



# USET

SOVEREIGNTY PROTECTION FUND

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January 25, 2019

The Honorable Tara Sweeney  
Assistant Secretary – Indian Affairs  
U.S. Department of the Interior  
1849 C Street N.W.  
MS-4660-MIB  
Washington, D.C. 20240

Dear Assistant Secretary Sweeney,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write concerning the Department of the Interior's (DOI) evaluation of the Secretary of the Interior's authority to take land into trust in Alaska under the Indian Reorganization Act of 1934 (IRA) via the extension of Section 5 of the IRA to Alaska in 1936. USET SPF is deeply concerned with DOI's decision to revisit the Secretary's authority to put land into trust in Alaska given that: (1) DOI conclusively settled this issue in 2014 with changes to 25 C.F.R. Part 151 that deleted a provision in the regulations that excluded, with one exception, land acquisitions in trust in Alaska (the "Alaska Exclusion"); and (2) reversing DOI's position on fee-to-trust acquisitions in Alaska would result in treating Alaska Tribal Nations differently than all other Tribal Nations with respect to the application of Section 5 and 25 C.F.R. Part 151, violating the directive of Congress in 25 U.S.C. § 5123. USET SPF recognizes that the issues on which DOI has sought input focuses exclusively on Alaska.

Nevertheless, USET SPF is compelled to provide input on DOI's consideration of these issues given the significance of fee-to-trust acquisitions for all Tribal Nations, as well as the wide-ranging consequences that might follow different treatment for a group of Tribal Nations that is not supported by law.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine.<sup>1</sup> USET SPF is dedicated to enhancing the

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people. This includes advocating for the full exercise of inherent Tribal sovereignty.

### **1. DOI's Decision to Modify Part 151 in Favor of Alaska Trust Acquisitions Should Not Be Disturbed**

The Secretary's authority to place land into trust in Alaska under the IRA was confirmed by DOI in December 2014 with revisions to 25 C.F.R. Part 151 that deleted the Alaska Exclusion. See 79 FR 76888-76897 ("2014 Alaska Rulemaking"). Given the clarity with which the 2014 Alaska Rulemaking addressed the Secretary's trust land acquisition authority concerning Alaska, DOI's June 2018 decision in Solicitor's Opinion M-37053 ("M-37053") to withdraw Solicitor's Opinion M-37043 ("M-37043") seems to be little more than an effort to undermine the 2014 Alaska Rulemaking and limit the opportunity for Tribal Nations in Alaska put land into trust consistent with the promise of the IRA. DOI must treat Tribal Nations in Alaska equally with Tribal Nations in the lower 48 with respect to such activities. USET wholly rejects the notion that DOI may create a category of "second class" Tribal Nations.

As part of the 2014 Alaska Rulemaking, DOI reached several important conclusions. First, Congress expressly extended the Secretary's Section 5 trust land acquisition authority to Alaska in 1936. Second, in reviewing the text of Alaska Native Claims Settlement Act ("ANCSA") and other Federal laws, DOI concluded that the Secretary's authority to take land into trust in Alaska under the IRA was never extinguished or abrogated by Congress. Indeed, as set forth in M-37043, DOI's 2014 conclusion is supported by several longstanding principles of statutory interpretation, including that repeals by implication are disfavored under the law, and that when two statutes are capable of co-existence, each should be regarded as effective absent a clearly expressed congressional intention to the contrary.<sup>2</sup> Moreover, if any ambiguity existed among the statutes examined by DOI in concluding that the Secretary's authority to put land into trust in Alaska remains intact, the application of the Indian canon of construction, which requires that ambiguous statutes be interpreted favorably for Indians, should lead DOI to conclude that Congress never intended to diminish the Secretary's trust land acquisition authority in Alaska. M-37053 hardly offers a reasonable basis upon which DOI should attempt to re-evaluate the Secretary's trust land acquisition authority in Alaska. Instead of pointing to sound principles of statutory interpretation to conclude that M-37043 should be withdrawn, M-37053 merely claims that ANCSA and "post-ANCSA statutes create[d] a fundamentally different regime for Alaska Native tribes when compared to

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<sup>2</sup> See M-37043 at 21 (citing *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)) concerning repeals by implication and quoting *Mancari*, 417 U.S. at 551 regarding the co-existence of statutes).

tribes in the contiguous United States.”<sup>3</sup> In light of plain statutory language passed by Congress in 1936 that has not been reversed, neither M-37053’s vague reference to a different legal regime in Alaska nor what impact the United States’ position in *Akiachak Native Community v. Jewell* concerning 25 U.S.C. § 5123 may have had on the 2014 Alaska Rulemaking should undermine DOI’s obligation to recognize the Secretary’s trust land acquisition authority in Alaska.

