DOI SELF-GOVERNANCE ADVISORY COMMITTEE

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Department of the Interior
1849 C Street, NW, MS-4141
Washington, D.C. 20240
Attn: Ms. Elizabeth Appel
Via email: consultation@bia.gov

Re: SGAC Supplemental Comments for the Land-Into-Trust Consultation

Dear Assistant Secretary Sweeney:

I am writing on behalf of Self-Governance Advisory Committee (SGAC) to submit supplemental comments in response to the Department of the Interior's ("DOI") December 6, 2017 Dear Tribal Leader Letter ("December Letter") concerning the trust acquisition regulations at 25 C.F.R. Part 151 ("trust acquisition regulations" or "land-into-trust regulations" or "Part 151").

By this letter, we state our strong opposition to any proposed revisions to Part 151 and ask that the DOI formally withdraw its efforts in this area, given the overwhelming opposition from tribes during consultations. The importance of gaining trust land has not wavered in Indian Country, and Congress has prioritized this federal action. Possessing a tribal land base is extremely important for our Tribe. If the DOI intends to make changes to its trust acquisition process, it should dedicate more resources to streamlining the existing process rather than amending Part 151. Last, we strongly oppose many of the specific changes proposed in the DOI's draft regulations that have now been withdrawn.

A. The objective of the land-into-trust process should be to efficiently facilitate the acquisition of tribal homelands, as intended by Congress in the Indian Reorganization Act and other land acquisition statutes.

Congress has authorized the Secretary of the Interior ("Secretary") to place land into trust for the benefit of a tribe in over fifty different statutes. The DOI uses the Part 151 process to administer tribal requests for the Secretary to place land into trust on behalf of a particular tribe under the authority delegated by a given statute. The majority of trust land applications cite to the Secretary's authority under the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, ("IRA"). However, the DOI also uses the Part 151 process to administer trust land applications under other statutory authority, such as discretionary tribal settlement or restoration act acquisitions.

It is very concerning to us that the DOI asks about the advantages of operating on land that is in trust given the well-known and demonstrated success of the IRA, the success of the

Indian Self-Determination, Education and Assistance Act, and the wide range of examples of tribal strength and recovery—all related to and often dependent on the ability to exercise tribal jurisdiction and self-governance on tribal trust lands. Of course, Indian Country still suffers and includes some of the most impoverished, remote, and underserved populations in the country. The placement of land into trust for tribes, however, has been a success story.

Acquiring land into trust is one of the most significant processes of the federal-tribal government-to-government relationship. This is because regaining a land base is essential to tribes' exercise of self-government without interference from state and local governments. When the federal government holds land in trust for a tribe, the tribe is able to exercise jurisdiction over the land, including over individuals' actions and over taxation. The Supreme Court itself has recognized that "there is a significant territorial component to tribal power." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

This land-based jurisdiction allows the tribe to protect its people and to generate economic growth. It allows tribes to decide how to use their lands, including for economic development purposes or governmental and community purposes. Trust land insulates tribes from state and local government taxation, allowing tribes to have a limited tax base. Trust land also provides tribes the ability to protect land with historic or cultural significance. Jurisdiction over territory is a bedrock principle of sovereignty, and tribes must exercise such jurisdiction in order to fully implement the inherent sovereignty they possess. Tribes cannot overstate the importance of acquiring trust land as a means for rebuilding tribal homelands and furthering tribal sovereignty and self-sufficiency.

It is helpful to return to the adoption of the IRA to understand why land in trust is so important. The IRA reflected a drastic sea change from a policy of divesting tribal lands under the Indian General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388 (1886), to a policy of halting divestment and restoring land back into tribal ownership.

According to the Supreme Court in *Mescalero Apache*, "[u]nquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). It quoted the IRA's legislative history in explaining:

> The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934). See also S.Rep.No.1080, 73d Cong., 2d Sess., 1 (1934).
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> As Senator Wheeler, on the floor, put it:
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> > "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians." 78 Cong.Rec. 11125.
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> Representative Howard explained that:

> "The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Id*., at 11732.

Mescalero Apache Tribe, 411 U.S. at 152. *See* Felix S. Cohen's Handbook of Federal Indian Law 1039-1041 (2012 ed.).

