June 29, 2018

Via email to consultation@bia.gov

Mr. John Tahsuda
Principal Deputy Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Re: Comments on Trust Acquisition Regulations – Consultation Topics

Dear Assistant Secretary Tahsuda:

Please accept these comments on behalf of the Seneca Cayuga Nation Office of the Gaming Commissioner in response to the questions presented in your letter of December 6, 2017, relating to the Department of the Interior's ("Department") trust land acquisition process. Our responses are as follows:

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

The objective of the Department's land-into-trust program is to advance the objectives for which the Indian Reorganization Act was enacted: to restore tribal homelands and secure for all tribal governments a land base on which to engage in economic development and self-determination. The Secretary's IRA authority to acquire lands in trust for tribal governments reaches the core of the Federal trust responsibility. As trustee for tribal governments, the Secretary should be working to minimize the bureaucratic burdens associated with the process and improve internal efficiencies through increased training and hiring of new staff.

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

We believe the current system for processing on-reservation trust applications, though slow and cumbersome, has been effective overall and is not in need of revision. The current regulatory framework provides the flexibility for tribal governments to work closely with BIA officials to ensure that their trust applications are technically sufficient and legally adequate.

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

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The Secretary's continuing active duty under the IRA to take land into trust does not depend on whether the property is on or off-reservation. In enacting the IRA, Congress recognized that the acquisition of land outside reservation boundaries was a necessary means of fulfilling the IRA's purposes of providing adequate lands for tribal governments and promoting tribal economic development. Congress did not intend for off-reservation acquisitions to only be carried out in narrow, unique circumstances. We urge the Department to avoid any policy or regulatory changes that would result in making the off-reservation acquisition process more challenging or cumbersome for tribal applicants.

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

Subject to the recommendations set forth in #10 below, we believe the existing criteria for approving off-reservation trust acquisitions is sufficient and enables the Department to appropriately weigh and balance local and state interests. The addition of new criteria and/or review processes would disrupt the balance struck in the regulation between the Secretary's fiduciary duty to take land into trust and considerations posed by state and local governments. It would also have the effect of increasing costs and delays, as well as the Department's own administrative burdens. Rather than creating new barriers to off-reservation acquisitions, the focus should be on improving and expanding he Department's internal capacities to process trust applications timely and efficiently.

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)?**

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

    c. **Whether the application involves no change in use?**

We strongly oppose any proposal to distinguish trust acquisitions for gaming purposes from other (non-gaming) economic development. The Secretary's duty as trustee to take land into trust should not be affected or limited by the type of economic activity for which the trust property will be used. This is not what Congress intended in enacting the IRA. We understand that there may be public concerns regarding off-reservation gaming; however, issues concerning gaming should not be made a part of the broader fee-to-trust process set out in Part 151.

The IRA land acquisition process under Part 151 should be kept separate and distinct from the Department's determinations involving the Indian Gaming Regulatory Act ("IGRA"), as it is currently under the existing regulations. Under IGRA, any land acquired in trust after October 17, 1988 may be used for gaming activities only if it meets one of IGRA's express exceptions to the "after-acquired trust land prohibition" in accordance with the 25 C.F.R. Part 292 regulations. The Part 292 regulations already require tribal governments to request a determination that their newly acquired trust lands meets one of IGRA's statutory exceptions. Given that the current regulations at Part 292 already account for and distinguish trust acquisitions for gaming under IGRA, we see no reason for bringing gaming into the IRA process under Part 151.

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

The acquisition of land in trust enables tribal governments to secure a developable land base that is inalienable, non-taxable, and eligible for certain federal programs that further tribal sovereignty and economic development. It also clarifies and affirms tribal sovereign powers over the land, which can have far-reaching benefits for both governmental and commercial purposes. The acquisition of trust land is thus essential to tribal self-determination because it increases opportunities for economic development and provides tribal governments the most critical resource necessary to generate revenues for governmental purposes – a land base.

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

We strongly object to any proposal that would apply any new revisions to Part 151 retroactively to presently pending applications. As an initial matter, we note that retroactive application of regulations is generally prohibited absent Congressional authorization and is disfavored by the courts. It is well established that federal agency rules are presumptively prospective unless Congress has explicitly given the agency retroactive authority. There is no need or rationale to justify overcoming this presumption, especially given that the current system has proven effective in processing trust applications.

The nature of this question suggests that the Department may be postponing any final action on pending applications until the regulatory updates, if any, are finalized. We certainly hope that this is not the case and urge the Department to continue actively processing trust applications under the current regulations. If the Department elects to proceed with any new Part 151 revisions, such revisions should apply only to those applications submitted after the effective date.

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 current regulations already recognize and appropriately balance the concerns of state and local jurisdictions by providing multiple opportunities for public input, including opportunities for interested parties to comment on the NEPA documents prepared in connection with the application. Any amendments to accord greater weight or deference to state and local interests would be contrary to the Department's trust responsibility to tribal governments and thwart the ability of tribal governments to enjoy the full benefit of laws enacted by Congress.

In weighing the concerns raised by state and local jurisdictions, the Department should bear in mind that it has a legally enforceable fiduciary obligation to protect tribal lands and support tribal self-determination and self-sufficiency; there is no similar duty owing to the states or local jurisdictions. The Department should never deter from its trust responsibility to tribal governments and its policy of promoting self-determination and strong tribal economies.

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?**

MOUs and other similar cooperative agreements have proven helpful in facilitating intergovernmental relationships, but the IRA was not enacted for the purpose of improving tribal/state/local relationships. As noted above, the Department has a trust responsibility to tribal governments, not to state and local governments. The primary focus of the Department's review should be on whether the proposed trust acquisition will be in the best interest of the tribe and its members.

We strongly object to any proposal that would make MOUs and other similar cooperative agreements either a requirement or a consideration under Part 151. The decision of whether to enter into an MOU should remain discretionary and on a case-by-case basis as it is now under the current regulations. Otherwise, the Department runs the risk of allowing states and local governments to withhold their acquiescence to such agreements until the applicant tribe has satisfied their concerns. This would severely undermine the leverage of tribes in their negotiations of such agreements.

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

One of the key challenges in getting a trust application approved is complying with the NEPA process, which requires documentation in the form of either an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS"). The preparation of an EA or EIS can take years to complete and the federal review process can take even longer depending on BIA staffing levels and expertise.

Moreover, the EA costs alone can be significant enough to deter tribal governments from even beginning the process of applying for a trust acquisition.

Such extensive environmental review under NEPA operates as a hindrance to tribal economic development, which is inconsistent with the Department's trust responsibility and the BIA's policy goals. We believe that one of the top priorities for the Department should be streamlining the NEPA process by allowing certain trust acquisitions to qualify as categorical exclusions. Proposing additional categorical exclusions would result in greater efficiency in terms of both time and cost for all concerned.

We would also recommend streamlining the review process for gaming and non-gaming trust applications by delegating the trust authority for gaming applications to local and regional BIA agency offices. The current BIA policy is to subject gaming trust applications to a more rigorous review process than non-gaming applications, which can be processed and approved at the local/regional BIA levels.

Sincerely,

Danielle Brashear
Gaming Commissioner