

**STATEMENT AND TESTIMONY BEFORE THE
DEPARTMENT OF INTERIOR
OFFICE OF THE ASSISTANT SECRETARY, INDIAN AFFAIRS**

**Jennifer McLeod, Tribal Council Member,
Sault Ste. Marie Tribe of Chippewa Indians**

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Jennifer McLeod, n'dizhnikaaz. Sault Ste. Marie Tribe of Chippewa Indians ndoo-debendaagoz. Kina Baawaa'ting Anishinaabek Omaa go nda Onji-kida. Wijiwaagwining, nda-wijnokiimaayek. My name is Jennifer McLeod. As a member and as a leader of the Sault Ste. Marie Tribe of Chippewa Indians, I am speaking on behalf of the Tribe. As always, my Tribe and I want to work in partnership with you.

It is our hope that the Department will want to work with the Tribes.

My Tribe begins this testimony by identifying overall concerns regarding the Department of Interior's proposed policy changes and possible regulatory changes to 25 CFR Section 151.11 and Section 151.12. Following this, the testimony will provide responses to each of the ten questions presented by the Department of Interior, to the Tribes.

OVERALL CONCERNS:

THE PROPOSED CHANGES ARE BASED ON FLAWED ASSUMPTIONS.

Department of Interior's proposed policy changes and possible regulatory changes to 25 CFR Section 151.11 and Section 151.12 appear to be based on an assumption that all Tribes have an adequately-sized reservation, and off-reservation acquisitions are needed only for a handful of unusual cases. These are simply not the facts.

Many Tribes are like my own, and have only scattered trust parcels and only small or diminished reservations that are insufficient as a viable land base for its people. Some Tribes have no reservation lands at all. For most Tribes, off-reservation acquisitions are vital, since on-reservation acquisitions are not an option. For example:

- When my Tribe was recognized in 1975, the Sault Ste. Marie Tribe was largely landless, and over the decades we have worked to re-establish lands of our own.
- My Tribe includes over 43,000 members, but we have an extremely limited land base. It consists of small, isolated land-parcels, scattered across a seven-county area in the Upper Peninsula of Michigan.
- Today, our main land base consists of a former land-fill and a lot of wetland, and is surrounded by the city of Sault Ste. Marie. It is extremely difficult to find any available land that abuts our reservation. We are, essentially, geographically land-locked. By necessity, many of our cultural resources, natural resources, and population service areas are located off-reservation lands.
- To the best of our ability, my Tribe provides essential government services to our members. Due to the non-contiguous nature of our land base, these programs and services are spread out. The scattered nature of our lands has created a "checker-board" type scenario, with trust land abutting private, non-Indian lands.
- Since we have so many members, and so little land, whenever possible, we try to purchase additional land, close to existing Tribal trust lands. We try to place any newly acquired, off-reservation lands into trust, so that we can use it for various Tribal

purposes. For instance, we have five parcels of off-reservation land located near our Tribal school, used for Tribal youth education purposes, and we also use off-reservation land to operate our Tribal Advocacy Resource Center, which includes our Domestic Abuse Residential facility, located just 100 feet from existing trust land. We also need off-reservation land parcels that provide Treaty fishing access sites. Several of these sites are already in trust, however we currently have an application pending for another. Such access sites are essential to our Treaty rights.

Some Tribes have larger reservations. Keep in mind, however, that most reservations were thought to be unsuitable for white settlers. Most reservations are located in isolated areas and have little or no natural resources. Most reservations were hand-picked by the U.S. government and Tribes were forcibly kept within their borders. The poorness, the isolation, and the lack of raw materials on reservation lands; none of this is an accident. Bottom-line, even those Tribes with reservations, need the opportunity to acquire off-reservation lands. The Indian Reorganization Act was not designed to keep us hemmed into “lands unsuitable for white settlers.”

Creating a heavy presumption against taking land into trust off-reservation would have a devastating impact on most Tribes and is not what Congress intended in the Indian Reorganization Act of 1934.

THE U.S. DEPARTMENT OF INTERIOR HAS NOT CONDUCTED MEANINGFUL CONSULTATION.

Meaningful Tribal consultation is an obligation of the federal government. Consultation is a normal obligation with respect to any treaty, whether international in scope, or domestic (See, Restatement (Third) Foreign Relations Law of the United States, Sections 325, 337 (1986)). Tribal rights to meaningful consultation have been repeatedly reaffirmed through Executive Orders, legal mandates, federal regulations and statutes, and upheld by federal courts.

