# *Muscogee (CREEK) Nation*

*Executive Office*

June 28, 2018

John Tahsuda
Principal Deputy Assistant Secretary
Indian Affairs
Department of the Interior
*Sent electronically to consultation@bia.gov*

RE: Proposed Changes to the Land-into-Trust program

Dear Principal Deputy Assistant Secretary Tahsuda,

In 1934 and 1936, Congress initiated a reversal of nearly 100 years of assimilation and allotment policy to end tribal governments through enactment of the Indian Reorganization Act (IRA) and Oklahoma Indian Welfare Act (OIWA) respectively. Both pieces of legislation authorize the Secretary of the Interior to restore lands to tribal governments and individuals to facilitate self-governance and self-sufficiency. Additionally, both Acts recognize that, in order to be successful, the Secretary would need to be able to transfer title of land within and without reservations to trust property. Since enactment of the IRA and the OIWA, there have been other shifts in the United States' policy regarding tribal governments and individual Indians – including another failed effort to eliminate tribal governments in the 1950s and 1960s.

However, tribal governments have prevailed and continue to build on the government-to-government relationship as outlined in the United States Constitution. It is essential for this Administration to carry on the Nixon Administration's commitment to reaffirm tribal self-governance and self-determination through the land into trust process, among other policy priorities. The issue of land acquisition is particularly sensitive, because there is no greater resource to tribal communities than the land which they reside and cultivate for tribal governance, community and economic development, and cultural expression and exploration.

Muscogee (Creek) Nation ("MCN") agrees that some changes to the regulation may provide improvements to the application process and clarify requirements for submission and approval of an application. Yet, the two-part review system being proposed for the land into trust process contradicts originally stated goals of the administration to streamline the review process and decrease administrative burdens and costs to tribal and local governments. The modifications would place additional burdens wholly on tribal governments by increasing administrative



*P. O. Box 580 Okmulgee, OK 74447-0580 1-800-482-1979*

burdens, lengthening the review process, and prolonging land status changes all while subjecting tribes to additional fees and possible litigation from state and local governments.

In general, MCN concludes that that land into trust application process is extremely burdensome and lengthy, though we are unable to assess if the proposed changes or questions would result in an improved or shortened process. However, any change to the regulation should have three goals: (1) to fully exercise the Secretarial authority provided in the IRA and the OIWA; (2) to streamline, clarify, and simplify the land into trust application requirements and review process, while protecting cultural sites in removed tribes' homelands; (3) to promote tribal self-sufficiency and self-governance in the decision-making process. As such, we have provided responses to the questions posed in the December 2017 Dear Tribal Leader Letter.

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

   The land-into-trust program should focus on the goals set forth in the IRA and the OIWA – which is to restore lands for the benefit of tribes and tribal citizens. Both Acts recognized the need to reverse nearly 100 years of removal, assimilation and allotment and to restore land to tribal governments for self-government and self-support. During the 1830s, MCN lost more than 22 million acres upon removal. Today we hold less than 120,000 acres in trust and restricted status – limiting our opportunities for economic development and self-sufficiency. The Oklahoma Indian Welfare Act of 1936 extends IRA-like provision to tribes in the state of Oklahoma, including Secretarial authority to purchase or to assign property to trust title and protection from Oklahoma taxes. As a result, the Federal Government, including the Department of the Interior, has a responsibility to take land into trust for the benefit of Tribes and Tribal citizens no matter the location.

2. How effectively does the Department approve or disapprove an off-reservation trust application?

   While MCN works cooperatively with the BIA Okmulgee Agency and the Eastern Oklahoma Regional Office, the tribe has limited experience in applying for off-reservation trust applications due to unnecessary and unrealistic demands in the Land Description Review portion of the application. MCN trust applications are frequently and significantly delayed because of standards applied by the Bureau of Land Management.

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

   Many tribes, including the MCN, were displaced from their original homelands only to experience additional land loss or disenfranchisement as the United States continued to expand. As such, the Department should make every effort to restore land to trust for tribal governments, including off-reservation lands, and to protect cultural sites in the homelands of removed tribes. Providing an efficient, effective process to allow for off-reservation land into trust application is critical and aligned with the goals of the IRA and OIWA. Off-reservation applications are specifically sensitive because tribes have already made investments to

purchase title to land in order to protect the property or exert authority over land which was once theirs.

