SENECA - CAYUGA NATION

P.O. Box 453220 Grove, Oklahoma 74344 | P: 918-787-5452 | F: 918-787-5521

July 2, 2018

Via email to consultation@bia.gov

Mr. John Tahsuda
Principal Deputy Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Dear Mr. Tahsuda:

Included with this letter are the Seneca-Cayuga Nation's comments in response to the Department of the Interior's Dear Tribal Leader Letter dated December 6, 2017 requesting feedback on issues concerning land acquisition regulations at 25 CFR Part 151.

Thank you for your consideration of our comments. If you have any questions, please contact Chief William Fisher, at the Office of the Chief, 918-787-5452.

Sincerely,

/S/ William Fisher

William Fisher, Chief
Seneca-Cayuga Nation

WF: cac

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Re: Comments on Trust Acquisition Regulations – Consultation Topics

Dear Assistant Secretary Tahsuda:

Please accept these comments on behalf of the Seneca Cayuga Nation in response to the questions presented in your letter of December 6, 2017, relating to the Department of the Interior's ("Department") trust land acquisition process and draft revisions to 25 CFR Part 151. Our responses are as follows:

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

The objective of the Department's land-into-trust program is to advance the objectives for which the Indian Reorganization Act was enacted: to restore tribal homelands and secure for all tribal governments a land base on which to engage in economic development and self-determination. The Secretary's IRA authority to acquire lands in trust for tribal governments reaches the core of the Federal trust responsibility. As trustee for tribal governments, the Secretary should be working to minimize the bureaucratic burdens associated with the process and improve internal efficiencies through increased training and hiring of new staff with the end result of processing fee-to-trust applications in a quick and efficient manner and maximizing tribal land bases.

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

The Department currently processes land-into-trust applications slowly and inefficiently. In our experience, the efficacy of the fee-to-trust application process is hampered due to resource constraints of the Department and not to any overriding policy or regulatory issues, other than the environmental hurdles discussed in #10 below.

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

This question impliedly distinguishes "on-reservation" and "off-reservation" trust applications, something unsupported by the IRA; the Secretary's continuing active duty under the IRA to take land into trust does not depend on whether the property is on or off-reservation. The "on-reservation" and "off-reservation" distinction arose from the Indian Gaming Regulatory Act. 25 USC §§2701 et seq. In enacting the IRA, Congress recognized that the acquisition of land outside reservation boundaries was a necessary means of fulfilling the IRA's purposes of providing adequate lands for tribal governments and promoting tribal economic development. Congress did not intend for off-reservation acquisitions to only be carried out in narrow, unique circumstances. Codifying a distinction between "on-reservation" and "off-reservation" acquisitions would be an unwarranted interference of the Department into tribal sovereignty indicative of the paternalism sought to be rectified with the passage of the IRA. We urge the Department to avoid any policy or regulatory changes that would result in making the off-reservation acquisition process more challenging or cumbersome for tribal applicants.

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

We believe the existing criteria for approving off-reservation trust acquisitions is sufficient and enables the Department to appropriately weigh and balance local and state interests. The imposition of additional regulatory hurdles and criteria would undermine the Department's trust responsibility and improperly favor sta te and local governments to the detriment of tribal governments. It would also have the effect of increasing costs and delays, as well as the Department's own administrative burdens. Coupling this with the Department's existing resource constraints will undoubtedly result in more delay and inefficiency. Rather than creating new barriers to off-reservation acquisitions, the focus should be on improving and expanding the Department's internal capacities to process trust applications timely and efficiently.

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)?

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

c. Whether the application involves no change in use?

It is unnecessary and violative of the spirit of the IRA to distinguish between economic and non-economic development in assessing fee-to-trust applications. "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life. . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. 152, *citing* H.R.Rep.No.1804. Congressional intent in passing the IRA was to facilitate economic development and allow tribes to develop an economic base, promoting their self-sufficiency and restoring sovereignty through alleviation of economic barriers.

There is also no need to distinguish trust acquisitions for gaming purposes from other (non-gaming) economic development. The Secretary's duty as trustee to take land into trust should not be affected or limited by the type of economic activity for which the trust property will be used. This is not what Congress intended in enacting the IRA, as laid out above. We understand that there may be public concerns regarding off-reservation gaming; however, issues concerning gaming should not be made a part of the broader fee-to-trust process set out in Part 151. Existing federal law adequately accounts for gaming acquisition. *See* 25 CFR Part 292. Additional regulations would be unnecessarily cumulative.

If the application involves no change in use, this should expedite the NEPA review process, as the acquisition would be a Categorical Exclusion to NEPA requirements. The Department should ensure that these exclusions are efficiently applied and that there are no delays to applications meeting this standard.

