this greater scrutiny as long as the requested acquisition is off-reservation regardless of the mileage between the tribe's reservation and proposed acquisition. If the proposed acquisition exceeds a commutable distance from the reservation the reviewer, at a minimum, should answer the questions listed below to help determine the benefits to the tribe. A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation

As noted above, section 151.11(b) requires the Secretary to "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" of trust land "as the distance between the tribe's reservation and the land to be acquired increases." The reason for this requirement is that, as a general principle, the farther the economic enterprise - in this case, a gaming facility - is from the reservation, the greater the potential for significant negative consequences on reservation life.

Tribes typically view off-reservation gaming facilities as providing two economic benefits to the tribe. The first is the income stream from the gaming facility, which can be used to fund tribal services, develop tribal infrastructure, and provide per capita payments to tribal members, and thus can have a positive effect on reservation life. Obviously, the income stream from a gaming facility is not likely to decrease as the distance from the reservation increases. In fact, off-reservation sites are often selected for gaming facilities because they provide better markets for gaming and potentially greater income streams than sites on or close to the reservation.

The second benefit of off-reservation gaming facilities is the opportunity for job training and employment of tribal members. With respect to this benefit, the location of the

gaming facility can have significant negative effects on reservation life that potentially worsen as the distance increases. If the gaming facility is not within a commutable distance of the reservation, tribal members who are residents of the reservation will either: a) not be able to take advantage of the job opportunities if they desire to remain on the reservation; or b) be forced to move away from the reservation to take advantage of the job opportunity.

In either case, the negative impacts on reservation life could be considerable. In the first case, the operation of the gaming facility would not directly improve the employment rate of tribal members living on the reservation. High on-reservation unemployment rates, with their attendant social ills, are already a serious problem on many reservations. A gaming operation on or close to the reservation allows the tribe to alleviate this situation by using their gaming facility as a conduit for job training and employment programs for tribal members. Provision of employment opportunities to reservation residents promotes a strong tribal government and tribal community. Employment of tribal members is an important benefit of tribal economic enterprises.

In the second case, the existence of the off-reservation facility would require or encourage reservation residents to leave the reservation for an extended period to take advantage of the job opportunities created by the tribal gaming facility. The departure of a significant number of reservation residents and their families could have serious and far-reaching implications for the remaining tribal community and its continuity as a community. While the financial benefits of the proposed gaming facility might create revenues for the applicant tribe and may mitigate some potential negative impacts, no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility.

As stated above, some of the issues that need to be addressed in the application if the land is to be taken into trust is off-reservation and for economic development are:

> What is the unemployment rate on the reservation? How will it be affected by the operation of the gaming facility?
>
> How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility? How will their departure affect the quality of reservation life?
>
> How will the relocation of reservation residents affect their long-term identification with the tribe and the eligibility of their children and descendants for tribal membership?
>
> What are the specifically identified on-reservation benefits from the proposed gaming facility? Will any of the revenue be used to create on-reservation job opportunities?

As long as it remains the policy of the Federal government to support and encourage growth of reservations governed by tribal governments, these are important questions that must be addressed before decisions about off-reservation trust land acquisitions are made. The Department should not use its IRA authority to acquire land in trust in such a way as to defeat or hinder the purpose of the IRA. It should be noted that tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department. It is only when the enterprises involve the taking of land into trust, as is required for off-reservation Indian gaming facilities, that the Department must exercise its IRA authority.

NOTE 1

Greater Weight

Section 151.11(b) also requires the Secretary to give "greater weight" than he might otherwise to the concerns of state and local governments. Under the regulations, state and local governments are to be immediately notified of a tribe's application to take land into trust, and are to file their comments in writing no later than 30 days after receiving notice. The reviewer must give a greater weight to the concerns of the state and local governments no matter what the distance is between the tribe's reservation and the proposed off-reservation acquisition. This is the second part of the two part review required by section 151.11(b).

NOTE 2

The regulations identify two sets of state and local concerns that need to be given "greater weight:" 1) jurisdictional problems and potential conflicts of land use; and 2) the removal of the land from the tax rolls. The reason for this requirement of giving "greater weight" is two-fold. First, the farther from the reservation the proposed trust acquisition is, the more the transfer of Indian jurisdiction to that parcel of land is likely to disrupt established governmental patterns. The Department has considerable experience with the problems posed by checkerboard patterns of jurisdiction. Distant local governments are less likely to have experience dealing with and accommodating tribal governments with their unique governmental and regulatory authorities. Second, the farther from the reservation the land acquisition is, the more difficult it will be for the tribal government to efficiently project and exercise its governmental and regulatory powers.

With respect to jurisdictional issues, the application should include copies of any intergovernmental agreements negotiated between the tribe and the state and local governments, or an explanation as to why no such agreements exist. Failure to achieve such agreements should weigh heavily against the approval of the application.

NOTE 3

With respect to land use issues, the application should include a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local governments, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility. Incompatible uses might consist of adjacent or contiguous land zoned or used for: National Parks, National Monuments, Federally designated conservation areas,

National Fish and Wildlife Refuges, day care centers, schools, churches, or residential developments. If the application does not contain such an analysis, it should be denied.

Conclusion

The Office of Indian Gaming will review the current applications. If an application is denied subsequent to this review, the applicant tribe will be notified immediately. Tribes receiving a denial subsequent to this review may resubmit the application with information that will satisfy the regulations. Regional directors shall use this clarification to guide their recommendations or determinations on future applications to take off-reservation land into trust.