



O'BRIEN & GERE

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Re: Cayuga Nation Land-In-Trust

File: 9011.125

Dear Joe:

We have completed a cursory review of the Pre-Publication Draft Environmental Impact Statement (DEIS) dated February 2009. Our comments are provided below.

Comments

1. The DEIS indicates that the Nation presently has no plans for further development of the (Non-Enterprise) properties subject to the Proposed Action." This is a specious comment; once accepted into trust, these properties can be developed to one of several maximum build-out scenarios, with no oversight as to the impacts or implications to environmental resources, surrounding properties, or the community.
2. The stated purpose of the proposed action (page 1-1), *...to address the Nation's need for cultural and social preservation, political self-determination, self-sufficiency, and economic growth [emphasis added] as a federally-recognized Indian tribe*" appears to contradict ensuing statements that no changes in land use are proposed. Further information is necessary to understand how the placement of these lands into trust will promote economic development vs. the "No Action" alternative.
3. The document is written from the perspective of the Nation; information presented in the document should be fact-checked (*i.e.*, reservation, treaties, *etc.*).
4. On page 1-2 of the document, there is a statement that indicates, *"The reestablishment of gaming facilities as a revenue source is critical [emphasis added] to the Nation's fiscal and cultural well-being."* The inclusion of such statements in the NEPA process, and the introduction of economics as a *"critical"* factor in the decision-making process opens the door for a review of economic factors in this review process, but no such information is provided to substantiate such claims. If, as the document indicates, the reestablishment of gaming is critical to the Nation's

fiscal and cultural well-being, which in itself is identified as the purpose of the action, then the current document provides insufficient information to allow a reasonable evaluation of such factors, and to either support or refute such claims, that are integral to the basis of the action. In addition, the introduction of gaming into the decision-making process would require an understanding of the environmental and socio-economic impacts from such a use; and such an evaluation is currently not presented.

5. On page 1-3 of the document, the BIA indicates that the Nation "*has no plans for further development of the subject properties.*" Furthermore, in the next paragraph, the BIA summarizes the action as "*a real estate transaction which would convey title to the subject properties to the United States.*" The document does not indicate what procedures for supplemental evaluations would be necessary if the Nation does, in the future, proposed expanded operations and/or development on the subject properties; or the impacts of the loss of local and State environmental-related regulatory jurisdiction (*i.e.*, bulk storage, storm water management, *etc.*), if lands are placed into federal trust. As a federal decision, the public and other stakeholders should be more fully informed of the potential broader implications of the proposed action.
6. The BIA statement on page 1-4 of the DEIS, "*The purpose of NEPA is to ensure that accurate environmental studies are performed, that they are done with public involvement, and that agencies make decisions based on an understanding of environmental consequences*" reinforces the need to fully account for the environmental and socioeconomic impacts that may reasonably occur as a result of the proposed action. Downplaying the action as a paper transaction (*i.e.*, title transfer) contradicts the BIA's stated purpose to inform the public and base decisions on environmental consequences. Consequently, more in depth analysis (*i.e.*, environmental studies) is needed to fully evaluate the environmental consequences beyond the title transfer.
7. On page 1-5 of the DEIS (*Cooperating Agency Review*), the BIA indicates that the cooperating agencies, including the Counties and NYSDEC, were provided a pre-publication draft of the DEIS for "comment and verification of the accuracy of information within their special expertise prior to public review of the DEIS." The comments of the cooperating agencies should be appended to the DEIS, so that decision-makers, other stakeholders, and the public can assess those comments relative to the information included in the DEIS. These comments could be included in referenced (see page 1-6) Appendix C along with the Cooperating Agencies Memorandum of Understanding (MOU).
8. Rather than referenced (DEIS page 1-5, *Record of Decision*), the requirements of 25 CFR 151.10 should be identified and/or appended to the document. As part of the decision-making process, these procedures require the BIA to evaluate "jurisdictional problems and potential conflicts of land use which may arise." Such impacts are not addressed in the current version of the DEIS.
9. Under Alternative 1: The Proposed Action (DEIS page 2-1, 2nd paragraph), the BIA should change the use of the word "including" to "consisting of", and delete "and related activities." The BIA should be specific as to the nature of the land uses (before and after acquisition) (*i.e.*, vacant