Each off-reservation application that meets the statutory goals outlined in the IRA and OIWA should be approved, unless there is a dispute with other tribal governments that have similar ties to lands which lay outside historical or current reservation boundaries. In cases where tribal disputes occur, the Department should operate with full transparency by notifying affected tribes of the conflict and making efforts to bring together parties for open communication. The Department should attempt to avoid protracted litigation and then facilitate discussion between all parties with the goal of seeking a resolution prior to a final decision. If a resolution is unattainable, the Department should move forward with the decision allowing individual tribes to take steps they deem necessary later, unless cultural sites of tribes other than the applicant tribe are located in or on the subject lands.

Specifically, when an applicant tribe seeks to place land into trust that was originally located in another tribe's ancestral territory, the Department should ensure the trust transaction will not endanger the latter tribe's sacred places, especially places containing burial sites and cultural items, as defined in the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001. The federal government has committed to "protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on federal, Indian and Native Hawaiian lands." H.R. Rep. No. 101-877, at 8 (1990).

Tribes nationwide have likewise committed to this goal. For example, the National Congress of American Indians has passed numerous resolutions respecting the protection of removed tribes' rights to protect sacred places in their original homelands. NCAI has called on the federal signatories to the Memorandum of Understanding "Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites," including the Department, to propose and implement "meaningful policy changes that preserve and protect sacred places and Native Peoples' rights to access and use them in accordance with traditional practices in original territories and without intimidation or penalty." ATL-14-087, available at http://www.ncai.org/resources/resolutions/call-for-federal-entities-to-take-actions-on-sacred-sites-memorandum-of-understanding.

To further these mutual goals, Part 151 should be amended to require the applicant tribe to (1) identify whether the subject land is in another tribe's ancestral homelands, and (2) if so, ensure that no burial sites or cultural items will be harmed by the acquisition. The applicant tribe should be required to demonstrate the latter either through agreement with the tribe in whose ancestral homelands the subject land is located, or through completing an archaeological survey to establish that no other tribe's burial sites or cultural items are located in the subject land. If the survey reveals that another tribe's burial sites or cultural items are located on or in the subject land and the two tribes cannot come to agreement that the acquisition will not endanger the sites or items, the Department should either not approve the trust application, or approve subject to adequate protective covenants.

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

    Though MCN believes the current requirements for approving or disapproving off-reservation trust applications are sufficient, MCN is also supportive of clarifying and amending the regulations to include information which the Secretary typically requests during the application. For example, MCN has previously provided land use plans, economic statistics related to the local community, and historical ties to properties in the application. MCN assumes that this information is helpful in the understanding the tribal intent and need for the land to be transferred into trust. Therefore, MCN would support expansion of off-reservation applications to include an explanation of historical and/or modern connection to the land, an analysis of land consolidation efforts, if applicable, and evidence that change in title will benefit the tribal government. Additionally, MCN would recommend that the application include whether it is possible that other tribal governments have historical or modern ties to the property in application. If a tribe has submitted an application that conflicts with another tribe (or tribes) that have current jurisdiction within the area, then the application should be reviewed with scrutiny and approved with consensus from all interested parties.

5. Should different criteria and/or procedures be used in processing off-reservation application based on:
    a. Whether the application is for economic development as distinguished from non-economic development purposes?

        As previously expressed, the goals of the IRA and the OIWA were clearly to provide additional tribal self-governance and self-sufficiency – neither of which are possible without a land base to support tribal government activities, community, and economic development opportunities. Inclusion of this criterion, though perhaps helpful when considering outside interest, would not serve the purpose of the Secretary's authority under the legislation. Nor would this inclusion recognize the decades of research that illustrates the most significant constraint tribal governments face is the loss of a land base.

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

        MCN does not support the bifurcation of off-reservation applications primarily for gaming and those for non-gaming purposes. Creating a separate application process based on the utilization of land not only places the burden for different evaluation standards on tribes, but also makes them more susceptible to scrutiny and bias based on the proposed use of the land. The Indian Gaming Regulatory Act (IGRA) specifically prohibits this consideration in the review of land acquisition applications and considers it to be outside the purview of the Department. Refraining from the collection of this information ensures equal consideration for all applications.

c. Whether the application involves no change in use?

