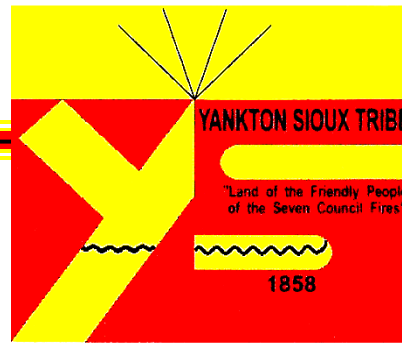


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YANKTON SIOUX TRIBE

COMMENTS ON THE DEPARTMENT OF INTERIOR'S PROPOSED REVISIONS
TO THE FEE-TO-TRUST REGULATIONS CONTAINED AT 25 CFR PART 151

JANUARY 12, 2018

The Yankton Sioux Tribe ("Tribe") appreciates this opportunity to comment on the Department of Interior's ("DOI") proposed revisions to the regulations at 25 CFR Part 151 dealing with the process of placing fee lands into trust. The Tribe is greatly concerned with the proposed regulatory changes and the effects those changes might have in regards to tribal autonomy, security, and self-governance, among other things. With that in mind, the Tribe submits the following comments.

1. Federal Trust Responsibility and Tribal Self-Determination

The trust doctrine is one of the cornerstones of Indian law. F. Cohen, Handbook of Federal Indian Law 419 (2005). The federal government owes a trust responsibility to tribes, not to state or local governments. The trust obligation owed to the Yankton Sioux Tribe is derived from the Treaties of 1851 and 1858. Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, 11 Stat. 749, II KAPP 594, IV KAPP 1065 ("1851 Treaty"); Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743, II KAPP 776 ("1858 Treaty"). Under its trust responsibility, the federal government "has charged itself with moral obligations of the highest responsibility and trust" in regards to tribal nations. *Seminole Nation v. United States*, 316 U.S. 286 (1942). The trust responsibility is a legally enforceable obligation requiring the federal government to act in the best interest of tribes and to ensure the survival and welfare of Indian tribes and individuals. This includes supporting tribal self-determination and economic prosperity, both duties that stem from general treaty guarantees to protect Indian tribes and respect their sovereignty.

The proposed revisions to the fee-to-trust regulations undermine tribal self-determination and limit tribal economic opportunity. By giving deference within the decision-making process to states and local governments, the DOI is proposing to put the interest of those states and local governments before the interest of tribes. As mentioned above, there is no trust responsibility owed to state or local governments, and the trust responsibility owed to tribes is a sacred promise that must be given priority over other interests. Likewise, by providing for more state and local government involvement, the proposed revised regulations have the potential to delay or even halt tribal opportunities in the areas of economic development that would lead to tribal prosperity.

In that same vein, the proposed regulations go against the current federal policy of tribal self-determination by adding a land use approval process in the fee-to-trust process, whereby the federal government can withhold placing land acquisitions into trust unless the federal government agrees with the tribes proposed use of the land to be placed into trust. So long as the purpose of the fee-to-trust acquisition is legal, the federal government should allow tribes to explore economic development options within their right to determine the interests and future of the tribe and tribal members.

The fee-to-trust regulations, as currently drafted, already afford state and local governments plenty of deference in the land acquisition process. The current regulations implement a rigorous fee to trust process that already requires consideration of state and local government interests. For on-reservation and off-reservation land acquisitions, the Secretary is required to consider, the impact that an acquisition of unrestricted fee land would have on the State and its political subdivisions resulting from the removal of the land from tax rolls and consider any jurisdictional problems and potential conflicts of land use that may arise. 25 CFR § 151.10(e) and (f). Furthermore, 25 CFR§ 151.10 already provides states and local governments thirty (3) days in which to provide written comments on land acquisitions. The process as it currently stands is already so demanding and cumbersome that it takes years for the process to be successfully completed. Mark Trahan, *Would that it be True: Bureau of Indian Affairs' Extreme Rubber Stamping for Land to Trust Applications*, INDIAN COUNTRY TODAY (May 27, 2015). The proposed revisions to those regulations only stand to add dissension to the already strained relations between states, local governments, and tribes. It has even been recognized by the Supreme Court that states and the non-Indians that reside within them are “often their deadliest enemies.” *United States v. Kagama*, 118 U.S. 375, 384 (1886). These proposed revisions are merely another inexplicable attempt of the Trump administration to divide this country.