The Supreme Court in *Yakima* later said:

> The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. See 48 Stat. 984, 25 U.S.C. § 461 *et seq.* Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. See §§ 461, 462. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership, see § 463, and for acquiring, on behalf of the tribes, lands "within or without existing reservations." § 465.

Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255 (1992).

To date, Congress has not changed this fundamental purpose of the IRA, nor has the Supreme Court held that the statute exceeds Congress's authority—despite numerous challenges asserting that land should not be placed into trust on behalf of tribes under the Secretary's authority.[1] No statutory authority or court opinion has changed the long-standing objective of the IRA.

Indian Country still suffers from the devastation wrought by previous Federal Indian policies, in particular, the Dawes Act, but also broken treaty promises and inadequate protection of trust assets. Indian Country includes some of the most impoverished, remote, and underserved populations in the United States. Tribes' ability to place land into trust has been a critical tool for us to govern and use our lands for the benefit of our members, which oftentimes results in benefits for our neighbors as well.

The DOI's objectives with its land-into-trust program should clearly be to carry out and achieve the objective of the IRA: to rehabilitate tribes' and Indians' economic lives and give them a chance to develop the initiative destroyed by a century of oppression and paternalism.

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[1] *See generally, Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433, 197 L. Ed. 2d 660 (2017); *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Dir., Bureau of Indian Affairs,* 32 IBIA 309, 312 (1998); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016) *aff'd sub nom*. *Stand Up for California! v. United States Dep't of Interior*, No. 16-5327, 2018 WL 385220 (D.C. Cir. Jan. 12, 2018).

The DOI's objectives with its land-into-trust program should also be to carry out the objectives of the other statutes authorizing the Secretary to place land into trust for tribes. The DOI's objectives, as directed by these statutes, should be to promote tribal self-determination, self-governance, and self-sufficiency through trust land acquisition. The DOI should also be working to accomplish the fulfillment of its treaty obligations and trust responsibility to tribes.

In fulfilling these various obligations, DOI should work with tribes to eradicate the negative disparities in economic, health, and social conditions found in Indian Country as compared with mainstream America. The acquisition of land in trust helps in this effort because tribes can use trust lands for economic and community development projects that raise the quality of life for their members and to exercise jurisdiction over their lands.

B. The DOI's changes to its trust acquisition process should involve allocating more resources to properly and efficiently carry the process out rather than amending Part 151.

All aspects of the land-into-trust process could be made more efficient. The DOI is slow to act on all land-into-trust applications. But, to facilitate Congress's goals in the IRA, the DOI need not amend Part 151. Instead, it should allocate more resources towards efficiently carrying out the trust acquisition process.

The DOI should provide the necessary resources and tools to the Regions, work directly with tribal applicants, and provide proper training in trust land title review to the Solicitor's Office where needed. Often times, when tribes discuss trust acquisitions, they find that different BIA Regions and Solicitors Offices have inconsistent approaches to requirements.

The Department should strive for more uniformity through increased staffing and training and should also look to the Regions that process trust acquisitions most efficiently to help develop guidance and training. We also recommend that the DOI dedicate more resources and personnel in both the realty and Solicitor's Office at the Region level.

Further, we recommend that the DOI look closely at the land-into-trust process and develop reasonable expected timeframes for completing the bureaucratic functions necessary to make the final decision and a timeframe for making the final decision on an application. Such defined timeframes will provide guidance to the DOI staff in their work and to the tribal applicant regarding the progress of its application.

C. The DOI's bias against gaming applications is concerning.

The DOI is biased against land-into-trust applications for gaming purposes, especially those involving "off-reservation" land. This is evidenced by the DOI's previously-proposed draft amendments to Part 151, which would have made it more burdensome for tribes to acquire trust lands for gaming purposes. The bias is also evident in the questions DOI poses in its December Letter. Such bias is very concerning to us.

The notion that "economic development" applications should be cordoned off from "non-economic development" applications is directly in contrast with the purposes of the IRA. The

Supreme Court has recognized that "[t]he intent and purpose of the Reorganization Act is 'to rehabilitate the Indian's economic life' . . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152, *citing* H.R.Rep.No.1804. Congress *intended* the land acquisitions to facilitate all types of tribal economic development. The erosion of this central fundamental purpose is outside Congress's intent and, if there any revisions at all to Part 151, this should be rectified. The DOI should not engage in the politics and rhetoric around gaming applications. Rather, the DOI should simply process these applications uniformly and efficiently in compliance with the statutory requirements of the IRA or other authorizing statutes—as intended by Congress.

