DOI SELF-GOVERNANCE ADVISORY COMMITTEE

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ATTN: Fee-to-Trust Consultation
Office of Regulatory Affairs and Collaborative Action
Office of the Assistant Secretary – Indian Affairs
United States Department of the Interior
Mail Stop 4660-Main Interior Building
1849 C Street, NW
Washington, DC 20240

RE: Self-Governance Advisory Committee (SGAC) Comments on the Proposed Regulatory Revisions to the Land Acquisition Regulations at 25 C.F.R. Part 151

Dear Office of Regulatory Affairs and Collaborative Action:

On behalf of the Self-Governance Advisory Committee, I write to urge the Department to withdraw from consideration its proposed revisions to 25 C.F.R. Part 151 – the land acquisition regulations due to the overwhelming response in opposition to this effort by Self-Governance Tribes from across the United States. In the alternative, we ask that the Department suspend further action on this effort until the new Assistant Secretary – Indian Affairs is confirmed and has had an opportunity to meet with the Self-Governance Tribes to discuss this proposal in detail. We further request that the Department refrain from drafting and/or amending any future regulations before complying with its own consultation policy that requires the Department to consult with Tribal leadership on a government-to-government basis before contemplating and/or taking any action that will impact Tribal citizens, lands and resources. Frequent and active engagement with Tribal leadership is an essential component of the Tribal/Federal partnership and creates a clear path forward and a framework for developing and implementing successful strategies that empower Tribes and uphold the principles of Self-Governance. The SGAC appreciates this opportunity to provide comments in response to the Department's proposed questions.

The SGAC serves a vital role in effectuating the policy recommendations to implement the Tribal Self-Governance legislation and authorities within the Department of the Interior under Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93-638, as amended. Comprised of Tribal leadership from all of the BIA regions across the country the SGAC provides advice to the Assistant Secretary-Indian Affairs and Director of the Office of Self-Governance regarding all Self-Governance programs, Federal laws, regulations, policies and budget issues that impact Self-Governance Tribes. Over the last two decades, more than 265 Tribes from across the Nation have chosen to enter into Self-Governance and to provide Federal services directly to their Tribal citizens and communities. Many Self-Governance Tribes have experienced firsthand the devastating impacts of land loss and its corollary infringement of Tribal Treaty rights due to past Federal policies. These proposed changes to land acquisitions would not only create greater regulatory barriers for Tribes but they are also reminiscent of previous failed Federal policies - removal, allotment, assimilation and a

de facto moratorium on taking land-into-trust during the Bush Administration – that continue to have devastating impacts for Tribal communities today. The Department should reconsider their position given the fact that most Tribal land acquisitions are non-controversial and the current regulations allow the Federal government to carry out its trust responsibility to Tribes while weighing the interests of state and local governments.

On December 6, 2017, the Department of the Interior issued a "Dear Tribal Leader Letter" that included a series of questions on proposed regulatory revisions to 25 C.F.R. Part 151 - the land acquisition regulations. Our responses to the questions posed are as follows:

1. **What should the objective of the land-into-trust program be? What should the Department be working to accomplish**?
   Land-into-trust is critical to fostering greater self-sufficiency and stronger Tribal governments and should be utilized as a mechanism to assist Tribes in achieving their full sovereign potential. The acquisition of trust land is one of the primary elements of Tribal governments being able to exercise their jurisdictional authority and governmental power. Taking land-into-trust is one of the most important functions the Department undertakes for Tribes and, as such, the Department should prioritize taking land-into-trust for Tribes as an Administrative priority. It should be included in the Departments Strategic Plan and acreage goals to support Tribal requests to expand the reservation or embark on economic endeavors should be established each year.

   The Department's objective should be to support Tribes in restoring their homelands and ensuring that the process assists Tribes in achieving this goal in the most expeditious and seamless way possible as opposed to creating more regulatory obstacles for Tribes to overcome. The current regulations provide broad flexibility for Tribes to acquire homelands and the success of the program can be measured by the former Administration's return of over a half million acres of land to Tribal ownership. The Department should not propose regulatory changes that would stifle the return of Tribal homelands by imposing greater administrative hurdles for Tribes, giving greater deference to state and local governments to the detriment of Tribes, thwarting the efficiency of the current process by imposing additional regulatory layers, and relegating the sovereign status of Tribes by requiring them to enter into agreements with other governmental entities or governmental subgroups.

