



# Shakopee Mdewakanton Sioux Community

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June 26, 2018

Attn: Fee-to-Trust Consultation  
Office of Regulatory Affairs & Collaborative Actions  
Office of the Assistant Secretary – Indian Affairs  
1849 C Street NW, Mail Stop 4660-MIB  
Washington, D.C. 20240

VIA U.S. MAIL & EMAIL

**Re: *Shakopee Mdewakanton Sioux Community: Written Comments on the Consultation Draft of Revisions to Trust Acquisition Regulations at 25 C.F.R. § 151.11 & § 151.12***

On behalf of the Shakopee Mdewakanton Sioux Community (the “SMSC”), I submit the following written comments pursuant to correspondence dated October 04, 2017, and December 06, 2017. The SMSC is a federally-recognized Indian tribe located in Prior Lake, Minnesota. These comments address the proposed changes included in the Consultation Draft of Revisions to Trust Acquisition Regulations at 25 C.F.R. §§ 151.11 and 151.12 (“Consultation Draft”). The comments also address the general topics in the correspondence and Regulations.

## **I. Comments Related to the Consultation Draft of Revisions to Trust Acquisition Regulations at 25 C.F.R. § 151.11 and 151.12**

As an initial matter, the SMSC is concerned with the manner in which the Department of the Interior (the “Department”) developed the Consultation Draft. Providing Indian tribes with an opportunity to participate in regular and meaningful consultation is an essential component of a productive federal-tribal relationship. To be meaningful, tribal consultation must be timely. In this instance, the Department did not initiate consultation until after drafting proposed changes to the Part 151 regulations. Meaningful consultation would involve tribal involvement in the drafting. Tribal consultation must also provide tribes with an opportunity to shape the drafting agenda by identifying needs not met by the existing regulatory framework. In this instance, the Secretary unilaterally established the agenda and drafted proposed regulation revisions without asking Indian tribes if they had unmet needs with regard to the existing Part 151 regulations.

The SMSC also has serious issues with the substance of the draft revisions included in the Consultation Draft. The fee-to-trust process is already unduly and unnecessarily complicated, time consuming, and expensive. The proposed changes to the Part 151 regulations would further

complicate the fee-to-trust process, further compounding its uneconomic delays and expense. For the most part, the proposed changes do not benefit Indian tribes. In fact, the singular aim of the Consultation Draft seems to be to make it easier for the Department to reject fee-to-trust acquisitions. The significant flaws of the Consultation Draft coupled with the way in which the Consultation Draft was developed leads to one conclusion: the proposed changes plainly were not meant to benefit Indian Country.

A. *The two-phased secretarial review and approval process adds unnecessary delay*

The revisions included in the Consultation Draft would create a two-step review and approval process for off-reservation fee-to-trust acquisitions. The process would be bifurcated into separate “initial review” and “final review” processes. The stated goals of the Department for creating the two-step process are to promote efficiency and ensure that tribes do not expend significant resources on applications that have little chance of approval.

Changes to the Part 151 regulations that actually promote efficiency would be welcomed. The most expedient way to promote efficiency would be to simplify and streamline the review and approval processes. The Consultation Draft does the exact opposite. The proposed revisions complicate the process and create an additional layer of bureaucracy. The proposed, additional layer of bureaucracy is contrary to what the Trump Administration has identified to be its own fundamental mission that is focused on advancing economic development by eliminating federal regulation and federal administrative red-tape. If the Department of the Interior had a strong track record of efficiently processing completed fee-to-trust applications, under this and prior Administrations, perhaps then our sentiments would be different. However, obtaining approval under the current regulations takes a significant amount of time and resources. Oftentimes, completed fee-to-trust applications sit idly at the Central Office of the Bureau of Indian Affairs with no reasonable explanation provided to the applicant tribe for the delay in processing such applications. The additional layer of bureaucracy and added complexity of a new two-step process will only increase the amount of time it takes for the Department to put land into trust.