land will remain vacant land, *etc.*). The document is not specific in terms of describing land uses. Phrases such as “no additional development or disturbance to the subject properties is anticipated to occur” are neither consistent with the intent of the environmental review process, nor land trust requirements. In accordance with 25 CFR 151.10(c), the BIA must identify “the purposes for which the land will be used.” In addition, on DEIS page 1-3, the BIA and the Nation (by reference), allude that the action is consistent with a “Categorical Exclusion” that indicates an environmental assessment or EIS under NEPA is not necessary where there are no extraordinary circumstances, and no planned or known development, physical alternation, or change in land use after acquisition; but has gone forward with the EIS process to evaluate “all potential environmental consequences which could result from the Proposed Action.” Indicating that no changes in land development are proposed should not be a matter of convenience for the purposes of minimizing the environmental consequences, but a threshold by which applicants should be held. The reality is that the Nation seeks to have the federal government place lands into federal trust to address, in part, “economic growth”; that this objective will likely require development, physical alteration, and changes in land use, and these likely scenarios should be evaluated in the NEPA process so that “*all* [emphasis added] potential environmental consequences which *could* [emphasis added] result from the Proposed Action are thoroughly analyzed, assessed and evaluated.” The current version of the DEIS is deficient and should be revised.

10. The DEIS states that “As a result of this alternative (Alternative 1: The Proposed Action), no new development or construction is planned, and therefore there would be no change to land and water resources, living resources, cultural resources, or resource use patterns.”

Again, the BIA continues to make the claim that the present land use will continue into the future. However, once placed into trust there are no enforceable restrictions that would prevent the land from being developed into one of several potential maximum build-out scenarios. Since there are no restrictions on future development, the BIA is obligated under NEPA to address impacts from secondary growth, cumulative impacts, and not to segment the potential for future development from the present NEPA process. These are the potential development and impacts that the BIA, in the agency’s own experience, has seen occur elsewhere in the country following acceptance of land into trust. Therefore, to ignore such implications of the land-in-trust process raises significant questions as to whether the agency has performed its requisite hard look under these circumstances; in fact, the agency’s obvious silence clearly falls far short of what is required with respect to a hard look.

11. The DEIS states that “If the Nation’s fee-to-trust application is approved by BIA, the subject properties will be held by the United States for the use and benefit of the Nation to ensure the cultural preservation, expression and identity, self determination, self-sufficiency and economic independence of the Nation as a federally recognized Indian tribe.”

The Preliminary DEIS couches the Public Need for the Proposed Action as the economic and cultural benefit of the Cayuga Nation. However:

- The BIA has failed to demonstrate under the No Action alternative that this “self-determination, self sufficiency and economic independence” would not occur and could not occur under circumstances that are less impacting of resources, socioeconomics, and environmental regulatory management than under the Proposed Action.
- The BIA has failed to present evidence by comparison to other Indian tribes across the country in circumstances similar to the Cayuga Nation that this “self-determination, self sufficiency and economic independence” has not been and is generally not achievable by other means, or that those other means are not available in this instance. Therefore, there would be no need for the Proposed Action.
- The BIA has failed to demonstrate that the Cayuga Nation is capable of this “self-determination, self sufficiency and economic independence” and that the transfer of these lands into trust actually is the final step necessary to achieve that goal.

12. The DEIS states that “The (Seneca Falls) property contains no mapped New York State (NYS) or National Wetland Inventory (NWI) wetlands.”

The presence of regulated wetlands is not limited to those wetlands that may be mapped under federal or state programs. There is an obligation to survey potential wetlands that may be present under appropriate environmental conditions; the document is silent on whether a survey to identify this critical resource has been performed at these properties. The document has not indicated whether there are wetlands, or potential wetlands, adjacent to or in close enough proximity to the subject properties for activities on these properties to impact such wetlands. The NYSDEC and the ACOE have a resource protection and a regulatory interest in knowing how activities on these properties will impact nearby environmental resources. This question has not been addressed in this instance in the DEIS, and placing these properties in trust will effectively remove the ability of these agencies to protect these resources on behalf of the state and U.S. residents from impacts of uncontrolled operations on trust lands. The same applies to the property in Union Springs.

13. The DEIS states that “The (Union Springs) property is located within the Cayuga Lake Watershed area...”

At an area of 111 acres, this property has the potential to undergo significant development in the future, with no oversight as to the impacts or implications to surrounding properties or the community. This is particularly alarming given that the property is located with the Cayuga Lake watershed. Cayuga Lake is a drinking water source and regional, if not national, natural resource that would be damaged by impacts from future development. Again, claims that there are no plans to develop these properties are beside the point, in that after placing these lands in trust, these significant lands could be developed unchecked and without recourse to natural resource damages, or the loss of drinking water supplies. The BIA is obligated to evaluate such scenarios and not accept blanket statements regarding development planning without an eye to reality and precedent; the absence of a present plan to develop the site at this point in time does not reflect a commitment by the Cayuga Nation (which would be unenforceable even if offered) not to develop these properties.

