

Summary of U.S. Department of the Interior Tribal Listening Session on
Potential Fee-to-Trust Regulatory Revisions
Capital Hilton, Washington, DC
February 15, 2018

Principal Deputy Assistant Secretary – Indian Affairs (PDAS) John Tahsuda and Counselor to the Assistant Secretary Kyle Scherer, opened the session and informed those present that the Associate Deputy Secretary for the Department would be arriving later that morning. The session was scheduled from 10:00 a.m. to noon, but Associate Deputy Secretary (ADS) James Cason agreed to stay an extra hour to accommodate Tribal leaders.

- A Tribal representative asked whether there were any plans for consultation in northeast Oklahoma.
 - PDAS Tahsuda replied that there are no plans for a Tribal consultation because the fee-to-trust regulatory changes would not have a great impact on Tribes in Oklahoma.
- A representative of the Narragansett Tribe asked what position the Department will take on *Carciari*.
 - PDAS Tahsuda replied that the Department is required to consider *Carciari* in each fee-to-trust application, and the Department is considering whether that analysis should be moved to earlier in the process, but ultimately it is up to Congress to address *Carciari*.
- A Tribal representative suggested the Department should analyze how its own resources cause delays in processing trust applications, rather than assuming there is a process issue. This representative stated that there should be an examination of whether insufficient full time equivalents (FTEs) or other resources are the cause of delays. As an example, there is only ¼ of an FTE in Knoxville.
 - PDAS Tahsuda replied that there are items beyond the Department’s control that are time-intensive and people-intensive, and that while an FTE may not be in the budget, we impress upon the Office of the Solicitor the importance of being timely in all reviews.
- A Tribal representative pointed out that the Department is responsible for making sure there are sufficient resources.
 - PDAS Tahsuda responded that there is an ongoing discussion between Tribes and the Region. PDAS Tahsuda also noted that the Department is examining whether NEPA reviews, which are time- and resource-intensive, can be done more efficiently.
- An attorney representing Tribal interests asked for clarification on what the problem is that the Department is attempting to address by revising Part 151 and what the Department’s policy position is with regard to off-reservation acquisitions. Specifically, this representative asked whether the Department’s opening premise is that there should be no off-reservation fee-to-trust acquisitions.
 - PDAS Tahsuda responded that the Secretary has expressed support for taking fee land into trust and has expressed respect and support for Tribes. PDAS Tahsuda stated that the main goal is to support Departmental fee-to-trust decisions and ensure they are defensible so that Tribes don’t have land yanked out by a court order later. Providing

Tribes with an answer before they spend three to five years conducting NEPA could save Tribes' resources.

- The attorney asked for more information on why this is a burning issue and asked whether the Department has analyzed how many acquisitions have been changed, what the factors are (distance, use, environmental).
 - PDAS Tahsuda noted that the Department could provide that report but noted that most off-reservation acquisitions are non-gaming and questioned whether gaming should be on a different track because it is high impact, politically sensitive, and has another law (IGRA) that applies.
- A Tribal representative stated that there should not be any criteria for trust acquisitions. He noted that off-reservation acquisitions may be necessary for some Tribes to bring in revenue, or for the protection of sources of groundwater, fisheries and streams for the Tribes and for the public's protection. This representative stated that the Department is the trustee for Tribes and should actively seek to acquire new land into trust through that lens.
 - PDAS Tahsuda stated that the Department's responsibility is to support Tribal self-determination, and wait for the Tribe to determine which parcels should be placed in trust and for what purpose. PDAS Tahsuda stated that there must be criteria for defensibility, and the regulations pull in constitutional issues that courts have addressed. For example, courts have stated that off-reservation acquisitions affect others, so the regulations are developed to address those concerns. The Department builds the record under the regulations so that the Department can answer the courts' questions.
- A Tribal representative noted that the regulations presume that a Tribe has a reservation, but there are many landless Tribes.
- A Tribal representative asked whose priority these regulatory changes are, who is "knocking on DOI's doors," and to what extent it was States and counties. The representative stated that the fee-to-trust changes were the first thing out of the Administration but there is no clear statement of DOI's goals. The representative stated that if Tribes are prioritized, this wouldn't be the first thing out of the Administration.
 - PDAS responded that parties are knocking on courts' doors. The issue has been around for some time, and Tribes want to know why it takes so long to get land into trust. PDAS asked specifically, do Tribes want the Department to act faster on fee-to-trust applications?
- A Tribal representative noted that increased use of categorical exclusions under NEPA could increase speed and said it would be useful to have data on the spread.
 - PDAS Tahsuda noted that the Department is currently reviewing its categorical exclusions and looks forward to seeing Tribes' input on those.
- A Tribal representative stated that in New York, Tribes' land is all in restricted fee, and Tribes want to keep it that way. The representative stated that the regulations should clarify how to take land into restricted fee because restricted fee land is not subject to the same rules that trust land is.

