Saint Regis Mohawk Tribe

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John Tahsuda
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Attn: Fee-to-Trust Consultation
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Office of the Assistant Secretary – Indian Affairs
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Re: Response to Consultation Questions Regarding Land-Into-Trust

Tekwanonhwera:ton / Our greetings to you Mr. Tahsuda:

Attached are the comments of the Saint Regis Mohawk Tribe to the Consultation Questions Regarding Land-Into-Trust. The Tribe adopts the broader policy comments provided by the United South and Eastern Tribes, Inc. In addition, the Tribe is providing more detailed comments that address many of these issues from a practical perspective.

The land-into-trust has been thrust upon tribes in New York by the Supreme Court ruling in City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), where the Supreme Court stated that in order for a tribe to regain its sovereignty over land taken illegally by the State in violation of the Non-intercourse Act, the tribe should use the land-into-trust process to achieve that goal. Since this is the case, the Tribe urges the Secretary to streamline the process, not create hurdles. If tribe can only achieve the return of their lost lands by way of this process, it needs to be speeded up.

As it is, the general wait for the land into trust application process averages many years, not many months. Much of that delay appears to be based on lack of manpower and time availability, not the regulatory criteria. During that time an application is pending, tribally-owned fee land is subject to state jurisdiction, in particular taxation, which is burdensome to tribes. We urge the Secretary to consider whether the draft proposal, which we understand has been withdrawn, is the best way to address the backlog. Our view is that the proposal would have created more delay, not less.

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We also believe that, if the Secretary deems it necessary to revise the regulations, the revisions be written and debated in a consultation process and not written by the agency alone.

We look forward to continuing to work with the Department on this very important issue.

Skén:nen / In peace,

Dale White
General Counsel
Saint Regis Mohawk Tribe

Enc.

SAINT REGIS MOHAWK TRIBE'S RESPONSE TO QUESTIONS FOR CONSULTATION

The questions posed by the Department raise concerns that are usually raised by non-Indian entities such a state and local governments and groups opposed to gaming. These entities often complain that the land-into-trust process is tilted in favor of tribes. Nothing can be further from the truth. The land-into-trust process seeks to assist tribes in correcting a process that was tilted in favor of non-Indians for most of history—tribal lands were taken illegally by states, as happened in the State of New York, where SRMT is located, or they were taken by the federal government by treaty, leaving little for tribes to thrive. The Department seeks buy-in from tribes on changes in the land-into-trust process that seek to rebalance the process but in fact, can only be deemed harmful to tribal land-into-trust applications.

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

Historically, the greatest injury suffered by tribes has been the loss of their lands. Tribal lands are an integral part of self-determination and sovereignty. The Department's objective should be to carry out the goals of the Indian Reorganization Act, the statute that created the right to place land into trust. The IRA sought to assist tribes with becoming self-sufficient, thriving governments. It was also intended to end the erosion of the tribal land base and to assist tribes with restoring what was lost by making a process available to recover land. Thus, the objective of the land-into-trust program should be for the Department to support, when appropriate, a tribe's request to increase its land base and to support its quest for sovereign authority over its lands for the benefit of the Tribe and its members.

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

Overall, the biggest impediment in the land-into-trust process is delay. While on-reservation acquisitions should be easier, they take just as long and that delay harms tribes.

It should be remembered that a parcel in fee status is a parcel subject to the assertion of jurisdiction by state and local governments. Changing the status of the parcel from fee to trust means removing it from non-Indian jurisdiction. While the tribe owns the fee parcel and is waiting for its trust application to be heard, the non-Indian government can continue to assert that it has authority over the land. A tribe's ability to assert jurisdiction, on the other hand, is limited. See City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005). This can result in a burden to a tribe. For example, a Tribe can only transfer clear title to the United States. This means that a tribe must pay property taxes to avoid a lien or foreclosure while the trust application is being resolved. A delay in the processing a trust application can cost a tribe thousands of dollars in property taxes and could subject a tribe to numerous regulatory burdens.

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

A trust application should be approved when the placement of land into trust will help a tribe to restore land lost, or when it will help a tribe to add to its land holdings in a way that will be beneficial to the tribe and its members. Considerations should include whether the trust acquisition will benefit (1) a tribe's core governmental function, such as providing housing medical care, or other services; (2) the tribe's cultural or environmental interests such as the preservation or protection of culturally or environmentally sensitive land, or (3) the tribe's goal of creating economic opportunities for its members or through the creation of an income stream that will allow the tribe to provide services and financial assistance to its members.

The Department should disapprove the application if it does not meet the criteria set forth in the regulations as gauged by the APA standards of agency action (arbitrary and capricious). As is explained in the response to Question 4 below, the criteria, as they stand, address the broad concerns of the non-Indian interests and are more than sufficient to support an approval or disapproval. The Tribe sees no reason for an adjustment to the current standards and factors.

