



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

FEB 22 2018

The Honorable Lisa Murkowski
Chairman, Committee on Energy and Natural Resources
U.S. Senate
Washington, D.C. 20510

Dear Chairman Murkowski:

Enclosed are responses prepared by the Bureau of Reclamation to the questions for the record submitted following the January 17, 2018, oversight hearing before your Committee to examine the Bureau of Reclamation's title transfer process and potential benefits to federal and non-federal stakeholders.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosure

cc: The Honorable Maria Cantwell, Ranking Member
Committee on Energy and Natural Resources

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water & Power
January 17, 2018 Hearing: The Bureau of Reclamation's Title Transfer
Process and Potential Benefits to Federal and Non-Federal Stakeholders
Questions for the Record Submitted to Mr. Austin Ewell

Questions from Ranking Member Maria Cantwell

Question 1: How would Reclamation ensure that multiple beneficiaries are protected in any potential title transfer?

Response: An open, public and transparent process is essential to the successful transfer of title of Reclamation projects or parts of projects. Reclamation has memorialized that lesson in its *Framework for the Transfer of Title* guidance, which notes that all transfers must have the consent of other project beneficiaries. Beyond project beneficiaries, any legislation that authorizes Reclamation to conduct title transfers without additional congressional approval needs to ensure that affected state, local, and tribal governments, appropriate federal agencies, parties to interstate water compacts and treaties, and the public continue to have the opportunity to voice their views and suggest options for remedying any problems.

Question 2: What would you see as Congress's role for more complex projects, such as those involving preference power rates or other complicating factors?

Response: Reclamation projects such as large multipurpose projects where there is no consensus among the project beneficiaries concerning the transfer, where multiple competent but competing beneficiaries have expressed an interest in acquiring title, or where the institutional and legal concerns cannot be readily resolved are not considered good candidates for administrative title transfer, and therefore would benefit from the oversight of Congress. Projects that involve power marketed by the Power Marketing Administrations or projects that have preference power rates add additional complexity to the transfer process, and therefore should require congressional approval before title can be transferred out of Reclamation ownership.

Question 3: How do you ensure that in these transfers, the public interest is protected and that the intent of Congress in construction of these facilities remains?

Response: In addition to ensuring the public has the opportunity to participate in an open, public and transparent process as noted above, Reclamation's existing guidance and recommended eligibility criteria referenced in our testimony is designed to both ensure that the transfer protects not only the interest of the non-federal entities interested in taking title, but also the authorized purposes for which the projects were developed and the public interest as well.

Question from Senator Jeff Flake

Question: The Bureau of Reclamation's Framework on Transfer of Title indicates that "future uses on transferred land and waters" should be considered in determining the price for a project and previous experience has shown a range of future operations being considered in NEPA

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reviews for a title transfer. Please explain how potential future operations should be predicted, assessed and/or documented during the title transfer process.

Response: In negotiating a title transfer, Reclamation must balance the benefits available to a transferee, including greater autonomy and flexibility to manage the facilities to meet current needs, with Reclamation's interest in ensuring the Reclamation project continues operations consistent with the authorized project purposes. Reclamation must consider future uses in order to determine the appropriate compensation to the United States, which includes the equivalent of the net present value of any repayment obligation to the United States or other income stream the United States derives from the assets to be transferred. It has been Reclamation's experience that during the development of a potential title transfer agreement, the associated public process provides an important forum for recipients of title to outline their goals and intentions, as well as allowing other stakeholders to inquire how their interests would be protected if the title transfer were to be approved.



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FEB - 8 2018

The Honorable John Hoeven
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed are responses to questions received by Mr. John Tahsuda, Principle Deputy Assistant Secretary – Indian Affairs, following his October 2017 appearance before your Committee at the hearing “Doubling Down on Indian Gaming: Examining New Issues and Opportunities for Success in the Next 30 Years.” We apologize for the delay in our response.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional
and Legislative Affairs

Enclosure

cc: The Honorable Tom Udall
Vice Chairman

Questions for the Record
Indian Gaming Hearing
Senate Committee on Indian Affairs
October 4, 2017

1. **The Administration recently published an advance notice of proposed rulemaking¹ indicating its intent to revise the off-reservation land into trust process for parcels that could later be eligible for gaming.**
 - a. **In the 29 years since the passage of IGRA, a governor concurred in a positive two-part determination only 10 times. And of the over 1,700 successful trust acquisitions processed from 2008 to 2014, fewer than 15 acquisitions were for gaming purposes, with even fewer for off-reservation gaming purposes. What is the Administration's impetus for revising the regulations regarding off-reservation acquisitions?**

