

Shelley Buck
President

Nicci Lehto
Secretary



Lucy Taylor
Vice President

Johnny Johnson
Treasurer

Melanie Urich
Assistant Secretary/Treasurer

June 29, 2018

Via electronic mail only: consultation@bia.org

Attn: Fee-to-trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240

Re: Prairie Island Indian Community comments on proposed revisions to fee-to-trust regulations

Dear Acting Assistant Secretary:

The Prairie Island Indian Community (“Community”) submits its written comments to proposed revisions to the fee-to-trust regulations proposed by the Secretary of Interior, Bureau of Indian Affairs (“Secretary” or “Bureau”). The Community has grave concerns over the lack of meaningful consultation, the necessity for proposed changes, and the dramatically increased burden placed on tribes seeking off-reservation acquisitions.

Introduction

Our Reservation is along the Mississippi River in Welch, Minnesota. It is in the flood plain of Lock and Dam No. 3, operated by the United States Army Corps of Engineers (“Corps”). This dam was constructed in the 1930s and sits just south of our Reservation.

The flooding caused by the dam has negatively impacted the Community's ability to fully use and develop its Reservation. The flooding has endangered our members and in the past we have had to move housing due to the flooding, and we have had to construct expensive safeguards to protect our people as well as the patrons and infrastructure of the Community's businesses including Treasure Island Resort & Casino.



As you know, federal law requires that Congress approve any taking or flooding of tribal land. The Corps and Interior never got approval. Instead, in the 1930s they entered into an unauthorized agreement allowing the Corps to flood the Community's Reservation land.

Compounding our problems, after flooding the Community's land, the federal government placed and licensed a nuclear power plant literally adjacent to our Reservation on Prairie Island. Then, over the objections of the Community and the Bureau, the government authorized the storage of more than two dozen casks of nuclear waste at the plant site.

Due to failures of the federal government to execute its nuclear waste policy, plans to move the waste away from Prairie Island have failed. Instead, decades-worth of nuclear waste (currently 44 full casks) sits literally next door to our homes and our gaming facility, which is our only significant economic development project. We are extremely concerned for the safety of our citizens living in such close proximity to a nuclear storage facility.

The prior actions of the Corps, Interior, and other federal agencies have resulted in an unconscionable threat to our families and our existence. The federal government has a responsibility to make it right and replace what they have taken from us by, among other things, taking land into trust through a process that is reasonable and efficient. The revisions to the process that you have proposed thus far are anything but, and to the contrary construct additional barriers for tribes to get land into trust.

Primarily, the proposed regulations target 25 C.F.R. § 151.11, which covers off-reservation acquisitions, and § 151.12, which governs Interior's process for acting on fee-to-trust requests. The proposed changes aim to make significant changes to these sections—changes not favorable to tribes. The biggest proposed change is to bifurcate the off-reservation-application process into separate initial review and final review. This proposed new process includes a host of new evaluation criteria, such as whether the tribe has any historical or modern connection to the land that would be acquired. Moreover, Interior would use different criteria to review fee-to-trust applications depending on whether or not the proposed acquisition was gaming related.

Interior claims that these new regulations will give tribes more certainty as to the possible approval of fee-to-trust applications before expending significant tribal resources, and limit the risk of developing land only to face costly and protracted litigation. But the Trump administration has signaled since the beginning, a desire to limit tribes' ability to take additional land into trust particularly in off-reservation acquisitions and for gaming purposes.

It is within this context that we submit the following specific comments in response to the proposed revisions to the fee-to-trust regulations.

Specific Comments

1. Lack of meaningful consultation

In October 2017, the Bureau issued its first set of proposed changes to the fee-to-trust regulations without initially seeking any tribal input. Instead of engaging in meaningful discussion with tribes about ways to identify problems or increase efficiency in the fee-to-trust process, the Bureau instead, unilaterally proposed a “solution” to a perceived problem. If the Bureau honestly wants to pursue fee-to-trust reform that benefits tribes, it is essential that the Bureau consult with tribes at the pre-drafting stage. This would ensure that real problems are identified and studied, instead of focusing on “problems” that don’t exist. By issuing fully formed revisions to the fee-to-trust regulations, the Bureau has actually limited maximum tribal participation and impeded consultation and collaboration—both detrimental to an honest government-to-government relationship.