Lastly, it is a violation of the trust responsibility for the federal government to treat tribes effectively as political guinea pigs for their experiments on changing policies. Tribal nations have had to deal with changing policies towards dealing with native peoples since the beginning of colonization. These policies have included allotment, assimilation, termination, and finally self-determination. There has been stability in the policy era of self-determination and tribes are thankful for that. However, to implement the proposed regulations as revised would subject tribes to further continuing and uncertain changing policies, not to mention the regulations would undermine fundamental goals of tribal self-determination.

2. The Fee-to-Trust Process is Necessary for Reservation Restoration

Due to the disastrous federal government policies of allotment, assimilation, and termination, as well as the sale of reservation lands to non-Indians, the federal government is directly responsible for taking more than 90 million acres of land from Indians, totaling nearly 2/3 of all lands that were once tribal reservations. The Yankton Sioux Reservation is now a checkerboard reservation due to the history of these failed policies as applied to the Tribe. Specifically, prior to 1858 the Yankton Sioux people had a land-base totaling nearly 11,000,000 acres. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1002 (8th 2010). That land-base was later reduced to 430,400 acres by an 1858 treaty and, after allotment occurred and surplus lands were sold off, the Tribe was left with only 37,600 acres of trust land. The remaining 392,800 acres

that were part of the 1858 Reservation are no longer considered “reservation” lands by the United States. Although today the Tribe owns approximately 38,299.80 acres of reservation land, some of this remains in fee simple status due, in large part, to the ongoing challenges by state and local governments against land into trust acquisitions.

The fee-to-trust process is afforded under the Indian Reorganization Act of 1934 (“IRA”). The IRA was enacted for the purpose of halting the loss of tribal land base across the country and remedying the negative effects that loss of tribal land has had on the economic, cultural, governmental, and social well-being of tribes. Acquiring off-reservation trust lands is vitally important to tribes due to diminishment of reservations and for tribes’ economic security. Many reservations are of small size, some are located in subprime areas of the country, and others have no reservation boundary. Whatever the issue may be, the point is that many reservations are insufficient to constitute a “homeland” or viable land base for long term economic security and success of the tribe and its members. Tribes need to acquire more lands in order to provide a suitable homeland and government to their citizens.

Moreover, trust land is essential to strong tribal governments and tribal economies. This is especially true for many large, land-based tribes, such as Yankton, whose reservations were typically opened for settlement, causing the checkerboard reservations dealt with on a daily basis by Yankton and other tribes. *See* Act of Aug. 15, 1894, 28 Stat. 286. For these tribes, it is of critical importance that they be able to consolidate fee lands within their reservations back into trust for both jurisdictional purposes and maintaining peaceful relations between tribal members and non-members on and off the reservation. The proposed revisions punish these larger land-based tribes, presumably for the past actions of small, urban-based tribes in regards to trust land acquisitions.

The IRA is well known as a vital correction to disastrous federal Indian policy and the issues the IRA is working to resolve still exist today. However, only ten percent (10%) of the 90 million acres of tribal lands lost under allotment laws and policies have been restored as tribal trust lands under the IRA. *Frequently Asked Questions*, Bureau of Indian Affairs, <http://www.bia.gov/FAQs/> (last updated June 6, 2017). As noted by the Supreme Court, “[t]he intent and purpose of the [Indian Reorganization Act] was to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). In order for tribes to make a homeland out of their reservations, there needs to be jurisdictional certainty and uniformity within reservations, both of which the fee-to-trust land process is currently able to provide. The proposed revisions would only stand to delay and further undermine any tribal attempts at creating a homeland in order to further goals of tribal self-determination.

3. Do Not Increase the Role of State and Local Governments

The proposed revisions to the fee-to-trust regulations give substantial deference to state and local governments at the expense of tribal members and tribal nations. Under the proposed revisions, if the land acquisition sought is for gaming purposes, tribes would be required to produce all evidence of cooperative efforts to mitigate impacts of the proposed gaming facility to the local community. 25 CFR § 151.11(a)(1)(xi) *as proposed*. Such evidence includes copies of intergovernmental agreements between tribes and state and local governments, and, if no such

agreements or evidence of cooperation exists, an explanation of why that is. *Id.* Additionally, if land is in unrestricted fee status, the Secretary must notify the state and local governments with regulatory jurisdiction over the land to be acquired and give them 30 days after receipt of the notice to provide written comments as to the acquisitions potential impacts on regulatory jurisdiction, land use, real property taxes, and special assessments. 25 CFR § 151.11(b)(1) *as proposed*. The proposed regulations as revised would also force the DOI to take land placed into trust out of trust if a court rules that the DOI erred in taking the land into trust and orders that the land to be taken out of trust. 25 CFR § 151.12(e) *as proposed*.