The 2014 Alaska Rulemaking also highlighted important policy considerations supporting DOI’s decision to eliminate the Alaska Exclusion. For example, DOI noted that the Indian Law and Order Commission, which was formed by Congress to investigate criminal justice systems in Indian Country, recommended that DOI allow former reservation lands to be taken into trust as part of efforts to address public safety concerns in Alaska.<sup>4</sup> Likewise, the Secretarial Commission on Indian Trust Administration and Reform, which was established during the Obama Administration to evaluate the management and administration of the trust administration system and review all aspects of the federal-tribal relationship, endorsed the Law and Order Commission’s findings and recommended authorizing trust land acquisitions in Alaska.<sup>5</sup>

Beyond these points, and as emphasized in USET SPF’s June 2018 submission to DOI concerning potential revisions to 25 C.F.R. Part 151, DOI should be reminded as it considers the Secretary’s Alaska trust land acquisition authority that the existence of a land base for each Tribal Nation is a core aspect of Tribal sovereignty, cultural identity, and represents the foundation of Tribal Nation economies. The ability to place land into trust is a vital mechanism for Tribal governments in protecting and restoring their land bases, and enhancing opportunities to strengthen their communities and exercise their right to self-determination. Such action is critical given the federal government’s shameful treatment of Tribal Nations, particularly the millions of acres of land lost under federal policies and the destabilization of many Tribal communities. Fee-to-trust acquisitions have enabled Tribal Nations to provide essential governmental services through the construction of schools, health clinics, elder centers, veteran centers, housing, and other Tribal community facilities. Tribal trust land acquisitions have also been instrumental in helping Tribal Nations protect their traditional cultural resources and practices. Equally important, Tribal trust lands have also helped to spur economic development in Indian Country, providing much needed financial benefits, including jobs, not only for Tribal communities, but also nearby non-Tribal communities. These benefits should be realized by all Tribal Nations, including those in Alaska.

In giving the Secretary broad authority to acquire land in trust through the IRA, including in Alaska, Congress aimed to end the devastating loss of Tribal land that marked the federal policies of assimilation and allotment. Trust land acquisitions should be considered part of DOI’s core responsibilities in assessing its relationships with Tribal Nations. Indeed, no Tribal Nation should remain landless. All Tribal Nations, whatever their historical circumstances, need and deserve a

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<sup>3</sup> M-37053 at 4.

<sup>4</sup> See 79 FR 76889.

<sup>5</sup> *Id.*

stable, sufficient land base – a homeland – to support robust Tribal self-government, cultural preservation and economic development. DOI should ensure that every Tribal Nation, including those located in Alaska, has the opportunity to acquire land in trust.

## **2. Ignoring the Mandate of 25 U.S.C. §5123(f) and (g) Has Far-Reaching Consequences for All Tribal Nations**

The instructions of Congress in 25 U.S.C. §5123(f) and (g) should also guide DOI’s consideration of the Secretary’s trust land acquisition authority in Alaska:

*(f) Privileges and immunities of Indian tribes; prohibition on new regulations  
Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.*

*(g) Privileges and immunities of Indian tribes; existing regulations  
Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.*

Congress was clear in its mandate: DOI cannot enact new regulations (with respect to subsection (f)) or maintain existing regulations (with respect to subsection (g)) to eliminate or reduce the privileges and immunities (e.g. the ability to ask the Secretary to put land into trust) of one or more Tribal Nations that are readily available to all other Tribal Nations. Indeed, DOI recognized this mandate in publishing the 2014 Alaska Rulemaking, announcing that “the Department’s policy is that there should not be different classes of federally recognized tribes.” 79 FR 76890.