The IRA does not distinguish between "on-reservation" and "off-reservation" trust land. In fact, the text of the IRA and associated congressional reports indicate that the IRA "seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council . . . ." 78 Cong.Rec. 11125.

Instead, that language arose from the enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.,* ("IGRA") with regard to what trust land would be eligible for gaming purposes. But the text of the IGRA states: "Nothing in this section shall affect or diminish the authority or responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c). And the IGRA itself recognizes that gaming may take place on trust land acquired both on and off a reservation. *See* 25 U.S.C. § 2719. The DOI should not be injecting gaming concerns into the Part 151 process, but rather those concerns should be dealt with as part of an IGRA gaming eligibility analysis under 25 C.F.R. Part 292.

The IRA was specifically intended to put tribal decisions, including decisions about trust land acquisitions, into the hands of tribes without second-guessing by the DOI. 78 Cong.Rec. 11125. Today, tribes are more capable than ever to make those types of informed decisions and, thus, the DOI should defer to tribal expertise and process trust applications efficiently without concern over purpose.

D. Memoranda of Understanding and/or Cooperative Agreements should not be required in a land-into-trust application.

The IRA does not require the cooperation of state and local governments, nor does it give them a role in the land-into-trust process. We strongly believe that requiring cooperative agreements outside of the National Environmental Policy Act ("NEPA") process creates a "pay-to-play" scenario whereby tribes simply seeking to increase their land base for a variety of reasons will be forced into unfavorable agreements with state and/or local governments in exchange for their support or neutrality on a land-into-trust application. We have always strived to be good neighbors to our neighbor governments. It is simply good governance for neighboring governments to work together for the provision of public health and safety services such as water, fire, emergency services, and law enforcement. Tribes often reach such agreements with their surrounding state and local jurisdictions. These agreements are usually done outside of the trust land application process, and sometimes they are also reached during the NEPA review portion of the land-into-trust process to mitigate traffic or other concerns.[2] Importantly, these are agreements appropriately reached by contracting parties on equal footing

[2] *See* https://www.walkingoncommonground.org/ for many examples of intergovernmental agreements between tribes and state and local governments.

to obtain a certain desired result in the interest of both parties. To require these types of agreements to be included in the land-into-trust process would place a tribe on unequal footing and subject it to having to acquiesce to the demands of the other jurisdiction or not grow its land base, which could be used for a variety of purposes both economic and non-economic. Such a requirement could essentially give state and local governments veto power over the tribal land-into-trust decision process, at odds with the intent of the IRA and the concept of tribal self-determination.

That being said, the Department has clarified that it does not intend to create a veto situation by referencing such agreements in Part 151 but is instead trying to pinpoint showings that would expedite applications. Even if this is the intent, it may not be the effect. More likely, any mention of these agreements in the Part 151 regulations will be seized upon by those opposed to trust acquisitions and implemented to de facto require such an agreement.

E. The United States trust responsibility and fiduciary duty flows only to tribes—not to public citizens or state or local governments—and Part 151 already takes into account these local interests.

The IRA does not require the DOI to consider public citizens or state and local concerns when evaluating a land-into-trust application. In fact, the IRA was passed to *protect* tribes from those very interests who—much like today—sought to keep land out of tribal ownership. The United States trust responsibility and fiduciary duty flows only to tribes—not to public citizens, state, or local governments.

However, the land acquisition regulations at Part 151 do provide a role for state and local government participation. Part 151 requires that local interests are notified of the possible trust acquisition and given the opportunity to comment. For trust acquisitions pursuant to the IRA, the DOI must notify the state and local governments having regulatory jurisdiction over the land. 25 C.F.R. § § 151.10, 151.11(d). As part of its review of trust acquisition applications, the DOI prepares a Notice of Application to inform state and local governments and any person or entity requesting notice about the application and the opportunity to provide comments. Each notified party is then given 30 days to provide written comments regarding potential impacts on regulatory jurisdiction, real property taxes, and special assessments, and then the applicant tribe is provided with the comments and given a reasonable time to reply.