- A Tribal representative stated that anytime a regulation changes, Tribes are concerned with how it affects what they're doing on their land and it is important to have Tribes sit down with the Department's experts to, among other things, ensure cultural resource access.
- A Tribal representative read a statement expressing concerns that the Department is unnecessarily importing Part 292, and noting that Part 151 is working as designed. The representative then provided Tribal history regarding how the Tribe and Tribal members were manipulated and lost land, and noted that land recovery is a priority. He suggested having a session on the history of why land is so important to Tribes. The representative stated that:
 - The two-part determination requirements for State consent are intrusive to Tribes.
 - The draft regulatory language unfairly increases bureaucratic requirements and conflicts with the Administration's goals of reducing regulations.
 - Consultation should take place in all BIA regions and that the current consultation process is insufficient.
 - ADS Cason requested Tribes share with the Department procedures for the Department to conduct effective consultation that are repeatable and would satisfy everyone. ADS Cason mentioned the idea of holding a United Nations–type event somewhere in the middle of the country on a regular basis. When someone interjected that NCAI's meeting will be held in Kansas City this June, he suggested NCAI may be able to pull together a combined recommendation to represent the diverse interests.
 - ADS Cason stated that the original reason for pursuing changes to Part 151 is that sometimes the Department gets a land-into-trust application that they know immediately won't succeed, but the Tribe still has to undergo the process, with all the years and money it entails, only for the Department to ultimately say no. For that reason, the Department is seeking a process that allows a “no” up front.
 - ADS Cason stated that he understands the importance of fee-to-trust, and that gaming affords opportunities, but not everyone on Capitol Hill is of the same mindset, so the Department has to balance and look at all the circumstances, including the concerns of the local communities. If the Department doesn't address the local communities' concerns, there will be more litigation.
 - ADS stated that this process is for Tribes to help the Department shape revisions if revisions are made.
 - The Tribal representative stated that NCAI would be happy to do the work to pull together recommendations.
- A Tribal representative read a statement that the draft regulatory revisions would add burdens and restrictions on fee-to-trust, while Congress's intention was to *restore* lost lands with no restrictions on DOI authority.
 - The Tribal representative noted that Tribes and Tribal member's lost property through taxation and sale and that her Tribe must seek land off reservation because of climate change effects in Puget Sound that causes flooding.
 - The Tribe opposes MOUs with local jurisdictions because Tribes would not have any leverage to negotiate the MOU. The Tribe is already in litigation regarding taxation, and the municipality is already unwilling to help Tribes in what they consider Tribes to be taking.

- The Tribal representative requested that the Department remember the Federal trust responsibility and requested that any streamlining be to the Tribes' benefit.
- Finally, the Tribal representative requested an extension of the comment period to give more robust comments following NCAI's session in Kansas City in June.
 - ADS Cason agreed to extend the comment period to June 30.
- A Tribal representative requested his previous comments be extended forward for fee-to-trust. The Tribal representative also stated that:
 - DOI is the trustee of Tribes, not of Congress or States, and should focus on reacquiring land.
 - DOI should not listen to only one or two Tribes because lobbyists are not the voice of Indian Country.
 - The draft regulatory changes are regressive.
 - All of his Tribe's revenue goes to support Tribal members and subsidize the Federal Government for not doing its job, and that 2/3 of the Tribe's members live outside of the service area and receive nothing from the Federal Government.
 - Lincoln witnessed slaves being sold and his view on slavery changed. The Federal Government should be about changing and not deferring to State and local government.
 - The Department played its card, and the draft changes have the support of only one or two Tribes. This would make it harder for us to take land into trust.
 - ADS Cason stated that the fee-to-trust area may be fertile for consultation. The Department has the option to jam acquisitions down the throat of the community, but then the community's Congressional representation gets involved and it becomes a political problem. The Department is looking at ways it can better manage community relations and prevent litigation.
- The Tribal representative noted that in their case, they had local support and the Department still rejected the application. He stated that it should be left up to the Tribe to work out differences with local communities.
- A Tribal representative stated that half the Tribe's land was flooded, became the site of a nuclear power plant placed by the Federal Government, and has trains carrying oil running through the land, so the Tribe's only option is to take off-reservation land into trust. The Tribal representative further stated that:
 - The connection to the land shouldn't be relevant because it wasn't relevant when the land was taken from Tribes.
 - The Tribe has a tough relationship with the State, so there should be no requirement for a memorandum of understanding.
 - Regarding the two tracks –there is no legal basis to distinguish gaming from non-gaming. IGRA says nothing in the Act will affect current law, including the authority to take land into trust.
 - The draft regulations would add bureaucracy.
 - The 30-day delay would create a delay even if the claim was baseless.
 - ADS Cason responded that he will have the Bureau of Land Management (BLM) Deputy Director Brian Steed identify any Federal land within 100 miles to see if it could be made available to the Tribe.