These proposed revisions, along with others, give substantial deference to state and local governments when deciding to approve or deny applications to get fee land placed into trust. The Tribe is concerned that giving such an amount of deference to state and local governments will make the fee-to-trust process even more difficult, time-consuming, and costly. This amount of deference, if given to certain states, will make the fee-to-trust process nearly impossible to implement. Some states, such as South Dakota where the Tribe is located, consistently challenge any and all fee-to-trust land acquisitions under the current regulations, which afford the state substantially less input and deference in the process than would the proposed regulations. The case of *South Dakota v. United States Department of the Interior*, 423 F.3d 790 (8th Cir. 2005) is exemplary as to this point. Even the counties of states like South Dakota routinely challenge acquisitions of land into trust for tribes. *See County of Charles Mix v. United States Department of Interior*, 674 F.3d 898 (8th Cir. 2012). If a state such as South Dakota and a county such as Charles Mix are given the deference afforded under the proposed revisions, then the fee-to-trust process would be effectively unusable for tribes. The process would be delayed for a significant amount of time, if not indefinitely, and tribes would have to continue paying taxes on land that would otherwise be untaxable if placed under trust status.

The federal government has offered no reasoned explanation as to why states and local government should be afforded so much deference in the fee-to-trust process and the Tribe sees no legitimate reason why states and local government should have so much power in this context. The fee-to-trust process is a legal mechanism afforded to tribal nations and tribal individuals for the benefit of tribal nations and individuals under the federal government's trust responsibility. As discussed above, the federal government owes this trust responsibility to tribes, not to state and local governments. State and local government input should be limited significantly more than would be the case under the proposed revisions because states and local governments have little at stake compared to the tribes that apply for fee land to be placed into trust.

4. Potential Illegality of the Proposed Regulations

The proposed revisions to the regulations would violate both the IRA and the Indian Gaming Regulatory Act ("IGRA").

As briefly discussed above, the power for the fee-to-trust land acquisition process comes directly from the IRA. Specifically, Section 5 of the IRA provides the power and reads, "The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments

whether the allottee be living or deceased, *for the purpose of providing lands for Indians.*” The current criteria set forth in 25 CFR Part 151 are derived from the DOI’s interpretation of the IRA and its purposes. However, “Congress, as the trust settlor for all Indian Affairs matters, has the sole authority to evaluate and amend existing statutes, including the Indian Reorganization Act, to determine if the existing Fee-to-Trust statutes need to be constrained or expanded.” Statement of James Cason, Acting Deputy Secretary United States Department of Interior, Before the United States House Subcommittee on Indian, Insular, and Alaska Native Affairs, Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act, July 13, 2017. Therefore, the DOI should not attempt to constrain the ability of tribes to utilize the fee-to-trust land acquisition process by itself through regulation, and should instead defer to Congress.

Turning to the potential violations of IGRA, under the proposed regulations, fee-to-trust acquisitions for gaming-related purposes would be subject to a host of considerations that would not apply to a fee-to-trust acquisition for other purposes. For example, a gaming-related fee-to-trust acquisition identification of the on-reservation unemployment rate and an analysis of the gaming project’s effect on that unemployment rate, identification of the on-reservation benefits of the proposed gaming project, and evidence of cooperative efforts to mitigate impacts of the proposed gaming facility to the local community would be required under the proposed regulations. 25 CFR § 151.11(a)(1) *as proposed*. However, the inclusion of these additional gaming-related considerations are prohibited under the terms of IGRA. Section 2719(c) of IGRA states “Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.” The proposed revisions certainly “affect” and “diminish the authority and responsibility of the Secretary to take land into trust” by adding additional considerations that are specific to taking fee land into trust for gaming purposes.

The DOI invites litigation on the proposed regulations by trying to limit tribal utilization of the fee-to-trust process and by making the process more difficult due to enhanced deference to be afforded to state and local governments. Effectively, the DOI is attempting to change an Act of Congress and statutory law through regulation. Instead of attempting to revise the fee-to-trust regulations, the DOI should leave the regulations as they currently are and allow Congress to exercise its authority over Indian affairs when and how it sees fit. Otherwise the DOI would be usurping Congress’ power and subjecting itself to litigation for its actions.