



CENTRAL COUNCIL  
*Tlingit and Haida Indian Tribes of Alaska*  
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**WRITTEN COMMENTS**

**OF**

**CENTRAL COUNCIL OF TLINGIT & HAIDA INDIAN TRIBES OF ALASKA**

**Submitted for the record**

**August 1, 2018 (Public) Listening Session and August 3, 2018 Tribal Consultation  
Regarding Fee-to-Trust Policy in Alaska**

**August 9, 2018**

Gunalchéesh/Háw'aa. My name is Richard Chalyee Éesh Peterson, I am Tlingit from the Kaagwaantaan clan, Eagle's Nest House. I grew up in Kasaan, Alaska. I was recently unanimously re-elected President of the Central Council of Tlingit & Haida Indian Tribes of Alaska (hereinafter "Tlingit & Haida" or "Tribe") by the over 100 delegates that make up Tlingit & Haida's governing body. I have held that post since 2014.

Tlingit & Haida is a federally-recognized regional tribe as confirmed by the U.S. Congress by statute in 1994 (25 U.S.C. 1212) and as originating pursuant to the Act of June 19, 1935 (49 Stat. 388, as amended, commonly referred to as the "Jurisdiction Act").

Tlingit & Haida has multiple fee-to-trust applications pending before the Department, one for nearly ten years. All of them relate to parcels located in the historic Juneau Indian Village where our tribal headquarters remains today, and where many of our tribal citizens continue to reside. All of these parcels were once under federal protection as trust or restricted lands that were not subject to alienation or taxation. When Tlingit & Haida purchased these parcels from its tribal citizens, the BIA terminated the federal restrictions that protected these parcels.

Our first-hand experience with these applications, and our struggles with the Interior Departments under the last four U.S. presidential administrations, not just this current Administration, leads Tlingit & Haida to find objectionable the Administration's withdrawal of the 2017 M-Opinion and establishment of this one-year consultation and review process. Instead, the Administration should reinstate the 2017 M-Opinion and expedite its final review and approval of Tlingit & Haida's pending fee-to-trust applications under the existing authority of the 25 CFR 151 regulations and the 1994 Amendments to the Indian Reorganization Act that require the Department to extend the same privileges and immunities of fee-to-trust approvals to Tlingit & Haida as it does to Indian tribes in the Lower 48.

Contrary to what we heard from federal officials at the August 1, 2018 public meeting and August 3, 2018 tribal consultation, there is a sense of immediacy and urgency -- T&H has applications that are awaiting action. Our applications involve Indian land that was protected for decades in the Juneau Indian Village as restricted Native allotments, but which, now, in the ownership of the Tlingit &

Haida Tribe, have lost that federal restriction. This is an immediate and urgent problem that the BIA should not put on pause.

Further, to the comments of federal officials at those consultations, the Secretary's authority to take land-in-trust in Alaska is no more at risk of judicial attack than it is elsewhere in the Lower 48. Case after case, court after court, has upheld BIA decisions to take land into trust under the IRA. The IRA is solid in the courts. And just as fee to trust decisions in the Lower 48 must be done right, and are being done right, BIA should do the same in Alaska. Competent and timely BIA action, not study, is what is needed.

Tlingit & Haida believes that the Secretary's authority to take land-in-trust in Alaska is not in any way circumscribed by the Alaska Native Claims Settlement Act, the Federal Land Policy and Management Act of 1976, and the Alaska National Interest Lands Conservation Act. None of those Acts amended or repealed any provision of the Indian Reorganization Act, and certainly did not make express change to the Secretary's ability to take land-in-trust in Alaska. The 1994 Amendments to the Indian Reorganization Act make that quite plain, following as they did the 1993 M-Opinion authored by Mr. Sansonetti in the final days of the outgoing Bush I Administration. In those 1994 Amendments, Congress specifically responded to Mr. Sansonetti by insisting that the Interior Department not treat tribes differently and declaring that all tribes, including those in Alaska, possess the same powers and authorities notwithstanding what Mr. Sansonetti wrote a year earlier. Under the statute, each tribe is to get the same privileges and immunities from the Interior Department. Yet, in this consultation process, the Department is denying Tlingit & Haida the same privileges and immunities regularly extended to all tribes outside of Alaska.

It is a basic rule of statutory construction that Congress must expressly and specifically amend or repeal another statute if that is its intention. Congress simply did not do this with ANCSA, FLPMA, or ANILCA. Not only does the Secretary have the "ability" to take land-in-trust in Alaska, the 1994 Amendments to the Indian Reorganization Act require the Secretary to take land-in-trust in Alaska.

If the Secretary takes land-in-trust for tribes anywhere, which he has done hundreds of times in recent years, he must do so for tribes in Alaska. The 1994 Amendments do not permit the Secretary to create two classes of tribes based on geography or history or culture or any other category unless Congress has expressly and specifically required that discrimination in statute. Instead, the Secretary must take land-in-trust in Alaska on the same basis and under the same rules as the Secretary does for tribes in the rest of Indian Country.

If the Department were to promulgate regulations governing land-into-trust acquisitions specific to federally recognized tribes in Alaska, such regulations should be, and would be, struck down in court because they would be in violation of the 1994 amendments to the Indian Reorganization Act. There is no lawful or practical reason why the Department should promulgate rules specifically regulating land-in-trust acquisitions by tribes in Alaska that are different from those rules regulating all other tribes in America.