   Restoration of Tribal homelands is central to the intent of the Indian Reorganization Act (IRA). The IRA was enacted to provide Tribes the opportunity to assume a greater degree of Self-Governance – politically and economically – and to reverse the course on prior Federal policies that sought to destroy Tribal economies, institutions, culture and communities and to rob them of their land base and natural resources. There continues to be a need for the Department to support and actively implement the land-into-trust program in a manner that is consistent with the IRA and for the benefit of Indian Tribes. We therefore urge the Department to work to accomplish this goal under the current regulations rather than developing new regulations that would effectively undermine it.

   Concrete ways that the Department can support Tribes in placing land-into-trust include, providing the regions with sufficient resources and tools necessary to carry out their Federal function, work directly with Tribal applicants and provide assistance to Tribes so that they are able to comply with all of the application requirements, provide ongoing

training to the Solicitors Office on trust land title review, and develop a consistent policy across regions for processing land-into-trust applications utilizing best practices from regions who have proven successful in this area.

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

The current regulatory paradigm works for both on and off-reservation land-into-trust applications – there should be no distinction. It also provides sufficient mechanisms for the Department to employ to balance state and local interests against the backdrop of the Federal trust obligation to Tribal governments. The Department should work towards improving current regulatory mechanisms to further the intent of the IRA rather than creating new regulations. One of the primary ways the Department can improve the current process is by ensuring all Federal Offices - central, regional and agency - are adequately staffed and resourced to carry out their Federal trust responsibility to assist Tribes in reacquiring their Tribal homelands in a timely and efficient manner.

Another way to improve current processes is to continue to treat contiguous lands as part of "on-reservation" lands and expand the on-reservation land classification to include former treaty and ancestral homelands. The expansion of this classification would allow Tribes who are reservation-less, because their Treaty was abrogated or never ratified by the Senate and others that have been displaced from their ancestral homelands or had their reservations diminished as a result of past Federal land policies, an opportunity to reacquire lands that were wrongfully taken from them. While we cannot turn back the clock and make reparation to Tribes for the past injustices, we can move forward with a policy and process that supports Tribes to the fullest extent possible in rebuilding their homelands.

Finally, the National Environmental Policy Act (NEPA) is one of the biggest impediments to Tribes reacquiring homelands due to the exorbitant costs and the Act's time consuming requirements. The Department should work towards streamlining the process, including, allowing for categorical exclusions when possible. In the alternative, the Department should allow the Tribe to conduct its own environmental review for on-reservation acquisitions in lieu of the Federal NEPA process.

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

The current regulatory paradigm works for both on and off-reservation land-into-trust applications – there should be no distinction. It also provides sufficient mechanisms for the Department to employ to balance state and local interests against the backdrop of the Federal trust obligation to Tribal governments. Adopting arbitrary standards regarding the acquisition of off-reservation trust land is counterproductive and dismissive of the impact that historical policies have had on Tribes. Further it doesn't align with the intent of the IRA. The IRA provides the Secretary of the Interior with the authority to acquire lands in trust within or without existing reservations. To otherwise limit the Secretary's legal authority would be in contravention to established law and inconsistent with the goal of restoring Tribal homelands.

State and local interests need to be considered against the paramount goal of the IRA and the Federal trust responsibility to Tribes. When a Tribe submits an application to put

land-into-trust state and local governments are notified and provided ample opportunity to comment on the potential impacts to state and local government interests. Often, states and local governments will express concerns over loss of jurisdictional authority or the loss of revenue generated through tax on the land parcel in question. However, Tribes often use their lands to generate economic opportunity and jobs for their citizens, as well as, state and local citizens residing in the surrounding communities. The state and local governments often fail to weigh the loss of tax revenue against the Tribal investment through compacts or other means, to include, employing state citizens and providing services to state citizens residing in rural areas, such as, health and dental care access.

The current regulatory rules should continue to be followed and implemented and the process should not be subject to additional delays and certain lands, such as, ancestral homelands should be fast tracked for approval. In addition, lands that would generate much needed income, or land acquisitions that are supported by state and local governments should also be fast tracked. Under the current regulations the Department provides adequate notice of its decision to take lands into trust and allows for additional opportunities for outside interests and governments to seek review of that decision. The current regulations also provide for prompt review of land-into-trust decisions to avoid lengthy delays due to legal challenges and frivolous cases filed with the intent of delaying the Department from taking land-into-trust for Tribes. The final rule was a positive step in the land-into-trust acquisition regulations and should not be changed.

