



MILLE LACS BAND OF OJIBWE

Executive Branch of Tribal Government

Via email

March 15, 2018

Mr. John Tahsuda
Principal Deputy Assistant Secretary-Indian Affairs
U.S. Department of the Interior
consultation@bia.gov

RE: The Mille Lacs Band of Ojibwe's Comment on Fee to Trust Regulations at 25 C.F.R. Part 151

Dear Mr. Tahsuda,

The Mille Lacs Band of Ojibwe ("Band") appreciates the opportunity to share its views on the Department's questions regarding the Department's regulations for taking land into trust for Indian tribes.

A fair and efficient fee-trust process is important to the Band. The 1855 Treaty with the Chippewa, 10 Stat. 1165, set aside a 61,000-acre reservation for the Mille Lacs Band in east-central Minnesota. As a result of illegal entries on the Mille Lacs Reservation in the 1860s, 1870s, and 1880s, and the unlawful refusal to allot Reservation lands to Band members under the Nelson Act, the Band lost nearly its entire Reservation land base. Today, the Department holds 3,648.03 acres, including 140.85 acres being allotments, of the Band's 61,000-acre Reservation in Minnesota in trust, while the Band owns (and pays property taxes on) an additional 6,183.41 acres within the Reservation in fee. The Band owns another 12,804.66 acres of fee and trust lands outside of the Reservation. The Band places a high priority on land acquisition and protection.

The Band has approximately 4,700 members, and its geographic area contains three districts composed of several distinct communities that have existed in East Central Minnesota for hundreds of years. District I includes the main reservation

DISTRICT I

43408 Oodena Drive • Onamia, MN 56359
(320) 532-4181 • Fax (320) 532-4209

DISTRICT II

36666 State Highway 65 • McGregor, MN 55760
(218) 768-3311 • Fax (218) 768-3903

DISTRICT IIA

2605 Chiminising Drive • Isle, MN 56342
(320) 676-1102 • Fax (320) 676-3432

DISTRICT III

45749 Grace Lake Road • Sandstone, MN 55072
(320) 384-6240 • Fax (320) 384-6190

URBAN OFFICE

1404 E. Franklin Avenue • Minneapolis, MN 55404
(612) 872-1424 • Fax (612) 872-1257

area on the west side of Mille Lacs Lake. District II includes the communities in Minisinaakwaang (East Lake), Sandy Lake, and Minnewawa near McGregor as well as the community of Chiminising in Isle on the south side of Mille Lacs. District III includes the Aazhoomog (Lake Lena) community near the St. Croix River east of Hinckley, as well as a large community of Band members living in Hinckley. In each community, the Band has created jobs for Band members and non-members alike and provides programs and services to Band members.

The Band is responsible for providing services to meet the needs of its people, much like any state does for its residents. The Band's Department of Education operates the K-12 Nay Ah Shing Schools in District I and charter schools in District II and District III. The Band's Department of Health and Human Services operates two health-care clinics, and offers public health services, behavioral health services, child welfare and foster care services, and community support services to assist Elders and Band members in need. The Band provides assisted living facilities to Elders in all three districts, as well as Circle of Health, an insurance program set up to help Band members with healthcare costs.

The Band's Community Development Department ensures that Band members' housing and infrastructure needs are met by building new homes and renovated existing homes and making infrastructure improvements in its communities. The Band's Department of Natural Resources manages natural resources within the Band's jurisdiction, issues hunting and fishing licenses and permits to Band members and non-Band members that hunt and fish on tribal lands, and enforces related regulations on the reservation. To ensure the safety and security of Band members and local communities, the Band's Department of Justice includes a Tribal Police Department with more than 20 full-time peace officers that exercise tribal, federal and state law enforcement jurisdiction within the Band's Indian country.

These are just some of the vital services that the Band provides to its members and local communities at its own expense, using money derived from the Band's

commercial enterprises. Many of these services are provided from Band facilities on trust land. As the Band's population increases, so does the Band's need for greater economic development and community development to support Band communities. Placing fee land into trust is key to satisfying those needs.

1. There Are Distinct Advantages of Holding Land in Trust, As Opposed to Fee, Status.

First, trust land status provides the strongest legal protection to Band lands from future loss or dispossession and ensures that these lands will continue to held for the Band and its members in perpetuity.

Second, trust status resolves jurisdictional disputes with the local jurisdictions. As you and the Department well know, Mille Lacs County asserts land use and other forms of civil jurisdiction over Band fee lands within its Reservation, based on its claim that the Reservation was disestablished and no longer exists. The Band disagrees with this; its position (and that of the Department) is that the original reservation boundaries remain in effect and, therefore, the County has only limited civil jurisdiction over Band lands within the Reservation. Despite this disagreement, the Band and the County largely agree on the jurisdictional status of trust lands, where the County has only limited civil jurisdiction. Transferring lands into trust therefore helps resolve jurisdictional disputes.