B. *Without statutory authority, the proposed regulations distinguish between gaming and non-gaming acquisitions*

The focus placed on gaming acquisitions in the Consultation Draft is unnecessary and inappropriate. Over 2,200 fee-to-trust applications were approved between 2009 and 2016. Less than one percent (1%) of those applications were for gaming purposes. By focusing an inordinate amount of attention on gaming acquisitions, the Department is straining to create a problematic solution for a problem that does not exist. Furthermore, the statute does not require increased scrutiny nor additional application items for gaming acquisitions. Neither the Indian Reorganization Act (“I.R.A.”) nor the Indian Gaming Regulatory Act (“IGRA”) supports creating heightened standards for off-reservation fee-to-trust acquisitions for gaming. IGRA generally prohibits gaming on lands acquired after 1988, unless the land satisfies one of the limited exceptions. 25 U.S.C. § 2719(c) states “[n]othing in this section shall affect or diminish the responsibility of the Secretary to take land into trust.” By enacting this language, Congress

made it clear that gaming eligibility should not be considered in the fee-to-trust process, however, the Department's proposal would run counter to this congressional policy. The Consultation Draft creates a new regulatory function for the Department with regard to Indian gaming that is not supported by federal law or policy.

C. *There is no statutory authority for requiring additional application items*

Federal law does not support distinguishing between on-reservation and off-reservation fee-to-trust acquisitions. Nothing in the I.R.A. does so. Instead, the I.R.A. authorizes the Secretary of the Interior to acquire any interest in land in trust "within or without existing reservations." 25 U.S.C. § 5108. No act of Congress supports treating off-reservation acquisitions differently than on-reservation acquisitions. No such distinction appears in the original land-into-trust regulations adopted in 1980. The Department addressed a number of concerns submitted by local governments related to off-reservation acquisitions when it adopted the initial regulations.

Many objections were received about the acquisition of fee land in trust status. These comments primarily concern the erosion of tax base and the serious jurisdictional problems that can arise when land outside of reservation is acquired in trust status. Many of the suggestions go beyond the scope of existing statutory authority and the proper purview of these regulations: e.g., the proposal that in-lieu taxes be paid for land transferred from fee-to-trust status.

45 FR 62034, 62035. Unfortunately, the Department's understanding of the proper scope of existing statutory authority and the proper purview of fee-to-trust regulations has strayed from the statute since 1980. The fee-to-trust regulations were amended in 1995 to their current form. The current regulations created separate processes for on-reservation and off-reservation acquisitions. Fee-to-trust requirements based on a parcel's off-reservation status were without statutory authority when they were promulgated and they remain without statutory authority today. The only practical effect of requiring additional application items for off-reservation applications is to give the Department more reasons to deny fee-to-trust applications.

D. *Reinstating the 30-day delay merely adds delay solely for the sake of delay*

The Consultation Draft would reinstate a thirty-day waiting period to delay successful applications from being taken into trust. The procedural provision was first implemented in 1996. Under the provision, the Secretary would make the fee-to-trust decision and then wait thirty-days before taking the property into trust. If an appeal was filed, the Department would wait to formally take the property into trust until the appeal was resolved. The intent of the thirty-day procedural stay was to provide individuals with a chance to file administrative appeals. The stay period was implemented because the Quiet Title Act ("QTA") precluded judicial review after the United States acquired title to land in trust.

The Supreme Court's 2012 decision in *Patchak* removed the need for the thirty-day waiting period by holding that the QTA does not preclude judicial review of fee-to-trust decisions after the land has been acquired in trust. *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S.Ct. 2199 (2012). The Court held that certain individuals could challenge fee-to-trust acquisitions, even after the land was taken into trust, pursuant to the Administrative Procedure Act ("APA"). An individual can now challenge fee-to-trust acquisitions within the APA's six-year statute of limitations. For this reason, reinstating the thirty-day waiting period serves no purpose other than unnecessary delay. There is simply no reasonable legal or policy rationale for reinstating the thirty-day waiting period.