4. **What criteria should the Department consider when approving or disapproving an off-reservation trust application?**
   The existing regulations provide adequate criteria for evaluating off-reservation trust applications and should not be amended. If the Department insists on moving forward despite unified Tribal opposition to changing the current criteria, the changes should be achieved through amending the BIA Fee-to-Trust Handbook and not through regulatory changes. In addition, changes to the current criteria should not be considered unless the changes would remove impediments to advancing trust acquisitions more quickly and efficiently. The Department should also treat each Tribal applicant on a case-by-case basis taking into account historical circumstances and unique situations facing landlocked or reservation-less Tribes. Tribal economic and geographical challenges should also be examined and resolved in a way that benefits the Tribes. Most importantly, the Department should consider the fact that acquiring off-reservation parcels of land are sometimes the only choice Tribes have and the Department has a trust responsibility to assist Tribes with these acquisitions.

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 healthcare 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?**

   The criteria used for off-reservation trust acquisitions should not be changed. Existing regulations already include different criteria for off-reservation land-into-trust applications

as opposed to on-reservation applications. Under the current regulatory process, Tribes are required to explain the need for the land, the purpose for which the land will be used. If the Tribe intends to use the land for a business purpose, the Tribe is required to provide a plan which specifies the intended economic benefits. The current regulations also subject applications for off-reservation parcels to additional scrutiny if they are located a certain distance away from the Tribe's existing reservation.

Indian Tribes need land for a variety of purposes and the need for land should not be subject to an arbitrary categorization that gives the Department subjective authority to decide what it deems a favorable or unfavorable use of land. The failure of the government to live up to its trust obligation and the severe underfunding of Tribal programs and services makes the acquisition of land for economic development purposes a high priority for Tribes. Tribal land use if often interconnected – land is used for economic development in order to raise revenue to support Tribal programs and services and address the health and welfare needs of Tribal citizens. Absent a tax base and legal authority to prohibit dual taxation by the state, Tribes are dependent on economic development opportunities. In essence, the Federal government should be more supportive of this due to the fact that Tribes are essentially assisting the Federal government by supplementing Federal funding and growing Tribal economies in order to achieve Tribal self-sufficiency.

If the Department were to enact criteria that limit the use of trust land for certain purposes it would be an infringement on Tribal sovereignty and Self-Governance. Such additional criteria would also be contrary to the intent of the IRA because it is paternalistic and subjects Tribes to a level of scrutiny that isn't extended in kind to state and local governments when they acquire lands for certain purposes. State and local governments often change their mind about the land use purpose due to a change in conditions, a change in need or other exigent circumstances – Tribes should be afforded the same consideration rather than the imposition of more stringent criteria or requirements. It is in both our best interests for Federal policy to encourage rather than inhibit Tribal self-sufficiency in order to establish strong Tribal governments, grow Tribal economies and diminish the Tribes reliance on Federal funding.

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

Generally, Tribal trust land is subject to Tribal law and applicable Federal law and exempt from state law and jurisdiction unless Congress has deemed otherwise. Trust lands are also generally immune from state and local taxation in certain circumstances. Tribal trust land is necessary for a Tribe, similar to other governments, to exercise its full sovereign authority over its territory and citizens. The status of land not only determines governmental authority and jurisdiction it is often a pre-requisite for Tribes to achieve their goal of self-sufficiency. Trust lands also qualify Tribes for a number of Federal programs and services that are not provided on fee lands.

One of the disadvantages with trust land that the Department should resolve in collaboration with the Tribes is that it cannot be used as collateral to secure financing. There are also several layers of Federal review and approval before the property may be utilized for another purpose and the Department should work with Tribes to develop streamlined procedures to make the process more effective and efficient.