The intention behind the IRA and the land-into-trust process was to assist tribes, most of whom lost their land to non-Indians, in reviving their territories and restoring their sovereignty. While there may be circumstances when land-into-trust cannot be justified in a particular circumstance, local interests should not have veto power over a tribe's request by allowing them to claim harm from checkerboard jurisdiction or loss of tax dollars without a recognition that this will almost always be an issue in an off-reservation acquisition. To date, the DOI has exercised its discretion to measure the impact on local governments based on the size of the impact, i.e., how many dollars will be lost, or whether there are substantial jurisdictional issues that will cause a real policing or regulatory problem. That is the correct test and should be continued.

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

The existing off-reservation criteria sets forth a comprehensive set of factors to be considered in off-reservation applications including the economic impact of the acquisition and jurisdictional conflict and issues. Courts, including the Supreme Court, have uniformly held that these criteria give more than adequate consideration to local government concerns. The Department has the discretion to disapprove any application that does not meet these criteria.

The Tribe however, will take this opportunity to generally address some of the criteria proposed by the Department in its draft regulations.

a. Connection to Land. The Department has proposed a new 25 CFR § 151.11(a)(1)(i) and (a)(2)(ii), that the applicant show a historical or modern connection to the land for both gaming and non-gaming acquisitions.

First, this requirement is duplicative of the Gaming on Newly Acquired Land regulations at 25 CFR § 292.17(i). For all duplicative requirements such as this, the Department needs to explain whether the same standard, tests, and rules will apply under each regulation.

Second, by adding extraneous factors such as historical or modern connection to the land, the Department is making the application process more onerous. For example, would the tribe have to engage an expert to prove its connection to the land? And would those opposed be able to provide analysis of the lack of connection? Would this turn into a battle of experts? What is the burden of proof? None of these questions are answered by the proposal.

b. Pattern of Land Holding. The proposed regulations requirment that a tribe address whether an acquisition will lead to consolidation or reduce a checkerboard pattern of jurisdiction is nonsensical. See Proposed 25 CFR § (a)(1)(v). Any acquisition of land off-reservation, by definition, creates some checkerboarding and it cannot be doubted that all state and local governments will argue that any off-reservation acquisition will result in checkerboarding since it is unlikely that state or local laws and tribal laws will be equal in every respect.

The Department should also define what constitutes so-called "checkerboarding," and the Department should be clear as to whether the existence of checkerboarding is fatal to an application. For example, there is a vast difference between a claim of checkerboarding if a tribe seeks to place a casino resort in a wholly residential and non-commercialized neighborhood from a simple claim that the local government has one set of laws and it objects to the application of different tribal laws to the land (which is usually the objection raised in these proceedings).

c. Distance. The proposed regulations require distance calculations for both gaming and non-gaming acquisitions. See Proposed 25 CFR § 151.11(a)(1)(iii).

First, as to gaming, this proposal is duplicative of the existing regulations at 25 CFR § 292.17(g).

Second, while distance from the reservation has always been part of the 151 analysis in a general sense, see existing 151.11(b), the Department's requirement to provide mileage and a map suggests that there could be a distance that would be deemed unacceptable as occurred in the past. Tribes should be told whether there will be a particular distance that is unacceptable in all instances or whether the Department will apply factors to determine if the distance is too great.

The Department should also give more consideration to a tribe's perspective in terms of why a particular piece of property far from the reservation is being acquired. There are often very good practical and economic reasons for a tribe to purchase land away from its reservation. Many reservations are located in parts of the country that are not conducive to economic development of any kind. This means that, for many tribes, property located farther from the reservation will actually have a better chance of being economically viable. No one can disagree that many reservations are located far from the necessary infrastructure, transportation and supply systems needed to do business. A tribe should not be punished simply because it seeks to acquire land in a place that can offer better commercial prospects.

Also, the land on many reservations is simply not suitable for development. For tribes like the Saint Regis Mohawk Tribe, some lands adjacent to the reservation are polluted Superfund sites that are of limited development value and may not even meet the environmental

criteria of the Department for trust acquisition. In all of these cases, distance from the reservation should be considered a positive, not a negative. The current standard does not take any of these factors into account.