- A Tribal representative noted that on-reservation and off-reservation may not fit the historical circumstances of Tribes. His Tribe has lands recognized by treaty plus un-ceded territories, but the 1877 Act took millions of acres in the Dakotas from the Tribe and the Tribe needs land for homes, economic development, and sacred sites. The Tribal representative said not to make the process more difficult and there should be a policy in favor of Tribes recovering their homelands.
 - ADS Cason requested that Tribes write up how the Department should treat ancestral treaty lands that Tribes no longer possess for consideration in the regulations.
 - ADS Cason also noted that the point is not to compel Tribes to make agreements with State and local governments, but to tell the Department what efforts they made and provide evidence of good relationships; otherwise, it is harder to have to burn political chits to approve. Having a good relationship gives the Tribe the best chance for an approval.

- A Tribal representative stated that it is a “no-brainer” to expedite acquisitions for landless California Tribes. He explained how the Tribe sought to take a 0.9 acre tract into trust for expansion of a medical clinic, and the city sued saying there will be a casino there, only to drop the suit when it was finally convinced the Tribe would not game on the site because the Tribe opened a casino elsewhere. The Tribal representative said another “no brainer” should be fishing and ceremonial areas. The Tribe has an MOU with the Forest Service for access to and non-disturbance of an area they consider to be the center of the world. These should be taken into trust and reduce the backlog.
 - ADS Cason stated that was a great idea and that he would follow up with PDAS Tahsuda on the Forest Service land.

- A Tribal representative suggested a reversal to ask whether the State and local governments have gotten consent from Tribes for their decisions that impact Tribes. He stated that the Department should talk to State and local governments regarding the benefits of having trust and restricted land being nearby.
 - This representative also stated that the Tribe was there first, so payment in lieu of taxes is not reasonable, and the State and local governments should not interfere with the Federal-Tribal relationship: the only consideration should be whether there is an impact to another Tribe.
 - The Tribal representative stated that the purpose of why the Tribe is seeking land to be taken into trust should not matter.
 - ADS Cason stated that the Tribe should write up comments on how the Federal government could have a different view.

- A Tribal representative stated that the Tribe applied for a two-part determination and had agreements with local governments but the process took so long that there was a change in leadership of one of the local governments and so that government withdrew from the agreement. This Tribe also noted that their ancestral lands are now home to gaming by another Tribe. He noted that DOI has a trust responsibility to Tribes, and that Tribes are better stewards of the land.
 - ADS Cason clarified that the Tribal representative was suggesting a regulation to govern taking land out of trust, and the representative responded that it is long and expensive to take land into trust but that it can be taken out of trust with the stroke of a pen. ADS Cason clarified that it can only be taken out of trust with an Act or court decision.

- A Tribal representative stated that “no brainers” should be brought into trust quickly. He noted that some individuals have land in restricted status but are required to go through the whole 151 process to bring the land into trust.
 - ADS Cason stated that the Tribe should send the package directly to his attention.

- An attorney who represents Tribes noted that the Department’s reorganization plan would split apart the Eastern Region, which would affect processing of trust acquisitions. She stated that the Department should investigate what applications are pending and why, rather than changing the process with new regulations.
 - ADS Cason replied to the question about the Department’s reorganization stating that the Secretary had the idea to base regions on eco-regions, but the Department is hearing that State boundaries are important. He also stated that the Department is on the fence about whether to include Indian Affairs as part of the reorganization effort.
 - ADS Cason stated that he has been trying to get BIA to speed up its process so that Tribes receive a reasonably timely answer, not in 8 or 9 years. He noted that he has not seen a single off-reservation trust acquisition package since his arrival in this Administration but would like to take care of the easy ones and get them unstuck.

- A Tribal representative asked whether the Department ever defined what the Secretary meant when he said there should be an “off ramp” for Tribes.
 - ADS Cason stated that the Secretary was trying to give voice to an issue raised to him by Indian Country: there is a spectrum of self-determination; on one end of the spectrum are Tribes that need the Government to get out of their way so they can be more independent and autonomous and on the other are direct service Tribes. The Secretary still has the desire to help Indian Country and has asked for input from John Berry and Ron Allen on how DOI can help support Tribal self-determination. The Department is open to ideas from Tribes.

- A Tribal representative stated that this discussion provides Tribes with hope and clarification and commended ADS Cason for giving Tribes a voice. He also stated there should be a strike force for backlogs located in Lakewood to travel to regions, or in California if the backlogs are due to GIS or the Office of the Solicitor. He stated that there is inconsistency in treatment among regions, and Central Office must redo things done by consultants of other BIA regions, resulting in costs. There should be criteria for who does the archeological review and accept it without redoing it.
 - ADS Cason stated that inefficiencies at BIA are being reviewed, there are challenges in finding competent staff, and BIA has not put a focus on training people in the past. He asked how we get from where BIA is now, to where it needs to be. The Department is looking at replacing some Deputy Directors, Regional Directors, and agency superintendents, but there are not many people with the right capabilities to fill in.

The session closed at approximately 1:00 p.m.