Despite the federal government’s obligation to conduct meaningful Tribal consultation regarding the Department of Interior’s proposed policy changes and possible regulatory changes to 25 CFR Section 151.11 and Section 151.12, meaningful consultation has not taken place.

The Office of the Secretary has failed to even meet the requirements of its own consultation policy. The Department of Interior, Bureau of Indian Affairs government-to-government consultation policy includes step-by-step directions for the consultation process. At its very core, the policy is designed for “government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input,” (Bureau of Indian Affairs, “Government-to-Government Consultation Policy,” 2000). It is unfortunate that neither the policy or the step-by-step directions for the consultation policy were followed.

Prior to the Department informing Tribes of its proposal to make changes to current fee-to-trust policies and regulations, Tribes were not solicited regarding whether change was

necessary or desired. Nor were Tribes solicited to provide input regarding the kinds of changes that would improve the fee-to-trust policies and process. Tribes were not solicited by the Department to provide any input, at all.

Tribes were not involved in pre-decisional scoping nor in the development of the Department's proposed changes.

Since the Department's announcement to the Tribes regarding changes to fee-to-trust policies, it has held a limited number of Listening and Consultation sessions. These sessions seem to have been designed to make it appear as though they are meaningful Tribal consultation sessions, even though they are not. For example, during these previous meetings, Tribal leaders weren't given nearly enough time to speak or to be heard by federal representatives. There were not sufficient Q & A opportunities. There were no web-based opportunities that would allow Tribes to participate without excessive financial burdens. The meetings were not extended to all 12 BIA regions, despite the significant impact the proposed changes would have on Indian Country. Nor have Tribes been given meaningful feedback, despite the passage of reasonable time periods.

THE DEPARTMENT OF INTERIOR, INDIAN AFFAIRS LACKS CONFIRMED LEADERSHIP. The Department of Interior's push for significant regulatory and policy change without benefit of a confirmed Assistant Secretary, Indian Affairs, and without the benefit of an appointed Deputy Solicitor, Indian Affairs, suggests that it wishes to avoid the United State Senate's authority to advise and consent on the President's appointments and the policies they create. Such a rush is inconsistent with the U.S. Constitution and with the federal government's Trust Responsibility to the federally-recognized Tribal governments.

THE PROPOSED CHANGES ARE NOT FOR THE BENEFIT OF TRIBAL GOVERNMENTS.

According to the Department of Interior, the proposed changes to 25 CFR Section 151.11 and Section 151.12 are made to benefit Tribes.

It is difficult to find sincerity in such a comment.

Indian Country has not requested these specific changes. The proposed language is detrimental to most Tribes throughout the nation. Without the benefit of an Assistant Secretary of Indian Affairs, the Department of Interior is proposing changes that will likely significantly diminish opportunities for federally-recognized Tribes to have land put into trust.

With all due respect, instead of making changes to "benefit" Tribes, as the Department claims, it is acting without regard to its obligation to protect Tribal treaty rights, lands, assets, and resources.

RESPONSES TO SPECIFIC QUESTIONS, BY THE DEPARTMENT OF INTERIOR, TO THE TRIBES:

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

Answer:

The objective of the land-into-trust program is to restore Tribal lands to federally-recognized Tribes, meeting one of the primary goals of the Indian Reorganization Act. In doing so, Tribes are better able to sustain their people. This is supported by a statement made by the Bureau of Indian Affairs:

Taking land into trust is one of the most important functions Interior undertakes on behalf of the tribes. Acquisition of land in trust is essential to tribal self-determination. Tribes are sovereign governments and trust lands are a primary locus of tribal authority. Indeed, many federal programs and services are available only on reservations or trust lands. The current federal policy of tribal self-determination is built upon the principles Congress set forth in the Indian Reorganization Act and reaffirmed in the Indian Self-Determination and Education Assistance Act. Through the protection and restoration of tribal homelands, this Administration has sought to live up to the standards Congress established eight decades ago and indeed to reinvigorate the policies underlying the Indian Reorganization Act. (BIA, Trust Services, Fee to Trust at <https://www.bia.gov/bia/ots/fee-to-trust>, retrieved March 7, 2018.)

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

Answer:

My Tribe's reservation land is so small that there is not a realistic issue of obtaining more land within the reservation boundaries to put into trust. The size of our reservation cannot in any way, shape, or form, meet the most basic needs of our people. Therefore, we are forced to seek off-reservation lands, for possible trust status.