So far as we are aware, no tribe has abused the land acquisition process in such a way that the distance requirement is needed to prevent abuse. Most tribes want to acquire land either in their historic territory or within some geographic proximity to their reservations. The distance requirement appears to be a factor sought by States as a way of stopping tribal land acquisitions. We suggest that the imposition of a distance requirement is not necessary. It is addressing a problem that does not exist on a large scale. If there is an isolated case of abuse, the Department should have the discretion to address that matter under the current regulations with the heightened scrutiny test.

d. Mitigation. The proposed regulations, 25 CFR § 151.11(a)(1)(xi), ask that in an off-reservation gaming context, a tribe provide "evidence of any cooperative efforts to mitigate impacts to the local community," including intergovernmental agreements and "an explanation as to why no such agreements or efforts exist." This rule assumes that there needs to be mitigation and it places the burden on the tribe seeking trust status to address the demands or concerns of the local community. A tribe should not be required to mitigate impacts on local communities if that mitigation comes at a great cost to the tribe's sovereignty and tribal revenue.

First, most issues of mitigation, such as covering the cost of policing, safety, traffic and other impacts are usually covered by a gaming compact if it is a class III facility. Moreover, this criteria is duplicative since it is also addressed in 25 CFR § 292.18(g) covering gaming acquisitions.

Second, there should not be a presumption that mitigation is required. Most often local communities benefit from tribal gaming development through increased employment and related economic growth. The local government should have to prove that they require mitigation before it becomes a factor. Vague statements of impact on tax rolls, policing conflicts or general worries about the spread of gaming have not been accepted by the Courts and should not be accepted by the Department.

Third, if mitigation is an issue, it is only fair that the Department engage in a cost benefit analysis and take into account the cost to the Tribe of providing mitigation. Mitigation does not come free to a tribe. Usually "mitigation" means that the tribe must provide some sort of financial compensation to a local community or take on some policing or regulatory burden to satisfy the non-Indian government. Any mitigation should be accepted so long as it is proportional and rational.

The Department also needs to take into account that sometimes mitigation offered by a tribe will not be satisfactory. Sometimes there is no amount of money or no terms of a cooperative agreement that can satisfy a local community who simply opposes the trust application on principle. Tribes should not be required to bend over backwards to engage in an effort to mitigate when the local community is opposed to the application without a rational

basis. Indeed, the Department should apply a reasonableness test to determine if a local community request for mitigation is well founded.

The Department should also place a similar burden on the State and local governments to explain what they have done to enter into cooperative agreements with the applicant tribe, and to explain why such agreements have not been forthcoming, if there are none.

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)?

Generally there should not be a difference in criteria. This is so for the simple reason that tribes engage in commercial enterprises for governmental reasons. Tribes lack a tax base and they need economic development to fund their government. This was recognized by the Supreme Court in Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024, 2043 (2014)(Sotomayor concurring), and it was recognized by Congress in the IGRA, 25 U.S.C. §2702(1).

But if the criteria are different, it should be weighted toward a tribe if it intends to engage in what is a traditional government function like housing, medical care or infrastructure. But use for economic development purposes should not be given greater scrutiny than use for governmental purposes.

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

It would depend on what the different criteria would be. As noted above, gaming is economic development for governmental purposes so there should be no difference. It is not clear, at this point in time, why it would have to be treated differently. Twenty-two states now have commercial casino gambling and 30 states allow tribal gaming. Gaming is simply not questioned in most parts of the country. If the Department deems it necessary to give different scrutiny to a gaming business versus any other kind of business, then the Department should also take into account the local, regional and statewide treatment of those same enterprises.

To suggest that an Indian gaming enterprise should be given a different evaluation, particularly given the saturation of gaming in the United States, is simply to bring discrimination into the mix. The fact is that in today's economy, casinos anchor convention centers, race tracks and malls, among other developments, and are considered a source of very much needed funds for States and local government operations. States and local governments have taken a page from tribal gaming by realizing that casinos can be used to fund government programs. Casinos are not unusual in the United States and at this point should be treated as any other economic enterprise.

Another factor to consider is the extent to which allowing different scrutiny to gaming versus nongaming economic development allows the commenting State or local government to tilt the market to favor existing gaming enterprises to the detriment of a tribe.

Finally, there may be legitimate concerns of a local community to a proposed land acquisition for gaming purposes, for example, with the impact on an environmentally sensitive area or even if a community simply wants to retain it rural character. But those kinds of impacts are addressed in the NEPA analysis and do not need duplicative consideration or review.

To the extent the Department believes it needs to have different criteria for gaming lands, the Department has already set forth extensive regulatory criteria regarding the use of land for gaming purposes in 25 C.F.R. Part 292.

c. Whether the application involves no change in use?

The current regulations handle the no-change in use issue reasonably. However, if there is significant opposition by the local governments or individuals when an application involves no change in use, the Department should take into account whether the objections by non-Indians appear to be based on the bias that the land or the business on it will be run by a tribe rather than a non-Indian.