A decision by DOI to reinstitute the Alaska Exclusion runs afoul of the privileges and immunities provisions of §5123. The federal district court in *Akiachak Native Community v. Salazar*, 935 F.Supp.2d 195 (D.D.C. 2013) acknowledged as much, finding that because the Secretary has retained authority to take land into trust in Alaska, the Alaska Exclusion as included within 25 C.F.R. Part 151 violated § 5123(g).<sup>6</sup> Although the *Akiachak* district court decision was vacated by the U.S. Court of Appeals for the District of Columbia after DOI’s issuance of the 2014 Alaska Rulemaking<sup>7</sup>, the district court’s ruling remains instructive for DOI as to whether the Secretary retains trust land acquisition

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<sup>6</sup> The *Akiachak* decision references the relevant statutory provision as 25 U.S.C. §476(g). Following the issuance of the opinion, the statute was recodified at 25 U.S.C. §5123(g).

<sup>7</sup> See *Akiachak Native Cmty. V. U.S. Dep’t of the Interior*, 827 F.3d 100 (D.C.Cir. 2016)

authority in Alaska, as well as concerning the limits that §5123(f) and (g) impose on any decision by DOI to ignore the Secretary's authority.<sup>8</sup>

Further, DOI's failure to acknowledge the limitation of §5123 sets a dangerous precedent for other agency action. This approach gives license to not only DOI, but all federal agencies, to find ways in which to categorize groups of Tribal Nations that limits the exercise of privileges and immunities available to them because of their status as Tribal Nations. Federal agency decision-making must not open the door to the creation of multiple classes of tribal governments with different levels of sovereign status. USET SPF calls on DOI to expressly reject such an approach – for DOI's own purposes and as an example to all other federal agencies – and reaffirm DOI's position that there cannot be different classes of federally recognized Tribes.

USET SPF's concerns are underscored by the fact that its membership includes several Tribal Nations that are subject to certain acts of Congress that resolved land claim disputes. The federal government's in resolving those Tribal Nation land claims reminds us of the critical responsibility that the United States government has to honor and safeguard the sovereign status of Tribal Nations, and to ensure that all Tribal Nations are treated equally. In failing to hold to the principle that all Tribal Nations must be regarded as standing on equal footing, USET SPF is concerned that DOI will interpret these settlement-based statutes in an overly restrictive manner that improperly limits the privileges and immunities that may be exercised by Tribal Nations. Such an approach fails to fully recognize the sovereignty that *all* Tribal Nations enjoy, and abdicates the trust responsibility that federal agencies must uphold in dealing with Tribal Nations. Adhering to a policy that agencies may not create separate classes of Tribal Nations provides the best opportunity to ensure that *all* of Indian Country can bring economic development to Tribal communities; improve public safety on and around Tribal Nation land bases; enjoy the benefits of adequate health care and other essential services needed by Tribal citizens; and protect cultural resources and sacred places, among a range of other benefits.

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<sup>8</sup> See *Koi Nation of Northern California v. U.S. Dep't of the Interior*, No. 1:17-cv-01718-BAH (D.D.C. Jan. 16, 2019), M. Op. at 56 and n.17 (noting that the privileges and immunities clauses in § 5123 are applicable to any agency regulation or decision, pursuant to the IRA or any other act of Congress, and that the persuasiveness of the *Akiachak* district court's opinion concerning the application of §476(g) is appropriate for consideration and citation given that the *Akiachak* circuit court decision did not address §476(g) when vacating the district court decision as moot).

## Conclusion

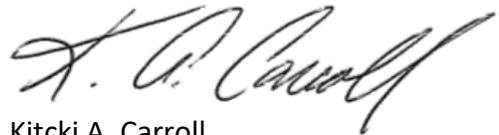
USET SPF urges DOI, in accordance with its trust obligations and the clear mandates of Section 5 of the IRA as extended to Alaska as well as subsequent acts of Congress, including but not limited to 25 U.S.C. §5123 (f) and (g), to halt further examination of the Secretary's trust land acquisition authority in Alaska. Further, M-37043 should be restored as binding legal authority on DOI. To act otherwise contravenes clear statutory directives, and undermines DOI's obligation to uphold its trust responsibility Tribal Nations in Alaska and across the United States.

Should you have questions or require additional information, please do not hesitate to contact Kitcki Carroll, USET SPF Executive Director, at [KCarroll@usetinc.org](mailto:KCarroll@usetinc.org) or 615-495-2814.

Sincerely,



Kirk Francis  
President



Kitcki A. Carroll  
Executive Director