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

As the Supreme Court has noted, "there is a significant territorial component to tribal power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). The acquisition of land in trust enables tribal governments to secure a developable land base that is inalienable, non-taxable, and eligible for certain federal programs that further tribal sovereignty and economic development. More importantly, it allows for the exercise tribal sovereign powers over the land, which can have far-reaching benefits for both governmental and commercial purposes. Additionally, tribes may acquire land in trust that has historical and cultural significance and protect said property. The acquisition of trust land is thus essential to tribal self-determination because it increases

opportunities for economic development and provides tribal governments the most critical resource necessary to generate revenues for governmental purposes – a land base. It also allows tribes to remove themselves from the taxing authority of state and local governments, which diminishes tribal sovereignty. These are the factors that compel a liberal interpretation of existing federal law and regulations in favor of granting fee-to-trust applications.

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

We strongly object to any proposal that would apply any new revisions to Part 151 retroactively to presently pending applications. Generally, retroactive application of regulations is generally prohibited absent Congressional authorization and is disfavored by the courts. It is well-established that federal agency rules are presumptively prospective unless Congress has explicitly given the agency retroactive authority; in fact, the federal Administrative Procedures Act specifically defines a rule "the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy" (emphasis added). 5 U.S.C. § 551(4). There is no need or rationale to justify overcoming the presumption of prospective effect, especially given that the current system has proven effective in processing trust applications.

8. 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 interests should be limited to the NEPA review process; if a tribe adequately mitigates or addresses environmental concerns then no further consideration is owed to state and tribal interests. Any amendments to accord greater weight or deference to state and local interests would be contrary to the Department's trust responsibility to tribal governments and thwart the ability of tribal governments to enjoy the full benefit of laws enacted by Congress.

In weighing the concerns raised by state and local jurisdictions, the Department should bear in mind that it has a legally enforceable fiduciary obligation to protect tribal lands and support tribal self-determination and self-sufficiency; there is no similar duty owing to the states or local jurisdictions. In fact, the IRA's purpose was to protect tribes from those interested in keeping land out of tribal ownership. The Department should never deter from its trust responsibility to tribal governments and its policy of promoting self-determination and strong tribal economies.

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?

MOUs and other similar cooperative agreements have proven helpful in facilitating intergovernmental relationships, and are often reached between tribes and municipal or state governmental bodies in non-controversial fee-to-trust applications, but the IRA was not enacted to improve tribal/state/local relationships. As noted above, the Department has a trust responsibility to tribal governments, not to state and local governments. The primary focus of the Department's review should be on whether the proposed trust acquisition will be in the best interest of the tribe and its members.

We strongly object to any proposal that would make MOUs and other similar cooperative agreements either a requirement or a consideration under Part 151. The decision of whether to enter into an MOU should remain discretionary and on a case-by-case basis as it is now under the current regulations. Mandatory inclusion of MOUs would place tribes on unequal footing and would be prejudicial to tribal interests by allowing municipalities to potentially veto or delay the acquisition; essentially, tribes could be forced to acquiesce to local or state demands. Bolstering the position of state and local governments in negotiations runs contra to the trust responsibility discussed above.

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

A key change that would drastically streamline and improve the land-into-trust program would be increasing funding and staffing levels at BIA offices. As discussed above, the regulatory framework is not the biggest impediment to the process at this juncture. Bolstering the staffing at local BIA offices will hopefully result in timelier review of fee-to-trust applications. Improving training programs will also ensure that staff fully understand the process and lead to predictability and standardization of the review process.

An additional impediment to the fee-to-trust process is NEPA review, which requires documentation in the form of either an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS"). The preparation of an EA or EIS can take years to complete and the federal review process can take even longer depending on BIA staffing levels and expertise. Moreover, the EA costs alone can be cost-prohibitive and stymie smaller tribal governments from even beginning the process of applying for a trust acquisition.

Such extensive environmental review under NEPA operates as a hindrance to tribal economic development, which is inconsistent with the Department's trust responsibility and the BIA's policy goals. We believe that one of the top priorities for the Department should be streamlining the NEPA process by allowing certain trust acquisitions to qualify as categorical exclusions. Proposing additional categorical exclusions would result in greater efficiency in terms of both time and cost for all concerned.

We would also recommend streamlining the review process for gaming and non-gaming trust applications by delegating the trust authority for gaming applications to local and regional BIA agency offices. Decentralizing the review process may work to facilitate quicker reviews and ensure that gaming applications can be processed as efficiently as other types of applications. The current BIA policy is to subject gaming trust applications to a more rigorous review process than non-gaming applications, which can be processed and approved at the local/regional BIA levels.

Sincerely,

/S/ William Fisher

William Fisher
Chief, Seneca-Cayuga Nation