## **II. Commentary related to the Generalized Topics Included in the October 4, 2017 and December 6, 2017 Correspondence**

The correspondence dated October 4, 2017, and December 6, 2017, also sought input on a number of generalized topics. These topics are briefly addressed below.

- A. *What should the objective of the land-into-trust program be? What should the Department be working to accomplish?*
- The Department's objective should be to efficiently facilitate the reacquisition of land in trust by Indian tribes. The Department should carry out the intent of the I.R.A. to protect and restore tribal ancestral lands. The Department should be working to place as much land into trust as possible for tribes wishing to reacquire land. The Department's sole and overriding objective should be to facilitate a tribe's effort to restore its tribal homelands.
- B. *How effectively does the Department address on-reservation land-into-trust applications?*
- It would effectively make it worse. The existing on-reservation fee-to-trust process needs to be simplified and expedited. Requiring a laundry list of application items for on-reservation acquisitions complicates the process and slows it down even further.
- C. *Under what circumstances should the Department approve or disapprove an off-reservation trust application?*
- One of the primary goals of the I.R.A. was to combat the devastating effects of federal policy that systematically divested Indian tribes of millions of acres of land. The only constraint to the restoration of tribal lands to a tribe should be a balancing of its interests with those of one or more neighboring tribes regarding potential impacts the restoration of tribal land might have on nearby tribes.
- D. *What criteria should the Department consider when approving or disapproving an off-reservation trust application?*

- Same response as in the immediately foregoing question.
- E. *Should different criteria and/or procedures be used in processing off-reservation applications based on: whether the application is for economic development as distinguished from non-economic development purposes?; whether the application is for gaming purposes; and whether the application involves no change in use?*
- No. Nothing in the statute requires additional application items for off-reservation acquisitions. The Department should approve off-reservation and on-reservation requests with the same criteria.
- F. *What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?*
- The primary advantages of having land in trust status are: perpetual ownership is protected; jurisdictional responsibility is clarified; no property taxes erode the value of the land; tribal assertions of governmental authority over the land are a core expression of tribal self-governance and tribal sovereignty; and the land, as Indian Country, possesses a unique federal-tribal status that incorporates federal protection and asset enhancement.
- G. *Should pending applications be subject to new revisions if/when they are finalized?*
- No. Tribes are entitled to the protection of trust land in perpetuity. Making the land's trust status subject to revision is the antithesis of perpetuity.
- H. *How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?*
- State and local jurisdictions should be given an opportunity to present their views for consideration by the federal decision-makers in the fee-to-trust process. However, the weight given to such views should never outweigh the responsibility of the United States, as trustee, toward the tribe who has applied to reacquire land in trust; given that such responsibility includes tangible support for the long standing federal policies promoting tribal self-governance and self-sufficiency.
- I. *Do MOU's with state/local governments help facilitate improved tribal local relationships?*
- In many cases, MOU's improve relationships between tribes and state/local governments, however, such MOU's are seldom needed and are sometimes impossible to obtain because by definition they require mutual agreement. Thus, the absence of an MOU should not result in a fee-to-trust application being disapproved.

- J. *What recommendations would you make to streamline/improve the land into-trust process?*
- Many of the application item requirements should be eliminated. The review process should be simplified. The process should not distinguish between on-reservation and off-reservation acquisitions. The burden placed on Indian tribes to “prove up” the elements of a fee-to-trust application are great. That burden should be shifted to the individuals that challenge fee-to-trust acquisitions.

In summation, we believe that the Part 151 regulations are misguided, unnecessary, and not supported by statutory authority. The Department should withdraw the draft language that it has circulated to Indian tribes in the past few months and start over by first consulting with Indian tribes about the actual problems that exist for tribes associated with land acquisition and the fee-to-trust process. By consulting with tribes prior to drafting proposed regulatory amendments the Department can best engage Indian tribes and efficiently and effectively achieve regulations that serve congressional policy and enhance tribal sovereignty and tribal self-determination.

Sincerely,



Charles R. Vig  
Tribal Chairman