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Re: 1076-AF23; OMB Control Number: 1076-0100, Comments on information collection burden in Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648 (proposed May 1, 2014) (amending 25 C.F.R. pt. 151)

On May 1, 2014, the Department of the Interior, Bureau of Indian Affairs (BIA) formally solicited comments on proposed regulations that would remove the prohibition against taking land into trust in Alaska on behalf of Indian tribes and individual Indians.¹ In conjunction with this proposed action, BIA seeks to expand its previously approved information collection request (ICR) under the Paperwork Reduction Act.²

The State of Alaska submits the following comments on the information collection.

¹ Land Acquisitions in the State of Alaska, 79 Fed. Reg. 24,648, 24,652-53 (proposed May 1, 2014) (amending 25 C.F.R. pt. 151).

² *Id.*; see also Acquisition of Trust Land, OMB Control No. 1076-0100 (May 7, 2014), http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201404-1076-001.

1. Introduction

The proposed regulations would lift a 24-year-old prohibition on placing Indian land in Alaska into federal trust status, and would allow individual Alaska Natives and more than 200 federally recognized Alaska tribes to request BIA to take land into trust.³ The preamble to the proposed rule indicates BIA intends to review the requests “on a case-by-case basis,” exercising “full discretion to analyze and determine whether to approve any particular trust application.”⁴ To that end, BIA will require individual Alaska Natives and Alaska Native tribes to submit supporting documentation.⁵ However, BIA does not identify what documentation it will require applicants to submit. BIA’s estimate that the proposed rule change will result in an additional information collection burden of 6,600 hours appears to lack foundation.

BIA notes that it will consider the “substantive criteria enumerated in [25 C.F.R.] part 151,”⁶ but recognizes that those criteria are not tailored to the unique status and history of Alaska Native owned and tribally owned land in Alaska, and does not explain how those criteria may be changed for Alaska applications.⁷ Instead, BIA proposes to “engage in further government-to-government consultations on how those procedures are best applied in Alaska . . . [and] solicits comments on that issue.”⁸ Yet the ICR indicates BIA anticipates information collection from 1060 Indian tribes and individuals (an increase of only 60 respondents from its currently approved information collection) and anticipates a time burden of 74,400 hours (an increase of 6600 hours).⁹ The basis for BIA’s estimated information collection burden is unclear, given BIA’s stated intent to defer development of application requirements and decision criteria.

³ 79 Fed. Reg. at 24,649, 24,652.

⁴ *Id.* at 24,649, 24,652.

⁵ *Id.* at 24,652.

⁶ *Id.*

⁷ *See id.* (“The Department recognizes, however, that applying those factors in Alaska requires the consideration of unique aspects of Native Alaska Villages and Native land tenure in Alaska . . .”).

⁸ *Id.*

⁹ *See id.* at 24,652; Acquisition of Trust Land, OMB Control No. 1076-0100, *supra* note 2.

The proposed rule asks for comments on the following issues: (a) the necessity of the information collection for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways the agency could enhance the quality, utility, and clarity of the information to be collected; and (d) ways the agency could minimize the burden of the collection of the information on the respondents.¹⁰ The State of Alaska addresses each in turn.

2. The necessity or utility of the information collection cannot be determined for yet-to-be-identified application criteria.

BIA must gather information from applicants to properly exercise its discretion in reviewing fee to trust applications. However, BIA's failure to identify the specific information to be required in an application and the criteria that will be applied in evaluating the collected information frustrate any effort to evaluate the necessity or utility of the proposed information collection.

While BIA currently collects information from applicants on the criteria in 25 C.F.R. §§ 151.10-.11, BIA has not determined how these criteria will be tailored to Alaska.¹¹ Under the current regulations, for an off-reservation application (and all the newly available Alaska applications will be off-reservation¹²) BIA will consider the following criteria: (1) the statutory authority for the acquisition; (2) the tribe's or individual Alaska Native's need for additional land; (3) the purposes that the land will be used for; (4) if the applicant is an individual, the amount of trust land the individual already owns and how much assistance that individual will need in handling his or her affairs; (5) the impact of the land's removal from state and local tax rolls; (6) the jurisdictional problems and land use conflicts that may arise; (7) whether BIA is equipped to discharge the additional responsibilities of holding the land in trust; (8) environmental compliance; (9) the location of the proposed trust land in relation to state and reservation boundaries; and (10) if the land is for business purposes, the

¹⁰ 79 Fed. Reg. at 24,653.

¹¹ *See id.* at 24,652.