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

Land in fee is subject to the jurisdiction of state and local governments. It can result in the subordination of the Tribe, a sovereign nation, to the authority of another sovereign. The outcome is usually lawsuits or conflicts because tribes are not willing to kowtow to non-Indian sovereigns either in paying taxes or in submitting to statutes and regulation. So in the end, trust status is simply a better way to keep the peace.

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

No. Many applications have been pending for years and it would be unfair to ask tribes who have patiently waited in line to revise applications to meet new criteria.

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

The Department's current approach to weighing concerns and comments has been approved by courts for decades. The approach has passed numerous APA challenges. There is no reason to change the current system in this regard. The Department should weigh the factors in a way that will ensure the process if fair to all concerned and not arbitrary and capricious.

Ultimately, balancing the two sides of the equation are about deciding who should be in control of the land. A State or local government will never want to concede control over land particularly to a tribe. That is their main concern—they want to retain control. So it is unlikely there will ever be a state or local government happy with a decision to take land into trust. State and local governments would have to have the utmost trust in a tribe to agree to transfer that power. If that trust were in place, it is unlikely a trust application would be opposed. At most, the Department can satisfy itself that the concerns of the State and local government are considered and that they do not raise any critical issues that go beyond their need to retain control.

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?

To require cooperative agreements fails to recognize that in many instances such agreements simply will not be forthcoming because of long standing antagonism between a tribe and local governments. While it is a laudable goal, sometimes it is not always a realistic one. Because of that, it is unfair to place the burden on a tribe to seek such agreements. If they come, they will come naturally because both sides see a benefit to it. But such agreements should not be mandatory and if none exist, the tribe should not be penalized for it in the application process.

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

First, it might be worth considering whether the BIA should have a dedicated land to trust office that is properly staffed rather than relying on the Regional Offices to process the applications.

Second, as a general matter, the Tribe fails to see the purpose of duplicating regulatory requirements at both a proposed Part 151.11 and Part 292, both of which address off-reservation gaming acquisition. The Department needs to explain the reasoning behind this duplication since it is antithetical to any hope of streamlining the land-into-trust process.

Third, the proposal to bifurcate the off-reservation process should be abandoned. The proposed regulations, 25 CFR 151.11(c), divide the off-reservation trust application process into two parts – and initial review and a final review. The assumption is that the initial review "should precede any effort to comply with NEPA." But the Department's proposal to bifurcate the land-into-trust process into an initial review and a final review will not resolve the delay problem. In fact, it will string out the process making it more costly for all parties.

Nor will it solve a problem identified by the Department—saving a tribe money by not requiring environmental review at the initial application stage. The reason it that usually a NEPA analysis provides many of the data points being requested by the Department for the initial review. In fact, the Department's own explanation of the proposed regulatory changes

notes that "as a matter of practice" much of the information required for off-reservation acquisitions for gaming purposes is provided as part of the NEPA analysis.

For example, an Environmental Impact Statement will look at the potential conflicts in jurisdiction between a tribe and a state or local government. An EIS can also include a cost-benefit analysis which may include a discussion of the mitigation factors, not only as to the environment but also as to the state local governments. The EIS discussion of purpose and need will also identify on-reservation benefits of the project. Thus, it is not clear how the Tribe can successfully meet many of the initial review requirements without either independently developing the data that would go into a NEPA study, which would result in more work for the tribe, or by taking some steps to comply with NEPA, particularly as to a gaming acquisition.

The proposed regulation at 25 CFR § 151.11(c)(1)(iii) also provides that if, upon initial review, the application is not adequate, the application will be denied. It is not clear what burden of proof would be applied in making this determination. But if a tribe did not develop the information through a NEPA analysis or by other means, it may be inadequate and result in denial. The tribe then could be punished for failing to meet the regulatory criteria because the Department is discouraging development of the NEPA analysis even if that would be the effective vehicle to present the data.

Moreover, denial of an application at the initial review stage is harsh. It would be fairer to allow the applicant to resubmit or otherwise supplement the application to address the criteria the Secretary has deemed not sufficiently supported.

The bifurcation also creates delay. Assuming a tribe made it through an initial review, these is yet another phase, making the process longer than it is now rather than streamlining it.

Finally, the proposal is burdensome since, as we explain above, many of the criteria for the initial and final phase are duplicative of the requirements under Part 292. Even worse, the proposed regulation at § 151.11(c)(2)(iii) cross references the Part 292 regulations, confirming the duplication of effort.

Conclusion

The Saint Regis Mohawk Tribe believes the effort to revamp the off-reservation land into trust process is not only unnecessary but, at this point, appears to be intended to deter off-reservation applications. The IRA is not so limited and to take that approach would be to undercut the foundational goal to assist tribes with returning land to their sovereign control.