Even in cases where there is no proposed change in use upon application, the approval of an application cannot restrict future use of the property, unless another tribe's cultural sites are located on or in the subject lands, as discussed above.

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

   There are administrative and financial advantages of operating on land that is trust versus land that is owned in fee. Just as the IRA and the OIWA aimed to achieve, tribes operating on trust property can exert tribal control, develop a regulatory environment that promotes local priorities, meets local needs, and address tribal specific concerns. Tribes would not necessarily be able to achieve specific outcomes if the property remained in fee status, because of external government resistance and barriers. Specifically, tribes in Oklahoma sometimes experience difficulty in approval of permits and licensure for construction projects if there is local resistance to a project that is critical to tribal priorities, especially for housing or infrastructure development. Additionally, property which is in trust status is not subject to state and local taxation, providing tribes a small source of revenue to support self-government and self-sufficiency. Oftentimes, activity on trust land is the only source of non-gaming revenue for tribes other than federal funding which comes with many administrative requirements and creates another stakeholder in the development of plans to address a critical, tribal-specific need.

   One area that makes operating on trust property extremely difficult is the National Environment Protection Act (NEPA) clearance process. Yet, Congress provided a remedy for tribal governments to create a clearance process under tribal control with Department-approved regulations. The success of HEARTH regulations has been proven across the United States and is certainly something tribes with a significant amount of trust property can leverage to ensure that this limitation is mitigated.

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

   It would be unusual and improper to require tribes with pending applications to meet new requirements or revise applications to undergo a new review process and standard. Tribes with pending applications have already made significant NEPA remediation efforts, conducted studies, hired contractors and attorneys to conform to the regulations as published. The Department should honor the regulations as previously drafted and only make the rule effective upon final publication of 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?

   All concerns and comments should be considered but should not determine the final outcome of any application. Tribal governments pre-exist those of state and local governments, as does the government-to-government relationship tribes enjoy. As such, these

comments should only be weighed in the context of the goals for the land into trust program, the IRA and the OIWA. Tribes recognize that state and local governments may have concerns or questions regarding tribal plans for trust property. However, in many cases, the NEPA process (or similar tribal regulations) would require public notification and response to any activities on trust property. Therefore, local and state governments would have an opportunity to comment on specific plans and activities, versus the federal action to take land into trust – which is based solely on the government-to-government relationship between tribes and the United States.

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?

    Tribal gaming compacts and cross-deputation of tribal law enforcement officers have proven that MOUs and other agreements can provide additional resources and opportunities in rural and geographically isolated communities across the Nation. However, requiring agreements in the off-reservation application does not recognize the unique relationship tribal governments have with the federal government nor the goals set out in the IRA and the OIWA. In fact, including this requirement could actually result in another leverage point for state and local government to slow or completely eliminate a tribe's sovereign right to possess trust land.

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

    The current process is often delayed because the designated official is under-resourced or inadequately empowered to make decisions. In addition to updating the regulations to reflect typical requests and clarify necessary information, the Department should work internally to develop a process that streamlines internal review and recommendations. It should also make designations to regional directors to coordinate the application approval process, rather than centralizing all the functions to one Department.

    MCN would also recommend that the Department continue to make the trust status immediately effective. Tribes ardently advocated for this provision in the last proposed regulatory changes. It is critical that the Department continue to actively work to make timely decisions and ensure that the status of land is clear upon completion of the review process. Delaying the effective date of title is unnecessary given the public notice and opportunity to comment during the review process and simply invites other interests to disrupt tribal initiatives.

The land into trust process is a sensitive topic for tribes across the Nation and the Department has a responsibility to tribal governments to make sure any changes do not disadvantage tribal authority or run counter to the goals of the IRA and OIWA. MCN looks forward to additional consultation based on recommendations received through this process prior to a proposed rulemaking process. Thank you for the opportunity to respond to these questions. If you require

any additional information or input, please contact Secretary Ben Chaney, at bchaney@mcn-nsn.gov.

Sincerely,

James R. Floyd
Principal Chief
Muscogee (Creek) Nation