



Sisseton-Wahpeton Sioux Tribe

LAKE TRAVERSE RESERVATION

Office of the Tribal Chairman

P.O. Box 509

12554 BIA Hwy 711

Agency Village, South Dakota 57262

Phone: (605) 698-3911

February 27, 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: Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Written
Comments on the Consultation Draft of Revisions to the Fee-To-Trust
Regulations**

Dear Acting Assistant Secretary – Indian Affairs John Tahsuda,

On behalf of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation (the “Tribe”), I respectfully provide written comments as requested by your October 4, 2017, and December 6, 2017, correspondence. I shared some of these comments pertaining to consultation at the January 18, 2018, listening session at Mystic Lake Casino & Hotel.

1. Consultation was not followed

Consultation between the Tribe and the federal agencies of the United States is founded upon:

- our Treaties
- the United States Constitution
- Federal statutes
- Executive Orders and Presidential Memorandums
- your Trust responsibility to all Indian tribes, and
- the inherent sovereign authority of our respective governments.

Timely. For consultation to be meaningful, consultation must be timely, which means that the Department of the Interior doesn’t initiate consultation *after* drafting proposed changes to important regulations, but well *before*.

Here, the Secretary has unilaterally established the agenda and unilaterally drafted proposed regulations without ever identifying the need for the proposed change. The Secretary must initiate consultation to discuss whether *any* change to regulatory language is even necessary. In other words, the Secretary must first consult with Indian tribes about the underlying concern, not the perceived solution.

Sharing Information. Consultation requires sharing information. The Department has provided no information about the need for a change to the off-reservation regulations. Without that information, Indian tribes cannot consult about its source, its credibility, its strengths or weaknesses.

Collaboration. Consultation also requires meaningful collaboration, which involves mutual respect and an emphasis on trust. Let's first collaborate about the perceived problem or difficulty and then, if necessary, we can discuss an agenda. Here, the Department is saying that consultation means that Indian tribes are treated no different than any member of the public who is invited to comment on proposed regulations.

Deliberation. Consultation involves shared responsibility to deliberate on the Department's perceived concern. Here, the Department is not sharing responsibility, but imposing its own agenda and seeking comments on its proposed changes to federal regulations. When we collectively deliberate on whatever concern the Department has, I not only want to learn about the problem, I want to first hear how we can protect and promote Tribal sovereignty and Tribal resources when discussing this alleged problem.

Honesty. Consultation is meaningless without honesty. In October 2017, I received a letter proposing regulatory changes to the Department's off-reservation regulations. Then two months later I receive another letter in December, but now the first two topics are "what should the objective of the land-into-trust program be" and "how effectively does the Department address on-reservation land-into-trust applications." If the Department is honest about some unknown concern pertaining to off reservation trust acquisitions, then why is the Department's agenda now shifting to on-reservation issues?

2. Comments Pertaining to the Consultation Draft of Revisions

The Consultation Draft further complicates the fee-to-trust process by making it easier for opposition to cloud the record and for the Department to reject fee-to-trust acquisitions.

A. Two-step review process

The Consultation Draft proposes a new two-step approval process for off-reservation trust acquisitions, which are labeled "initial review" and "final review." The Consultation Draft complicates the process and creates an additional layer of bureaucracy. Obtaining approval under the current is unnecessarily time-consuming. The additional

layer of bureaucracy with the two-step approval process would only accomplish a federal agency goal of decreasing trust acquisitions.

B. *Distinguishing between gaming and non-gaming*

Between 2009 and 2016 less than 1% of the Department's applications were for gaming purposes. The Department is creating a solution to a problem that does not exist. Further, federal law does not support creating heightened standards for off-reservation fee-to-trust acquisitions for gaming and the Indian Gaming Regulatory Act generally prohibits gaming on lands acquired after 1988, unless the land satisfies one of the limited exceptions. 25 U.S.C. § 2719. Once again, the Consultation Draft creates a new regulatory function for the Department to use should the goal be to deny trust acquisitions.

C. *The 30-day waiting period*

The Consultation Draft would reinstate a 30-day waiting period to delay successful applications from being taken into trust. The Supreme Court removed the need for the 30-day waiting period by holding that the Quit Title Act 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 Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012). Thus, no good reason exists to reinstate a 30-day waiting period, unless the Department's goal is to deny trust acquisitions.

3. Commentary on the Department's agenda.

At your request, the Tribe addresses topics that you selected to be discussed with no consultation from Indian tribes.

A. *What should the objective of the land-into-trust program be? What should the Department be working to accomplish?*

The Department's objective must protect and restore tribal homelands in the most efficient manner possible.

B. *How effectively does the Department address on-reservation land-into-trust applications?*

The Department's on-reservation application process should be simplified and expedited.

C. *Under what circumstances should the Department approve or disapprove an off-reservation trust application?*

The Department should approve off-reservation trust applications when located within an Indian tribe's aboriginal or modern-day land base.

- D. *What criteria should the Department consider when approving or disapproving an off-reservation trust application?*

The Department's criteria should focus on statutory authority and an Indian tribe's aboriginal or modern-day land base.

- 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.

- F. *What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?*

There are too many to list here, however, perpetual governmental ownership, jurisdictional clarity, self-determination, economic development, and not paying property taxes to a State government that provides no funds to a Tribal government.

- G. *Should pending applications be subject to new revisions if/when they are finalized?*

No.

- 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 already have too much control over the fee-to-trust process. No weight should be accorded to public comments because the public is already represented by state and local jurisdictions.

- I. *Do MOU's with state/local governments help facilitate improved tribal local relationships?*

That is for each Indian tribe to decide.

- J. *What recommendations would you make to streamline/improve the land into-trust process?*

Dedicate more staff to process applications and train that staff to effectively navigate the present process in the most efficient manner possible.

Assistant Secretary John Tahsuda

February 27, 2018

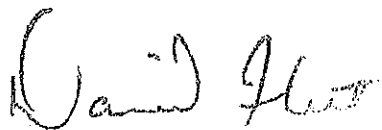
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Conclusion

The Tribe urges the Department to scrap the entire Consultation Draft and begin any consultation by first meeting with Indian tribes on a government-to-government basis to first determine if any issues or difficulties exist and should be addressed by the Department.

Please contact me with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Flute". The signature is written in a cursive, somewhat stylized font.

Dave Flute
Chairman