Part 151 also calls for compliance with NEPA. *See id.* at §§ 151.10(h),151.11(a). As part of its Environmental Compliance Review under NEPA, the DOI provides state and local governments with an extensive opportunity to comment and then considers comments received.

Part 151 then requires the DOI to consider effects on local interests in making a determination of whether to acquire land into trust. For trust acquisitions under the IRA, included within the regulatory criteria considered by the DOI are the following:

> If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; [and]
>
> Jurisdictional problems and potential conflicts of land use which may arise.

Id. at § 151.10.

If the land is located off-reservation, the criteria demand even more careful and weighty consideration of local interests, stating:

> The location of the land relative to state boundaries, and its distance from the boundaries of the Tribe's reservation, shall be considered as follows: as the distance between the 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. The Secretary shall give greater weight to the concerns raised pursuant to [the provision providing for comment by local interests] of this section.

Id. at § 151.11(b).

The Department's Fee-to-Trust Handbook states that the Notice of Decision ultimately issued should contain an analysis of comments and concerns by local interests.

Additionally, states and tribes engage in productive, mutually agreeable approaches to land use planning. State and local governments have an opportunity to engage in constructive dialogue with tribes, taking into account a tribe's history of land loss and the most sensible and mutually agreeable options for restoring tribal lands. In most cases, a very small "tax loss" is a minimal tradeoff for the development of schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe. Part 151 already adequately takes into account local interests.

F. Any new procedural revisions that would make the process more efficient should apply to pending applications, but higher substantive standards should not.

If the DOI makes any revisions to the land-into-trust process, such revisions should only be to make the process more streamlined and efficient for tribes. If the DOI ultimately implements any such revisions, then pending applications should benefit from such changes.

However, if the DOI ultimately implements revisions that make the process more burdensome for tribal applicants, then those revisions should not apply to pending applications. Applying such revisions to pending applications would amount to changing the rules and pushing the goalposts further away for tribes already in the process. This would be unfair to those tribes who have diligently followed current law when submitting their applications. It would also result in unnecessary significant costs to those tribes who would need to revise their applications and start anew in the process. This would directly contradict the DOI's stated goals.

G. A two-tier review and approval process does not respect tribal self-determination and sovereignty.

We are seriously concerned with the considered addition of a two-tier review and approval process. Unilateral denial without conducting a complete review of the application will result in additional costs for a tribe—not less. A tribe whose application is denied in the first review will have to expend valuable resources to appeal the decision, and, if it succeeds in overturning the initial decision, it will then continue proceeding through the remainder of the

process. Many tribes may not have the resources to sustain the application through such delay and cost, resulting in the deprivation of their rights to homelands. We know that delay is a common tactic used by well-funded tribal land acquisition opponents, and this would only serve to bolster their opposition.

Congress has recognized many times over the right of a tribe to make its own decisions in exercise of its sovereignty. If a tribe determines to place a parcel of land into trust, then the DOI should respect that tribe's decision and process the application with all due deliberation—no matter where the parcel is located.

H. Reinstatement of 30-day stay before placing land into trust will increase cost for tribes requiring them to use their "limited resources"—precisely what the DOI purports to avoid.

Finally, the repeal of the so-called "Patchak Patch" is contrary to the stated goal of the revisions—preservation of tribal resources. In 2012, the Supreme Court of the United States held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 567 U.S. 209 (2012), that the law does not bar Administrative Procedure Act challenges to the DOI's determination to take land in trust even after the United States acquires title to the property. Acquiring the land into trust immediately allows a tribe to proceed with its development plans without undue delay. It does *not* prejudice a potential challenger from filing a lawsuit challenging the Secretary's decision, as that challenge can be brought for six years after the decision has been made. Alternatively, restating the 30-day period before placing the land into trust *does* prejudice a tribe, which may be faced with a lawsuit brought within the 30-day period and an injunction prohibiting it from proceeding with its economic development opportunity while the challenge is litigated.

Conclusion

On behalf of the SGAC, we appreciate the opportunity to comment on this most significant topic. As you consider your next step on this important issue, we strongly urge you to carefully consider your federal fiduciary responsibilities and our concerns as well as Congress's intent when passing legislation to return land to tribal ownership. We strongly oppose changes to the Part 151 process at this time.