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

Answer:

Congress has given the Secretary the authority to put lands into trust for Indian tribes, regardless of whether the lands are off-reservation. The Indian Reorganization Act states:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in land, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for purpose of providing land to Indians.

Plainly, the statutory goal is to put lands into trust, whether in or off-reservation. This Congressional goal has not changed since 1934.

According to the Department of Justice, the Secretary of Interior has a fiduciary duty to place land into trust for Indian Tribes where there are no underlying environmental issues with the land, where there are no encumbrances that might defeat the title, and where the application is submitted in accordance with the BIA's land into trust regulations and the Tribe's own governing process. DOJ Title Standards state with respect to Part 151 acquisitions, that *"[a]cquiring title to real property as a fiduciary presents challenges and responsibilities distinct from those applicable to lands purchased for use and possible eventual disposal by federal agencies."* (U.S. Department of Justice, Environment and Natural Resources Divisions, Land Acquisition Section, "Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions, at 1.5.2 (2016). This quote indicates (1) that when the Secretary acquired title to lands under Part 151, he does so as a fiduciary; and (2) that Part 151 acquisitions rarely require the Department to purchase or otherwise acquire the underlying lands for the Tribe, but rather only request that the Department take title to fee lands already held by the Tribe and hold it in trust on behalf of the Tribe.

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

Answer:

The Department should continue to use the current criteria considered at 25 CFR Section 151.11.

5. Should different criteria and/or procedures be used in processing off-reservation applications based on:

- a. **Whether the application is for economic development as distinguished from non-economic development purposes (for example Tribal government buildings, or Tribal health care, or Tribal housing)?**

This question is troubling because it implies that the Department is contemplating linking its approval process with land-use decisions. Using the fee-to-trust authority as a means of interfering with Tribal governmental decisions regarding land-use is contrary to the sovereignty status of Tribes, and to federal statutory intent. A Tribe's purpose for economic development is to support and sustain the Tribal government and its members; therefore there must be no differentiation in approval process. Please note, one of the main purposes of the Indian Reorganization Act is to protect Tribal lands by putting the land in trust, so that

Tribes can *use the land* to better provide for their members. This *use* includes economic development, whether through farms, stores, restaurants, etc.

If however, this is merely a question regarding the National Environmental Policy Act (NEPA), my Tribe submits that, overall, NEPA appropriately addresses varying land uses. We would also urge the Department to work in partnership with Tribes in determining whether it should eliminate the distance analysis currently at 25 CFR 151.11(B) and replace it with a more favorable economic benefits analysis.

b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?

Answer:

The application should not be distinguished by gaming and non-gaming. The Department would be wrong to insert gaming considerations into the Fee to Trust Process. It is statutorily prohibited. The Indian Gaming Regulatory Act explicitly states, "Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 CFR Section 2719 (c).

Again, however, if this is merely a question regarding the National Environmental Policy Act (NEPA), my Tribe submits that, overall, NEPA appropriately addresses varying land uses. We would also urge the Department to work in partnership with Tribes in determining whether it should eliminate the distance analysis currently at 25 CFR 151.11(B) and replace it with a more favorable economic benefits analysis.

c. Whether the application involves no change in use?

Just as in question 5(a), this is a troubling question. It implies that the Department is contemplating linking its approval process with land-use decisions. Using the fee-to-trust authority as a means of interfering with Tribal governmental decisions regarding land-use is contrary to the sovereignty status of Tribes, and to federal statutory intent. Tribes must be entitled to expand their land base without regard to their sovereign right to use the land as it fits their needs.

To repeat however, if this is merely a question regarding the National Environmental Policy Act (NEPA), my Tribe submits that, overall, NEPA appropriately addresses varying land uses. We would also urge the Department to work in partnership with Tribes in determining whether it should eliminate the distance analysis currently at 25 CFR 151.11(B) and replace it with a more favorable economic benefits analysis.

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

Answer:

Each time a Tribe makes a decision regarding an application, the Tribe will be weighing factors that are unique to the land and to the Tribal purpose for the land. Not only are factors unique to each piece of land, but there are factors unique to each particular Tribal government. The answer to this question will be different for every Tribe and for every piece of land. It should have no bearing on the process by which the Department approves or disapproves applications.