7. **Should pending applications be subject to new revisions if/when they are finalized?**
   We strongly urge the Department to refrain from making changes to the current land acquisition regulations. However, if the Department does proceed down this course despite Tribal opposition, pending land acquisition applications should not be subject to the new process revisions unless, the Tribal applicant desires to proceed under the new process. Pending applications were submitted in compliance with the requirements of existing regulations and requiring Tribes to resubmit their applications is not only a drain on limited Tribal resources, it would impose additional unnecessary delays for Tribal land acquisitions. Many Tribes with pending fee-to-trust applications have been waiting for an extended period of time already and to impose additional time constraints on their application by having them re-apply and go through the entire process again is unreasonable and ineffective.

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 Department must first and foremost consider its role as trustee for Tribes and the overarching law, the IRA, which established the goal of assisting Tribes in securing the return of Tribal homelands via the land-into-trust process. The IRA does not require that the Secretary balance the interests of state and local governments nor should the Department elevate the interests of the state and local governments above their trust obligation to Tribes. State and local considerations should be measured against the backdrop of Tribal sovereignty, the Federal trust responsibility and current Federal Indian law which supports the return of Tribal homelands, self-determination and self-government.

   Further, under the current regulatory regime, state and local governments are afforded ample opportunity to weigh in with concerns or to challenge a potential application. The opportunity to be heard should not be equated to an outright veto power for state and local governments who are often at odds with Tribal interests. Land-into-trust is a vitally important part of Federal Indian policy and the protections afforded Tribes under Federal law are often the result of protecting Tribes from state and local hostility. State and local concerns do not change Federal Indian law or the governments trust responsibility to Tribes.

9. **Do Memorandum of Understanding and other similar cooperative agreements between Tribes and state/local governments help facilitate improved Tribal/state/local relationships in off-reservation economic development? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?**
   A Tribe should decide when and if it should enter into an MOU with a state and local government and the decision should not be imposed on them as a condition of acquiring land – not only is this paternalistic it is an assault on Tribal sovereignty. State and local governments could use this requirement as a means to coerce Tribes to agree to terms that advance their own self-interests or improperly require the imposition of state law and jurisdiction on Tribal trust lands. It would also effectively provide state and local governments a veto power over all land-into-trust decisions resulting in an unequal bargaining position – either the Tribes agree to the state and local government terms or

the land is not taken into trust. The Federal government has a unique duty and responsibility to Tribes, not the state and local governments. This course of action also assumes that land-into-trust applications are controversial when more often than not the land applications are uncontested transfers of land that often have local support. MOUs in certain circumstances do facilitate Tribal, state and local relationships but MOUs are not always plausible or appropriate and it is a decision that rightfully belongs to the Tribe as a sovereign government.

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

A. First and foremost, we urge the Department to rescind the April 2017 Department Memorandum removing off-reservation land acquisition decisions from the regions and transferring those decisions to Central Office. The regions are best equipped with the local knowledge necessary to process these applications in a timely and efficient manner. Central Office should focus their efforts on attending to the small number of applications that are deemed controversial in nature.
B. The Department should make land-into-trust a priority within the Department and include it in the Presidential Budget Requests to ensure that all Federal offices are properly staffed and resourced to handle and process land-into-trust applications in a timely manner.
C. Support legislation that calls for treating all Federally-recognized Tribes equally under the IRA and would provide a clean fix to the Carcieri decision.
D. Meet and engage with Tribal leaders from every region and work with Tribes and Regional Organizations to study and understand the diverse land needs of Tribes across the United States.
E. Refrain from reinstating the thirty (30) day wait period following a determination by the Department to take land-into-trust. This only encourages frivolous legal challenges and subjects Tribes to greater costs, loss of economic development opportunities, and the imposition of state and local taxes.
F. Consider Streamlining the NEPA process through categorical exclusions
G. Abstain from gaming issues – they should not be considered an impediment to the fee-to-trust process. Allow the NCAI and NIGA Gaming Task Force to work with Tribes on issues involving Indian gaming.
H. We object to the Department's statement that rulemaking is warranted to make land-into-trust decisions more defensible in litigation. There is no litigation justification that would support changes to the 25 U.S.C. Part 151 regulations.
I. Request that you delay moving forward with this proposal until both the Assistant Secretary - Indian Affairs and Deputy Solicitor Indian Affairs have been appointed and they have had an opportunity to discuss this issue with Tribes.

We appreciate this opportunity to provide these comments and request that the Department focus its efforts on implementing and adhering to the current land-into-trust regulations.