Response: As a point of clarification, the Department did not issue an advance notice of proposed rulemaking; rather, on October 4, 2017, the Department distributed a draft of possible revisions to tribal leaders for consultation purposes. The Department withdrew the draft and then sent a revised consultation schedule to tribal leaders on December 6, 2017, with questions for discussion at the consultation sessions. The purpose of the consultation is to clarify the land into trust process and to seek ways to save tribal resources.

With regard to your question, the application process for taking land into trust for gaming purposes can be costly and time consuming, particularly when compared to non-gaming applications. Currently, tribal applicants must submit all the application information, including certain resource-intensive application information, before the Department will consider the trust application. Rather than requiring tribes to expend much-needed resources pursuing a trust acquisition with no certainty of the outcome, the Department is considering ways to revise the existing regulations to reduce the burden on tribal applicants. The Department is also open to considering other revisions to the regulations and the land-into-trust process and criteria and has requested input from tribes for their ideas.

- b. **In your written testimony, you noted that gaming can introduce "new complications" to local communities, such as "a drain on local resources" due to crime. Given that IGRA and its implementing regulations already require Interior to conclude that an acquisition would not be detrimental to the surrounding community, how does Interior intend the new regulations to give greater consideration of impacts to communities than the existing requirements?**

Response: Local communities are often in the best position to assess potential impacts from off-reservation gaming that would affect them. Off-reservation lands taken in trust can potentially create jurisdictional impacts in local communities, complicate land-use planning, and affect the provision of local services such as law enforcement. The

¹ Off-Reservation Trust Acquisitions and Action on Trust Acquisition Requests, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1076-AF36>

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Department is considering whether the regulations should request evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and state and local governments, if any, or an explanation as to why no such agreements or efforts exist. In this way, the Department would be better able to determine potential impacts to the surrounding communities. In practice, tribal applicants often provide information about their cooperative agreements even though it is not specifically required by the existing Part 151 regulations.

- c. The Administration proposes to give greater weight to local concerns the further away the proposed acquisition is from the Tribe's reservation. This seems to be a thumb on the scales in a manner not intended by the statute. What is the Department's reasoning?**

Response: Part 151 currently requires that as the distance between a tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition, and greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. *See* 25 C.F.R. § 151.11(b). The Department is considering whether greater clarity on what factors would provide evidence to support a decision on the relative justifications and concerns would be helpful to the tribe and surrounding communities.

- d. You testified that the Department had not adequately applied the Part 151 regulations in the past few years. Please provide the specific trust acquisitions to which you referred in your testimony where the Department believes it had not previously considered the factors in an adequate manner.**

Response: As stated in my verbal response to this question at the oversight hearing on October 4, 2017, "I think that it is our [the Department's] belief that past actions over the years did not adequately apply our regulations as they should have so that all factors and criteria to be adequately considered were not adequately considered...some were given greater priority over others."

It is our commitment to consider all the factors we are required to consider by the law and by our regulations and apply those to the factual situation in front of us.

- e. We understand that the Department intends to hold tribal regional consultation sessions on the draft regulations. Will the Department conduct similar consultations once the regulations are formally issued? In other words, will tribes have additional opportunities to comment as the proposal advances toward final?**

Response: On December 6, 2017, the Department advised tribes that it would be consulting on a list of questions related to the fee-to-trust process, and announced six consultations for January and February. The Department will determine next steps

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following those consultation sessions, in compliance with the Administrative Procedure Act and the Department's consultation policy.

- f. **In the draft regulations, Interior proposes a new requirement that a tribe demonstrate a historic or modern connection to the land for off-reservation acquisitions. What is the statutory basis for this requirement?**

Response: Section 5 of the Indian Reorganization Act provides the general authority for the Secretary to acquire land in trust for Tribes. The Secretary has the authority to promulgate regulations, as found in Part 151, to implement the statutory grant of discretionary authority in Section 5.

The draft changes reflect the Department's continued interest in balancing tribal interests. In practice, tribal applicants often provide information on their historic or modern connection to the land even though it is not specifically required by the existing Part 151 regulations.