¹² The only reservation in Alaska, Metlakatla, was exempted from the Alaska exception and therefore is not affected by the proposed rule change. *See* 25 C.F.R. § 151.1 ("These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members.")

anticipated economic benefits associated with the proposed use.¹³ A respondent Alaska Native tribe or individual would need to research and compile documentation that would allow BIA to evaluate the above criteria. No specific form is used.¹⁴

At this time, the State of Alaska does not comment on the necessity of evaluating the above criteria in making land into trust determinations in other states. But the State of Alaska recognizes, as does BIA, that those criteria are not tailored to Alaska.¹⁵ For example, 25 C.F.R. § 151.11(b) requires the Secretary to give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition as the distance between the tribe's reservation and the land to be acquired increases. BIA establishes no standard for applying this sliding scale in Alaska, where the potential applicant tribes have no reservations. Taking land into trust in Alaska should require an analysis of other factors as well, such as the history of ownership of the parcel; whether there are competing claims to the parcel, including but not limited to claims to state-owned rights of way; and whether trust status will affect residents that are not tribal members. BIA proposes to "engage in further government-to-government consultations on how those procedures are best applied in Alaska . . . [and] solicits comments on that issue."¹⁶ But without knowing what additional criteria may apply for Alaska applications or what unique considerations BIA intends to impose on Alaska applications, the necessity or practical utility of collecting yet-to-be-identified information cannot be determined.

While the State of Alaska objects as a matter of substance to lands being taking into trust in Alaska, and does not waive those objections in these comments on the information collection burden, the State of Alaska intends to provide more detail on the applicability of the land-into-trust application criteria in Alaska when it submits comments on the substance of the proposed rule.

BIA's liberal exercise of its discretion in evaluating trust land application also complicates attempts to determine the utility and necessity of the requested information collection. Indeed, one commentator has called BIA's land-into-trust application process

¹³ 25 C.F.R. §§ 151.10-.11.

¹⁴ 79 Fed. Reg. at 24,652.

¹⁵ *See id.* at 24,652.

¹⁶ *Id.*

“extreme rubber-stamping.”¹⁷ That commentator found that between 2001 and 2011 the Pacific Region BIA¹⁸ approved 100% of proposed fee-into-trust applications, which amounted to 111 applications affecting over 10,000 acres of land.¹⁹ During this timeframe, the Pacific Region BIA consistently found that *all* of the above criteria supported taking the land into trust.²⁰ Indeed the Government Accountability Office found that the criteria are not specific and there is no clear guideline for applying them.²¹ Without some indication that the collected information will support a reasoned decision, it is difficult to determine the information’s necessity and utility.

3. The accuracy of BIA’s estimate, including validity of the methodology and assumptions used, cannot be determined without knowing how BIA estimated the information collection burden.

Neither the proposed rule nor the information collection request discloses the methodology and assumptions used by BIA to estimate the time and cost burden of the requested information collection. However, the estimate itself indicates that the underlying assumptions and methodology may be flawed.²²

The current ICR approved by OMB contemplates 1,000 responses, a time burden of 67,800 hours, and a cost burden of 0 dollars.²³ In conjunction with the proposed rule,

¹⁷ Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 Pepp. L. Rev. 251 (2012), available at <http://digitalcommons.pepperdine.edu/plr/vol40/iss1/6>.

¹⁸ The Pacific Region covers Northern California, Central California, Southern California, and Palm Springs. *Pacific Region Overview*, U.S. Dep’t of the Interior, Indian Affairs, <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/index.htm>.

¹⁹ Waples, *supra* note 17, at 278.

²⁰ *Id.*

²¹ See U.S. Gov’t Accountability Office, GAP-06-781, Indian Issues: BIA’s Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications 15 (2006), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-06-781/pdf/GAOREPORTS-GAO-06-781.pdf>.

²² See 79 Fed. Reg. at 24,652-53; Acquisition of Trust Land, OMB Control No. 1076-0100, *supra* note 2.

²³ Acquisition of Trust Land, OMB Control No. 1076-0100, *supra* note 2.

BIA requests approval of 1,060 responses, a time burden of 74,400 hours, and a cost burden of 0 dollars.²⁴ The proposed rule includes a table indicating average responses and time for on- and off-reservation applications and for National Environmental Policy Act documentation.²⁵ However, the proposed rule only addresses applications for off-reservation Alaska tribes and individuals. Additionally, the fact that land-into-trust applications would be a new process for Alaska tribes and individuals would indicate that respondents would be less prepared to gather the necessary information and the application process would take more time. The time burden estimate also does not indicate whether BIA considered the difficulty of gathering yet to be identified information for unique Alaska-specific criteria.²⁶ Finally, the ICR contemplates only 60 additional responses (on top of the current 1000). Given that Alaska is home to 40% of federally recognized tribes, the 60-response increase appears arbitrary. The lack of any explanation for the assumptions underlying BIA's estimate make any assessment of its accuracy impossible.