Third, trust status allows tribal governments to avoid paying property taxes on lands that would not be paid by any other governmental entity. For example, in 2010, the United States acquired the property on which the Band's Chiminising Community Center is located in trust. The Community Center is a Band government building that is operated for the benefit of Band members and the larger community as a public, governmental service. It houses the Niigaan Program which is funded by the Band and provides afterschool activities for all members of the local community in the evenings and throughout the summer month (at no cost to the community). The Community Center also provides a space for the local school district to hold its

basketball tournaments, dances and other activities at no cost to the district. Under Minnesota law, this type of facility would not be taxed if it was owned by the State, a county, a city or any other unit of government – with the exception of an Indian tribe. The Band applied to transfer the land into trust, among other reasons, to avoid paying taxes that would not be paid by any other government.

2. The Department Should Not Change the Off-Reservation Trust Acquisition Criteria Currently Found in 25 C.F.R. Section 151.11.

Imposing more stringent criteria for off-reservation fee-to-trust applications would place a fundamentally unfair burden on tribal communities that, through no fault of their own, lie outside of reservation boundaries or lack an existing trust land base. The Band's communities District II and District III lie outside of reservation boundaries yet the Band needs to transfer land into trust in those communities to ensure that Band members there can benefit from Band government services and permanently protect the communities' land from alienation.

The history of the Band's District II communities demonstrates why it is so important for tribes to protect tribal lands from dispossession. In the early 1920s, approximately 20 to 25 Ojibwe families lived on the shores of Rice Lake. During the Depression, the Rice Lake Ojibwe had been paying their property taxes. By the early 1930s, the families at Rice Lake were in danger of losing their ancestral land to tax foreclosure. Two elderly Ojibwe landowners were among those behind in their property taxes; they appealed to the federal government for help with their debts but such assistance was not forthcoming. Instead, on October 31, 1935, the President signed an Executive Order establishing the Rice Lake National Wildlife Refuge. In order to build a Civilian Conservation Corps camp to work on the refuge, the federal government forcibly removed the Rice Lake Ojibwe from their homes and destroyed their property. The Ojibwe who remained in the Rice Lake area eventually acquired lands a few miles east of their former location, and those lands are now part of the Band's District II community.

Thus, it is not surprising that Band members are keen on remaining in their home communities throughout their lives and ensuring permanent protection of their lands from alienation. As Congress recognized in enacting the IRA, acquiring off-reservation land in trust for tribes is necessary to achieve those goals. For example, in 2004, the Department accepted 40 acres of Band-owned fee land into trust in District II that was outside of the Band's 1855 Reservation but processed as an on-reservation application because the land is contiguous to trust land housing the Band's District II community and government offices. The land houses an assisted living unit for the Band's elders and allows the Band to support its elders' desire to remain close to their home community and Band services while receiving assisted living care. The Band operates the assisted living unit at no cost to the local township and county governments. This type of "self-support" and permanent protection of tribal land is precisely what Congress was trying to achieve when it enacted the IRA in 1934. Although the Band can avoid the off-reservation application process by ensuring that fee lands subject to a fee-to-trust application are contiguous to existing Band trust lands (and thus within the definition of "Indian reservation" found at 25 C.F.R. § 151(f)), that will not always be the case.

Imposing a higher standard for off-reservation fee-to-trust transfers would undermine the purposes of the IRA. The existing criteria have been in place for many years. Sections 151.10 and 151.11 provide a reasonable process that takes the interests of local and state governments into account while properly recognizing that those concerns, in most applications, do not outweigh the benefits of taking land into trust. There is no need to change the regulations now.

Furthermore, any change in the existing regulations would likely be arbitrary and capricious given that the Department's "authority to acquire lands in trust for all Indian tribes, and ability to provide certainty concerning the status of and jurisdiction over Indian lands, reaches the core of the Federal trust responsibility," BIA, *Land Acquisitions: Appeals of Land Acquisition Decisions*, Final Rule, 78 Fed.

Reg. 67928, 67929 (Nov. 13, 2013), and there has been no change in the legal landscape that warrants revision of the regulations.

3. The Department Should Not Impose Different Criteria or Procedures For Off-Reservation Applications Based on the Tribe's Proposed Use of the Land.

The IRA makes no distinction between off-reservation and on-reservation applications. A further division between economic development and non-economic development off-reservation applications is offensive to tribal self-determination and the very purposes of the IRA itself: "to provide land for Indians" and enable tribes to achieve and maintain self-support. Most sovereigns pay for essential governmental services and basic citizen needs with tax revenues. However, tribes are legally or practically precluded from collecting taxes on most reservation residents. The Band, like nearly every other tribe, uses revenues from commercial enterprises to provide for tribal member needs.