2. Gaming versus non-gaming acquisitions

The proposed changes require tribes to meet different requirements depending on whether the acquisition is for gaming purposes or not. The Secretary’s authority to take land in trust is found in the Indian Reorganization Act and there is absolutely no distinction made regarding the underlying purpose of a proposed acquisition. Simply, there is no legal basis to make a distinction between gaming and non-gaming parcels.

The Indian Gaming Regulatory Act already prohibits, generally, off-Reservation gaming on lands acquired after 1988. There are limited exceptions to this rule but nothing in IGRA gives the Secretary authority to treat gaming acquisitions differently. In fact, the IGRA expressly provides that nothing in IGRA will affect or diminish the authority and responsibility of the Secretary to take land into trust.

Finally, the fee-to-trust process is already lengthy and time-consuming. To create a whole separate track for gaming acquisitions is simply adding additional bureaucracy to the fee-to-trust process. This will undoubtedly act to further delay agency action.

3. New off-reservation application requirements

The proposed regulations add several significant new requirements to applications for off-reservation acquisitions.

- Information on the tribe’s connection to the land. This is a new requirement, again, without legal authority. Interior has never before demanded that tribes show a historic or modern connection to proposed off-reservation acquisitions. This creates an additional tool for Interior to determine whether a tribe has a strong enough connection—subverting a tribe’s own thoughts on the matter—to warrant the trust acquisition. This is particularly problematic for tribes that faced removal. At what point does a historical connection become too tenuous or far removed? This criterion

adds such a nebulous and ill-defined requirement as to guarantee an easy method for Interior to routinely deny off-reservation fee-to-trust acquisitions.

- It is further complicated where lands were historically shared by tribes that later became separate bands or communities. In Minnesota, there are three bands of Mdewakanton Sioux Indians who all have connections throughout Minnesota. How does the Bureau intend to prioritize which communities have stronger connections?
- Whether the Tribe can effectively exercise governmental and regulatory jurisdiction over the land. Again, this criterion places Interior in a position to determine whether a tribe's exercise of its inherent jurisdiction is sufficient. By making Interior the ultimate decider of appropriate exercise of governmental and regulatory jurisdiction, these regulations actually act to diminish tribal sovereignty. It certainly doesn't further the government-to-government relationship or the United States' trust responsibility.
- The existing regulations already require the disclosure of economic benefits if the land will be used for business purposes. Because business purposes naturally include gaming, there is no reason to make separate and distinct provisions differentiating between gaming and other business purposes.

4. Two-step process

- Interior proposes a two-step application process that creates an initial review where the Secretary can effectively reject applications before reaching the environmental and legal review standards. Interior has touted this two-step process as one to benefit tribes because it allows tribes to save resources by submitting a streamlined application in the first instance. Only if the application meets threshold criteria, will the tribe be required to provide environmental and legal analysis.
- The addition of new evaluation criteria coupled with an opportunity to reject an application at the preliminary stage, appears to be an attempt for Interior to weed out controversial projects at the early stages. And while subject to judicial review, the agency would be entitled to deference in its decision.

5. 30-day delay for taking land into trust

- Another problematic change would reinstate the 30-day waiting period for taking land into trust. Under this policy, after the Secretary decided to take the land into trust, the agency would wait 30 days to allow any interested parties to file a lawsuit challenging the acquisition. Once the lawsuit is filed, the Department would wait until the lawsuit was finished before taking the land into trust.
- After *Patchak*, Interior changed this rule so that it would take land into trust immediately and opponents could file a challenge for up to six years—the federal statute of limitations. This change was designed to speed up the process after a decision was made. In short, tribes wouldn't have to wait years to have land taken into trust once they had already won approval.

- But for unexplained reasons, Interior now proposes to abandon this approach and revert to the 30-day waiting period approach. There is, again, simply no legal or policy basis for this change. The practical outcome of this proposed change is to make tribes wait longer, in some cases years, before having their land placed into trust. This would apply even in instances where any legal challenge to the trust acquisition was frivolous or baseless.

The three most significant outcomes from these proposed regulatory changes are: (1) more off-reservation applications will be denied due to lack of sufficient historic or modern connection to the land; (2) more off-reservation applications will be rejected at the early stages; and (3) tribes will face lengthy delays in having land placed into trust.

For all tribes, but specifically tribes like ours who have been placed in untenable circumstances by repeated failures on the part of the federal government, these proposed revisions should not and cannot be adopted. We look forward to seeing a new set of proposed revisions to the regulations following the feedback you receive.

Sincerely,



Shelley Buck, President
Prairie Island Indian Community