In both its currently approved information collection and in its proposed collection, BIA estimates a cost burden of zero dollars.²⁷ However, it may be costly for Alaska tribes and individual Alaska Natives to gather much of the necessary information because they would be first-time applicants. For example, applicants will have to discern tax implications of trust status and the economic benefits of proposed uses.²⁸ It is reasonable to assume that the respondents may have to pay for attorney, consultant, or accountant fees; conduct title searches and land surveys; and perhaps hire new tribal staff. Without explanation it is difficult to see how BIA could accurately estimate zero dollars in costs.

4. BIA could enhance the quality, utility, and clarity of the information by providing more objective application criteria and more meaningful state, local, and community participation.

BIA could improve the quality, utility, and clarity of the requested information collection by establishing Alaska-specific application criteria, providing guidelines for

²⁴ *Id.*

²⁵ 79 Fed. Reg. at 24,653.

²⁶ *See* 79 Fed. Reg. at 24,652 (noting uncertainty about how to apply current application criteria and procedures in Alaska).

²⁷ Acquisition of Trust Land, OMB Control No. 1076-0100, *supra* note 2.

²⁸ *See* 25 C.F.R. § 151.10-.11.

objectively evaluating that criteria, and providing more opportunities for supporting information and comments from states, local governments, and affected residents.

The Government Accountability Office found that the land-into-trust application criteria are not specific and BIA has failed to provide clear guidelines for analyzing them.²⁹ More clarity and guidance on how BIA will analyze and weigh evidence will improve the quality, utility, and clarity of the information collected—and it will save time. Applicants and other stakeholders, including state and local governments, benefit from transparency and clarity in BIA’s decision making process. Without knowing how BIA will weigh different application criteria, an applicant will not know how to prioritize its time and how to focus its information gathering.³⁰ For example, how should an applicant document “the degree to which he needs assistance in handling his affairs”?³¹ While BIA has issued a handbook on fee-into-trust applications, much of it merely recites the vague criteria that appear in the regulations.³² BIA should provide clearer guidelines on how applicants should prepare their information and how BIA will assess and weigh that information.

The utility of the proposed information collection also could be improved by expanding opportunities for other stakeholders to participate. The current regulations require BIA to notify state and local governments that have regulatory jurisdiction over land that is the subject of an application.³³ The state and local governments then have 30 days to provide written comments on the trust acquisition’s impacts on regulatory jurisdiction, real property taxes and special assessments. While the comment period allows some stakeholders to participate in the land-into-trust determination, the call for comments is too narrow and the time period is too short. Land-into-trust determinations

²⁹ U.S. Gov’t Accountability Office, GAP-06-781, Indian Issues: BIA’s Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications 17 (2006), *available at* <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-06-781/pdf/GAOREPORTS-GAO-06-781.pdf>.

³⁰ *See id.*

³¹ *See* 25 C.F.R. § 151.10(d).

³² *See* Dep’t of the Interior, Bureau of Indian Affairs, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) 8-11, 23 (2013), *available at* <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf>.

³³ 25 C.F.R. § 151.11(d).

may impact more than just governments with regulatory jurisdiction over the land. Neighboring local governments also may feel economic consequences of nearby trust land. Placing land into trust also could affect owners or residents on inholdings or adjacent land who are not members of the beneficiary tribe or related to the individual beneficiary. Placing land into trust also may limit public access over easements, to hunting and fishing areas, and to mining claims. Land-to-trust determinations should not be done without input from all of the parties affected.

Expanded stakeholder involvement in the land-into-trust determination would better inform the ICR for the proposed rule. As one commentator has suggested, BIA should provide full disclosure of tribe's intentions for the proposed acquisition; a longer comment period; notice to all state and local governments (not just those with regulatory jurisdiction); opportunity for comments on the full range of impacts, not just tax and jurisdictional conflicts; and opportunity for public comment.³⁴ Incorporating greater input from those affected by the land-into-trust determination would bolster the utility of the information BIA collects from its applicants and will enable BIA to make a more reasoned and fair determination.

5. Conclusion.

There are a number of errors regarding the necessity for the information collection and the accuracy of the agency's estimate of the information collection burden. At bottom, however, whatever information BIA ultimately collects for a land-into-trust application, the information should be fully considered and have some real correlation and consequence with respect to the denial or grant of the land-into-trust application. The legality of allowing land into trust in Alaska aside, if Alaska applications are going to be subject to yet-to-be-determined unique considerations, those unique considerations will dictate the required information collection procedures and impact the information collection burden on respondents. BIA must first determine what information must ultimately be collected and how it will be considered before the information collection burden can be determined.

Sincerely,



Michael C. Geraghty
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³⁴ Waples, *supra* note 17, at 305.