

# DOI SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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August 31, 2018

The Honorable Tara Mac Lean Sweeney  
Assistant Secretary-Indian Affairs  
Department of the Interior  
1849 C Street, NW  
MS-4004-MIB  
Washington, D.C. 20240

**Re: Comments Responding to DOI Letters dated July 2, 2018 regarding the Alaska IRA and Land-into-Trust in Alaska**

Dear Assistant Secretary Sweeney:

On behalf of the Department of the Interior Self-Governance Advisory Committee (DOI-SGAC), I am submitting comments in response to your July 2, 2018 “Dear Tribal Leader Letters” regarding the Alaska Indian Reorganization Act of 1934 (“Alaska IRA”); and, 2) the Secretary’s authority to take land-into-trust in Alaska. There have been three events held in Alaska on these two topics: a listening session held in Fairbanks, a public meeting held in Juneau, and most recently a consultation held in Ketchikan. The consultation schedule as published continues until mid-December, 2018. It is clear from the comments and activities to date that there is a broad, general consensus among Tribes in Alaska that both actions of DOI are misguided. The SGAC supports the Alaska Tribes and urges you to act in accordance with their wishes. This letter will make general comments, while deferring to Alaska Tribes to respond to the particular questions in each letter.

## **The Alaska IRA**

DOI representatives have assured Tribal Leaders in Alaska that the IRA-related letter and consultation are meant to address only petitions from Alaska Native groups that are not presently listed by the BIA as Federally-recognized Tribes. This effort, then, does not directly impact currently recognized Alaska Tribes. There are only two groups of Alaska Natives that are not Federally- recognized but have pending petitions to organize under the Alaska IRA: the Quteckak Native Tribe in Seward, and Knugnak Village in Olsonville, a historic village now within the municipality of Dillingham. We agree with Tribal Leaders in Alaska that this consultation process is a waste of time and effort, and that DOI should simply follow existing law and act on these two petitions.

There is already a clear eligibility standard in the statute itself – the “common bond” standard - for petitions for organization under the Alaska IRA. Petitioning under the Alaska IRA has long been understood in Alaska as an alternative to 25 CFR Part 83 by which Alaska Native

groups may obtain Federal recognition. About a third of the Tribes on the current Federally-recognized Tribe list organized under the Alaska IRA. In practice the Part 83 acknowledgement process has never been used in Alaska since Federal recognition was based historically on the Alaska IRA or qualification as an “Alaska Native Village” under the Alaska Native Claims Settlement Act (“ANCSA”).

There is no need to develop new regulations or to engage in extensive consultation to implement a statutory regime that has been in place for decades. We urge DOI to rescind its July 2<sup>nd</sup> letter on this matter and re-direct its effort to acting on the petitions of Qutekcak and Knugnak, which have been pending for 25 years and 17 years respectively.

### **Land-into-trust**

A main purpose of the July 2<sup>nd</sup> DOI letter regarding land-into-trust was to announce that DOI had withdrawn a Solicitor’s Opinion; Op. M-37043 (“M-Opinion”) dated January 13, 2017, which confirmed that the rules for taking land-into-trust are the same in Alaska as in the Lower 48. The M-Opinion concluded that Section 5 of the IRA (the trust land acquisition authority) had not been repealed by ANCSA or subsequent legislation, and that the 2009 *Carciari v. Salazar*<sup>1</sup> U.S. Supreme Court decision is irrelevant to the application of Section 5 of the IRA to Alaska. The July 2<sup>nd</sup> DOI letter informed Tribal Leaders of a decision on June 20, 2018 to withdraw the M-Opinion, asserting it had failed to “fully discuss the possible implications of legislation enacted after ANCSA upon the Secretary’s authority to take land-into-trust in Alaska.” The July 2<sup>nd</sup> letter cites the Federal Land Policy and Management Act of 1976<sup>2</sup> (“FLPMA”) the Alaska National Interest Lands Conservation Act<sup>3</sup> (“ANILCA”), the 1988 amendments to ANCSA<sup>4</sup>, and the 1994 amendments to the IRA<sup>5</sup>.

Like Alaska Tribes, we are mystified and disappointed by this action, which reopens a settled issue in a way that is adverse to Tribes. If DOI believed that further analysis and consultation was warranted, it should have consulted with Alaska Tribes *before* the M-Opinion was withdrawn.