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

Answer:

This question is troubling for several reasons:

- a. It is our understanding that since April 2017, all applications have been pulled to the Central Office and are now, essentially, in a holding pattern. This question implies that the Department is holding off on making decisions regarding current fee-to-trust applications. The Department should not halt its application process without first having informed Tribes of its intention and its reasons in doing so.
- b. The question also implies that the Department is close to making a decision regarding the proposed changes (the question references current “pending” applications), despite having failed to properly consult Tribes on a major policy and regulatory change, and without the benefit of a confirmed Assistant Secretary or an appointed Deputy Solicitor.
- c. The question implies that the Department of Interior has forgotten its goal is to reduce barriers and improve efficiency. If true, current pending applications should be processed under the current regulations. If any changes are finalized, only applications submitted after the date those regulatory changes are final and in effect should be processed under such new regulations.

8. How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?

Answer:

The Department of Interior must always meet its fiduciary duty and trust responsibilities to the Tribal governments. It has no similar duties and responsibilities to state and local

governments, or to the general public. The Department must always act in the best interest of the Tribe.

- As per the concerns of state and local jurisdictions: State/local government concerns should be considered and weighed by the Department of Interior in the same manner as prescribed by the Indian Reorganization Act.
- As per public comments: The federal government should weigh public comments on fee-to-trust applications in the same manner as it weighs Tribal comments on issues that have no Tribal jurisdictional bearing. The federal government has a government-to-government relationship with the Tribes. The general public does not share in this relationship.

9. Do Memoranda of Understanding (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?

Answer:

Although there are times when Tribal and state/local governments engage in cooperative agreements that benefit all parties, seeking such agreements should not be forced as part of a federal policy or regulatory scheme involving fee-to-trust applications.

- a. Federal policy and/or regulations requiring Tribal and state/local governments seek cooperative agreements regarding the placement of Tribal land into federal trust status has no standing in law.
 - It could create scenarios in which the federal government would be hampered/forced by state and local governments into “not” putting Tribal lands into Trust. For instance, if an MOU is required, and if a state or local government refuses to sign an agreement with a Tribe, the application requirements would not be met and the federal government would be unable to put land into trust. Putting the federal government in a subordinate position to state/local governments is unconstitutional. Additionally, the subordinate position of the federal government would make it impossible for the Department to always act in the best interest of the Tribes.

- Forcing Tribes to obtain permission from state and local governments puts Tribes in a subordinate position to states. Even forcing Tribes to seek state/local government agreement, puts state and local governments in a position of authority over the Tribes. Unless Congress expressly authorizes such authority, it is unconstitutional.
- b. Federal policy and/or regulations adding another layer of requirements will result in crippling delays and increased denials. It would be unreasonable to add requirements that force Tribes to negotiate with hostile parties. Such negotiations would add excessive impediments and costs to the process.

10. What recommendations would you make to streamline/improve the land-into-trust program?

Answer:

- It is the understanding of the Sault Ste. Marie Tribe of Chippewa Indians that the Department is considering reinstating the 30-day wait to have land placed in Trust. It is our recommendation that the Department not go back to this practice. Since the Patchak v Zinke decision, there is no reason to require Tribes to wait an additional 30 days. 583 U.S. ___ (2018).
- The Sault Ste. Marie Tribe of Chippewa Indians strongly recommends the Department of Interior determine whether changes to the process are needed, and, if so, what kinds of changes are needed, by consulting with the Tribes. We recommend the Department conduct an initial survey/study and then meaningful consultation efforts in the following manner:
 - The issues involving fee-to-trust are extremely significant to every Tribe in each BIA region. Therefore, a survey/study and consultation effort should proceed after the confirmation of the Assistant Secretary, Indian Affairs and the appointment of a Deputy Solicitor, Indian Affairs.
 - The survey/study should be framed and drafted with the assistance of inter-Tribal Working Groups. The framework could include issues regarding NEPA, Tribal gaming, other issues identified by the Inter-Tribal Working Groups, etc.
 - Once a framework is achieved, information regarding the purpose of the study/survey/consultation, as well as the overall framework and scope of the effort, should be sent to Tribal leaders.
 - Tribes should all have a reasonable time period to review and analyze the information, as well as to respond.

- The Department of Interior should follow BIA Consultation policy guidelines, including providing Tribes in every region the opportunity to attend consultation sessions.
- Using the information obtained throughout this process, the DOI can work with the Tribes to determine what, if any, changes should be made to the fee-to-trust process.