- g. **The last time an administration imposed a "commutability requirement" like the kind reflected in Interior's recently circulated draft - tribes objected on the grounds that such a rule prejudiced tribes with reservations away from population centers and ignored historical facts regarding where the federal government created reservations. What is the Administration's response?**

Response: The draft revisions did not impose a specific distance requirement in recognition that each Tribe's circumstances may differ. Rather, the draft revisions reflected factors, like those in the existing Part 151 regulations, which analyzed the anticipated benefits to the Tribe from the acquisition and the concerns of local governments.

2. **The Tenth Circuit recently held that Part 291 is inconsistent with IGRA, leaving tribes in the 10th Circuit without administrative redress if a state decides it does not want to negotiate a compact. If Interior cannot issue Secretarial procedures, what options do tribes have now, given IGRA's intent to give tribes at least some bargaining power relative to the states during the compact negotiation process?**

Response: Tribes are authorized by the "good faith lawsuit" provision of IGRA to file suit against a state that has not negotiated in good faith.² A state may, however, raise an Eleventh Amendment defense to such a lawsuit which would then be dismissed due to the non-waiver of the state's sovereign immunity.³ Secretarial Procedures promulgated

² See 25 U.S.C. § 2710 (d)(7)(A)(i).

³ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Only California has a waiver of sovereign immunity for tribal-state compacts.

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pursuant to 25 C.F.R Part 291 would be a Tribe's only other recourse to engage in class III gaming in circuits other than the Tenth and Fifth.⁴ In circuits where states have refused to negotiate with Tribes and have invoked their Eleventh Amendment rights, Tribes retain the ability to conduct class II gaming on Indian lands without a tribal-state compact.

3. **As a part of the advance notice of proposed rulemaking referenced above, the Administration proposed a 30-day delay before finalizing trust acquisitions. In light of *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, in which the Supreme Court found that challenges to trust acquisitions are "garden-variety [Administrative Procedure Act] claim[s]" subject to a six-year statute of limitations and preliminary injunctions, what is the purpose of a 30-day stay?**

Response: As a point of clarification, the Department did not issue an advance notice of proposed rulemaking; rather, on October 4, 2017, the Department distributed a draft of revisions to tribal leaders for consultation purposes. The Department then sent a revised consultation schedule to tribal leaders on December 6, 2017, with questions for discussion at the consultation sessions.

With regard to the 30-day stay that was included in the draft revisions distributed October 4, the Department is interested in tribes' input on the stay. Currently, there is no general authority for the executive branch to take lands out of trust. The authority to take trust lands out of trust status rests with Congress and potentially the judicial branch. The draft revisions would reinstate the 30-day waiting period to enable potential litigants to file during that 30-day period before title is transferred into trust. The 30-day waiting period is intended to help prevent situations where title is transferred into trust, and a Tribe expends resources developing that land, only to face protracted litigation and the possibility of having the land be taken out of trust.

4. **When an Indian tribe and a state submit a Class III gaming compact or compact amendment to the Secretary for review, Congress authorized the Secretary to take only one of two actions: approve the compact amendment, or disapprove the compact amendment. If the Secretary fails to take either action within 45 days of submittal, Congress mandated that the compact or amendment will be "considered to have been approved," a directive that is also reflected in Interior's regulations. Recently, the Secretary "returned" a compact amendment to the Mohegan Tribe of Connecticut and to the Mashantucket Pequot Tribal Nation of Connecticut, rather than taking action on it.**

⁴ See *Texas v. U.S.*, 497 F.3d 491 (5th 2007); and *New Mexico v. Zinke*, Nos. 14-2219 # 14-222 (10th April 21, 2017).

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- a. **Can you indicate where in IGRA Congress authorized the Secretary to "return" a submitted compact amendment without triggering IGRA's deemed approved requirement?**

Response: The Department did not act on the proposed compact amendments because there was insufficient information to determine whether they fell within the Secretary's jurisdiction pursuant to IGRA and whether the Secretary had authority to approve or disapprove them.

- b. **Given that the compact amendment is now deemed approved by operation of IGRA and its implementing regulations, when will the Secretary publish notice of the approval in the Federal Register?**

Response: The Department did not have sufficient information to determine whether the proposed compact amendments fell within the Secretary's statutory authority pursuant to IGRA. The Department specifically rejected the deemed approved option, therefore there are no plans to publish a notice of approval in the Federal Register for the proposed compact amendments.