After over a century of dispossession, historical trauma and marginalization, the needs of tribal communities are enormous. According to the 2016 American Community Survey, within the Band's Indian country, the unemployment rate was 14%, and over 19 percent of families and 24 percent of individuals had income below the poverty level. Economic development by the Band is literally a lifeline for many people. The Department, consistent with the IRA and its trust responsibility, should be working to remove obstacles to tribal economic development to help improve the lives of tribal members. In the absence of any change in the legal landscape, there is no legitimate reason for the Department to instead create new distinctions in off-reservation applications based on economic development, particularly if those distinctions come with heightened scrutiny of off-reservation acquisitions that would inhibit tribal economic development.

4. The Existing Part 151 Regulations Already Allow the Department to Recognize and Balance Concerns of State and Local Jurisdictions, and No Additional Weight Should Be Given to Public Comments.

The Department recognized, in 2013, that the existing regulations are sufficient to address and balance state and local jurisdictions' concerns:

[R]estoration of tribal homelands is a policy goal of the IRA, which has provided authority for acquiring land in trust for nearly eight decades. The IRA reflects the unique relationship between the Federal Government and Indians and Indian tribes. The existing framework set forth in part 151 reflects this policy goal and provides for consideration of State and local government concerns. The existing part 151 process provides State and local governments the opportunity to submit comments as to the proposed acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments, and also requires the Secretary to consider jurisdictional problems and any potential conflicts of land use that may arise in connection with the acquisition. The Supreme Court has recognized this process as "sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220–21 (2005).

78 Fed. Reg. at 67932. Without any intervening change in the law, there is no reason to change the existing regulations.

When state and local jurisdictions have specific, legitimate concerns about transferring a particular fee parcel into trust, the Band is generally able to negotiate a solution that works for all the sovereigns. Unfortunately, the fee-to-trust process is abused by some local and state governments as a forum to challenge tribal sovereignty in general, and a bargaining chip to seek unreasonable cessions from tribes.

For example, the Band recently asked the Bureau to take a parcel of Band-owned fee land adjacent to the Band's Reservation into trust for the express purpose of allowing the Band to use the land for Band members to exercise treaty hunting and gathering rights close to the Reservation. The Band proposed no change in use, emphasized that no development was planned for the parcel and that development was generally infeasible due to the topography and location, and described its efforts to work with the local county and township governments to address their concerns

about the trust acquisition. The local governments expressed concern about the parcel becoming exempt from local property taxes and the resulting impact to other taxpayers, but tabled the Band's offer of financial assistance roughly equal to three years' of property taxes until after the property went into trust and did not raise any other concerns during the application process.

After the Bureau issued its decision to accept the parcel in trust, the county and townships filed an appeal of the Bureau's decision raising about twenty different grounds for invalidating the decision, in addition to the already-stated concern over property taxes. Those grounds included arguments that the IRA is unconstitutional; that the Band is not a federally-recognized tribe; that the Band really intended to use the parcel to build a new casino, and that the Band was, with BIA's help, secretly developing roads on the parcel in advance of this development; that the BIA was inherently biased in favor of the Band; and that the acquisition violated the Endangered Species Act, NEPA, and CERCLA. Those concerns were not brought to the Band's attention during any of the Band's meetings and conversations with the local governing officials, which were focused solely on the property tax issue. Incredibly, one of the townships collects \$65 in property tax annually from the parcel. There is no rational reason for a township to spend thousands of dollars in legal fees to ostensibly preserve a \$65 tax assessment.

The existing regulations allow state and local governments to raise their concerns on a fee-to-trust application for the Department's consideration. The Department has a trust responsibility and statutory duty to acquire land for tribes to further a national policy of tribal self-sufficiency. The Department has no duty to allow greater public participation or give greater weight to non-tribal concerns when deciding whether to take land into trust, and doing so would add immeasurable cost and uncertainty to an already-cumbersome fee-to-trust process.

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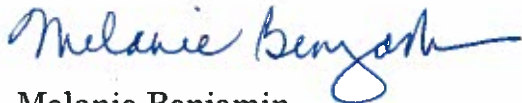
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Thank you for your consideration of this response to the Department's consultation on the Part 151 regulations in Title 25 of the Code of Federal Regulations. If you have any questions or need any additional information, please contact Ms. Bridgett Donahue, Director of Real Estate, by calling 320 532 7702.

Sincerely,

A handwritten signature in blue ink that reads "Melanie Benjamin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Melanie Benjamin
Chief Executive