There were extensive consultations in Alaska and in Washington, D.C. in 2014 following publication of a Proposed Rule to repeal the so called “Alaska Exception” then in 25 C.F.R. 151.1, which had prevented Tribes in Alaska from putting land-into-trust. Countless people testified and more than 100 written comments were received.<sup>6</sup> The 2017 M-Opinion was itself a thorough document which expressly referenced prior DOI legal opinions regarding the IRA’s application to Alaska, considering ANCSA and subsequent legislation such as FLPMA and reaching the conclusion that DOI continues to have the authority to apply Section 5 of the IRA to Alaska.<sup>7</sup> The author of the M-Opinion relied in part on these prior

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<sup>1</sup> 555 U.S. 379 (2009).

<sup>2</sup> Pub. L. No. 94-579, 90 Stat. 2744 (1976).

<sup>3</sup> Pub. L. No. 96-487, 94 Stat. 2371 (1980).

<sup>4</sup> Pub. L. No. 100-241, 101 Stat. 1788 (1988).

<sup>5</sup> Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709 (1994).

<sup>6</sup> 79 Fed. Reg. 76888, 76890 (Dec. 23, 2014).

<sup>7</sup> For example, Solicitor Leshy’s Memorandum to the Assistant Secretary dated Jan. 16, 2001; DOI’s briefs filed with the district court in the *Akiachak* litigation (and referenced in the Notice proposing to repeal the Alaska

opinions as a basis for her conclusions, and also provided her own analysis for concluding Section 5 of the IRA continues to provide authority for land-into-trust in Alaska.

The July 2<sup>nd</sup> DOI letter also disregards the fact – does not even mention – that the land-into-trust issue was the subject of litigation and that DOI lost a challenge to its prior (pre-2014) policy against taking land-into-trust in Alaska in *Akiachak Native Community v. Salazar (Akiachak I)*, 935 F. Supp. 2d 195, 198 (D.D.C. 2013). This litigation was resolved on appeal only after DOI changed its policy position.

Consequently the underlying premise for the July 2<sup>nd</sup> letter and DOI's re-opening of the land-into-trust issue in Alaska is false. This issue was thoroughly vetted during the rule-making process for the Final Rule repealing the Alaska Exception, and through other DOI legal opinions addressing DOI's authority to take land-into-trust, and in the M-Opinion itself, all of which concluded Section 5 of the IRA continues to apply to Alaska.

For these reasons, the SGAC joins Alaska Tribes in urging DOI to immediately reinstate the M-Opinion and continue to actively accept and process land-into-trust applications from Tribes in Alaska. If consultation on this issue is to be held at all, it should be limited to process issues related to how taking land-into-trust will be administered in Alaska.<sup>8</sup>

Thank you for the opportunity to provide these comments. If you have any questions or would like to speak further on these issues, please contact Jay Spaan, Executive Director, Self-Governance Communication and Education (SGCE) Tribal Consortium at [jays@tribalselfgov.org](mailto:jays@tribalselfgov.org) or (918) 302-0252.

Sincerely,



W. Ron Allen, Tribal Chairman/CEO  
Jamestown S'Klallam Tribe  
Chairman, Self-Governance Advisory Committee

Cc: John Tahsuda III, Principal Deputy Assistant Secretary – Indian Affairs  
Sharee Freeman, Director, Office of Self-Governance  
Eugenia Tyner-Dawson, Senior Policy Advisor to ASIA  
SGAC Members and Technical Workgroup

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Exception (79 Fed. Reg. 24648, 24650 (May 1, 2014)); the Solicitor's April 29, 2014 Memorandum to the Assistant Secretary-Indian Affairs (referenced in the Final Rule repealing the Alaska Exception and published at 79 Fed. Reg. 76888, 76890 (Dec. 23, 2014).

<sup>8</sup> There have been widespread complaints about the timing and process of the consultation as scheduled. Consultations occurred during the peak of subsistence fishing and hunting periods or scheduled during travel days to statewide conferences such as the Alaska Federation of Natives convention. Further, scheduling 2 hour sessions limits Tribal Leaders and other speakers to only a few minutes per person. The format should allow for more engagement and meaningful dialogue.