14. The DEIS should identify how the Nation proposes to replace local and state regulations that are more stringent than federal regulations. If no plans are proposed, the DEIS should evaluate how actions on trust lands will not adversely impact adjacent non-trust lands or waters (*i.e.*, contravention of State water quality standards). The evaluation should also indicate whether authority, which the federal government has delegated to the State (*i.e.*, National Pollutant Discharge Elimination System [NPDES], *etc.*) will be delegated to the Nation if lands are placed into federal trust. These issues of jurisdictional authority are important to ensure that proposed actions do not result in a lessening of environmental oversight. Current issues, such as natural gas drilling within the Marcellus Shale, underscore the importance of maintaining adequate regulatory reviews and controls.
15. The “No Action” alternative would not include gaming activities, and would be subject to local and State regulations. These differences should be identified in DEIS Section 2 to distinguish the “No Action” alternative from the “Proposed Action.” Environmental and socioeconomic impacts from gaming operations should be evaluated in the DEIS. In addition, since the DEIS indicates that, under the “No Action” alternative, the Nation would continue to use its properties for multiple purposes, including the continuation of existing uses (*e.g.*, convenience store and gas station operations, a car wash, and related activities), how would the objectives of the Nation (defined in Section 1 under “Purpose and Need” not be met?
16. In Section 3 of the Preliminary DEIS (Affected Environment), the BIA is very limiting in its description of the Affected Environment. The properties are in the watershed of Cayuga Lake, one of the Finger Lakes of New York State, an environmental resource of significant value on many levels. There is no acknowledgement of the potential for impacts of the ongoing activities to the watershed, or of the potential for future activities, and of future development of these lands to any extent, on the environmental health of the watershed resource and, as a consequence, on the communities in the watershed.
17. DEIS page 3.7-6 (Archaeological Sensitivity) – delete the word “generous” from “generous buffers.” In addition, the State Historic Preservation Office should be contacted and provided with the evidence of “substantial disturbance.” SHPO’s findings should be appended to the DEIS.
18. The BIA conclusion that the “Alternative 1: Proposed Action”, including the reopening of the closed gaming operations, would have no significant impacts on land resources is unsubstantiated, since environmental and socioeconomic impacts from construction and operation of these facilities were not reviewed in either a public SEQRA or NEPA review process. The same comment is presented for other resources (*i.e.*, water, air, *etc.*).
19. In DEIS Section 4.2 (Water Resource Effects), the BIA indicates that “At such time as development is contemplated in the future, a formal wetland delineation would be required on each of the four properties...” The Proposed Action, as stated by the BIA and Nation in the beginning of the DEIS, indicates no further development, which is the basis of the ensuing impact

evaluation. If development is proposed, the document should be redrafted to reflect potential development scenarios and potential impacts; or conversely, the document should state no additional development will occur. What are the ramifications to the process (BIA petition and NEPA) if additional development occurs after the land is placed into trust, and that such activity is contrary to statements made in the NEPA process?

20. While the contradictory statements regarding “no future development” and “at such time as development is contemplated in the future” makes it difficult to fully assess direct impacts to the project, the need to more fully define the action is also important to allow for a full assessment of indirect, secondary, and cumulative impacts. Such impacts have not been addressed in the DEIS.
21. The document relies heavily on such statements as “The Nation does not anticipate...” An impact evaluation and conclusions/findings should be based the requisite hard look including the reference of, and access to, supporting documentation. The DEIS should be reevaluated and rewritten, as necessary, to provide for the requisite hard look.
22. Nowhere in the Preliminary DEIS does the BIA mention the Finger Lakes Land Trust and its activities, which include having “...protected more than 10,000 acres of the region's wetlands, forests, farmland, grassland, and gorges...” (http://fltl.org/protected_lands/) in the Finger Lakes, including properties in Seneca and Cayuga Counties. There is no indication of whether the properties that are the subject of this action have any impacts on these protected lands. This glaring omission by the BIA serves to underscore the fact that the BIA has not performed the requisite hard look in this instance and, in fact, that the DEIS is faulty and severely deficient. It is clearly inadequate to serve as the basis for any decision in this manner.
23. The DEIS should include an evaluation of cumulative impacts of the proposed action with the impacts associated with the BIA's placement of thousands of acres of land into trust for the Oneida Nation.

Please call me if you have questions or comments.

Very truly yours,

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