To avoid violating the 1994 Amendments, the Secretary must not promulgate special rules limiting the privileges and immunities of tribes regarding moving land into trust status in Alaska. The only way special regulations for Alaska would be lawful is if Congress writes a new law specifically and expressly requiring tribes in Alaska to be treated differently from all other tribes. Congress has not done so. If anyone in this Administration attempts to pressure Congress to write such rules, Tlingit & Haida

will strenuously and loudly and adamantly oppose that kind of modern-day discrimination. Tlingit & Haida and many other tribes have fought far too long for every bit of restored sovereignty and tribal identity we have. We will not permit anyone to push us backwards.

Congressional intent or legislative history may lawfully play a role in determining whether the Secretary should accept land into trust in Alaska only where the legislative text is not plain and clear. In this instance, the 1936 amendments to the Indian Reorganization Act expressly applied the Secretary's land-in-trust authority to tribes in Alaska. Expressly. And then again, in 1994, after the Bush I and Clinton administrations had expressed doubts, the U.S. Congress enacted the 1994 Amendments to the Indian Reorganization Act to expressly state that the Secretary may not treat tribes in Alaska differently than he treats tribes in the rest of Indian Country.

What part of the 1994 Amendments is not plain and clear to the Trump Administration? No other Act of Congress -- not ANCSA, not ALPMA, not ANILCA -- expressly and specifically alters the Indian Reorganization Act authority of the Secretary to take land in trust in Alaska. There can be no question of "whether" the Secretary has this authority.

This consultation is proceeding on a false and groundless question. The only legal questions are -- (1) whether it is lawful for the Secretary to question his own authority, and (2) whether it is lawful for the BIA to continue its long, slow delays in processing the fee-to-trust applications of tribes in Alaska like those of Tlingit & Haida. The 1994 Amendments provide the answer to both questions -- a resounding NO.

The late Supreme Court Justice Antonin Scalia said it best: "examining the entrails legislative history is a fool's errand... . The statute is what Congress voted on, not what some committee member said he thought it mean. I don't care what he thought it meant, since the rest of the Congress didn't know what he thought it meant when they voted for the law."

The Secretary knows what the Indian Reorganization Act, as amended, says. Plainly, the Secretary has the authority to accept land in trust for a tribe. It does not say except a tribe in Alaska. And the Indian Reorganization Act, as amended in 1936 and 1994, says this authority expressly applies to tribes in Alaska, who the Secretary must accord the same privileges and immunities he extends to other Indian tribes. The plain meaning of the law leaves nothing to consult about. Accordingly, the 25 CFR Part 151 process is not only "as appropriate" for tribes in Alaska as it is for tribes in the rest of Indian Country, there is a mandatory statutory obligation that the Department follow that Part 151 process for tribes in Alaska.

The only challenges unique to Alaska are the ones caused by the many decades of unlawful Interior Department refusals to take land-in-trust for tribes in Alaska. Tlingit & Haida has encountered these challenges for the past ten years in our efforts to return this land, right here where we are meeting, to federally-protected trust status. With all due respect, the Department's opposition is our sole challenge. The Department has dragged its feet on all of Tlingit & Haida's applications and those of every other tribal applicant across Alaska since then except for one small parcel in Craig. Meanwhile, the Department continues to process tribal land-in-trust applications for tens of thousands of acres outside of Alaska.

Although the 1994 Amendments bar the Department from writing regulations that treat tribes differently, the Department has not yet been called to task for how it is continuing to actually and painfully treat tribes in Alaska differently in practice. Discrimination in practice is no less vicious than it is in regulation. So Tlingit & Haida wishes to toss the question back to the Secretary – Why has the Department not approved our fee-to-trust applications for lands in what has always been known as the Juneau Indian Village? The Department’s “pause” for “consultation and review” did not withdraw the regulation or propose any change to it under the customary Administrative Procedures Act (APA). The 1994 Amendments require the Department to apply the current Part 151 regulation equally to all tribes. The Part 151 regulation is the law of the land. By not following it, the Department is violating the will of the Congress and the 1994 statute.

We have heard Department officials say that the Interior Solicitor’s office withdrew the 2017 M-Opinion because it “felt” it was “not well-founded.” This begs a question – does the Solicitor “feel” that the extensive APA rulemaking process that the Department carried out in 2013-2014 to remove the “except in Alaska” ban from the regulation, presumably with the Solicitor’s active participation, was likewise not well-founded? If on the other hand, the Solicitor’s Office “feels” that the existing Part 151, as amended in 2014, is well-founded, why does it block consideration of our Tlingit & Haida applications?

Some of our applications are nearly ten years old! Yet none have been approved. We purchased these parcels from our tribal members who held them for decades subject to federal restrictions against alienation and taxation. As a Tribe, we want to restore those same protections to this same land under and around our tribal headquarters. The very Peratovich Hall in which these consultations were held in Juneau is our Tribal Hall on our Tribal land which is under application to be accepted into trust status. Instead of processing our applications to approval in a timely fashion, the Department has now inserted further delays under the guise of seeking to “consult” with us on whether or not this is tribal land worthy of federal trust protection.

One of Tlingit & Haida’s oldest fee-to-trust applications, one we submitted in 2009, Lot 15, Block 5, lies right outside our Peratovich Hall in which the consultation took place. Our fee-to-trust application currently lies on the Assistant Secretary’s desk in D.C. for decision, where it has sat without any action for the past ten months.

In conclusion, with all due respect, we must ask: Why is our Tribe and our land being treated in such a discriminatory fashion by the Department? We renew our request -- approve our pending fee to trust applications today so we can restore our Juneau Indian Village to the legal status it enjoyed for decades under federal law.

Gunalchéesh / Haw’aa,



Richard J. Peterson  
President