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Via Email to consultation@bia.gov

Attn: Fee-To-Trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
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RE: Comments of the Seminole Tribe of Florida on Draft Revisions to 25 C.F.R. Part 151

Dear Acting Assistant Secretary Tahsuda:

On behalf of the Seminole Tribe of Florida (the "Tribe"), we offer the following comments in response to the October 4, 2017, draft revisions to 25 C.F.R. Part 151 ("October Letter") and the December 6, 2017, Dear Tribal Leader letter ("December Letter").

A. October Letter Draft Revisions Should Be Formally Withdrawn

As an initial comment, the Tribe appreciates the Department of Interior's ("Department" or "Interior") response to the concerns raised by tribes regarding the draft revisions contained in the October Letter. Unfortunately, that response does not go far enough to cure the problems caused by that letter.

The Tribe has participated in rulemaking processes, on a variety of subjects, by the federal government for many years. The informal and somewhat unstructured offering of draft revisions to 25 CFR Part 151 contained in the October letter is not in line with previous rulemaking procedures used by the Department. Over the past 25 years, the Department has consistently recognized the need to make tribal consultation on proposed new regulations meaningful and timely. Generally, the Department has sought tribal comments on proposed changes before formally issuing draft regulatory revisions. In this case, the Department simply attached them to a letter and sent it out.

The realities of Indian Country vary from tribe-to-tribe, region-to-region. The Tribe appreciates that the Department has made efforts to conduct consultations regionally. That said, the Tribe is concerned about whether the Department truly understands the negative impact its proposed actions on taking land into trust would have on Indian Country. As you note in the December Letter, it is more appropriate to begin

this process with a broader discussion of 25 C.F.R. Part 151 ("Part 151") and the land-into-trust process rather than follow a truncated approach. Therefore, the Tribe requests that the Department formally withdraw the draft revisions contained in the October Letter.

B. Comments to December Letter

i. Why trust land?

The importance of trust land for tribes cannot be overstated. Perhaps most importantly, trust land provides the tribal government the ability to exercise its territorial jurisdiction without interference from state or local jurisdictions. Tribes can then decide for themselves whether to develop the land for economic development or governmental purposes such as housing, health care or tribal administration. Trust land also insulates tribes from state and local taxation, can provide the tribe with a limited tax base, and gives tribes the ability to protect land with historical and cultural significance. The Supreme Court itself has recognized that "there is a significant territorial component to tribal power."¹

ii. The objective of any new regulations involving the land-into-trust process should be to more efficiently facilitate the acquisition of tribal homelands as intended by Congress when enacting the Indian Reorganization Act or other land acquisition statutes such as tribal land settlement or restoration acts.

Congress has authorized the Secretary of Interior ("Secretary") to place land-into-trust for the benefit of a tribe in over fifty separate statutes.² The Part 151 process is used

¹ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

² Indian Financing Act of 1974, 25 U.S.C. §§ 1466, 1495; Indian Land Consolidation Act, 25 U.S.C. § 2202; Pub. L. No. 106-462, Title I, § 103(6), 114 Stat. 2002, 25 U.S.C. § 2216(c) (2000) (originally enacted as Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Title II, § 217); Rocky Boy's Indian Reservation, Mont., Pub. L. No. 85-773, Aug. 27, 1958, 72 Stat. 931 (formerly 25 U.S.C. § 465); Payson Band, Yavapai-Apache Indian Reservation, Pub. L. No. 92-470, Oct. 6, 1972, 86 Stat. 783 (formerly 25 U.S.C. § 465); 25 U.S.C. § 5322(a)(3); Federal Property and Administrative Services Act, 40 U.S.C. § 523(a)-(b), Pub. L. No. 107-217 § 1, Aug. 21, 2002, 116 Stat. 1083 (formerly 40 U.S.C. § 483(a)(1)-(2)); Oklahoma Indian Welfare Act, 25 U.S.C. § 5201, June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (formerly 25 U.S.C. § 501); Shoshone Tribe: Distribution of Judgment Fund Act, July 27, 1939, ch. 387, § 4, 53 Stat. 1129 (formerly 25 U.S.C. § 574); Cheyenne River Sioux Tribe, Pub. L. No. 88-418, Aug. 11, 1964, 78 Stat. 389; Yakima Tribes, July 28, 1955, ch. 423, § 1, 69 Stat. 392; Pub. L. No. 88-540, § 1, Aug. 31, 1964, 78 Stat. 747; Pub. L. No. 100-581, title II, § 213, Nov. 1, 1988, 102 Stat. 2941; Pub. L. No. 101-301, § 1(a)(3), (b), May 24, 1990, 104 Stat. 206 (formerly 25 U.S.C. § 608); Seminole Indian Reservation, Act July 20, 1956, ch. 645, 70 Stat. 581 (formerly 25 U.S.C. § 465); Isolated Tracts Act, Pub. L. No. 88-196, Dec. 11, 1963, 77 Stat. 349, amended by Pub. L. No. 91-115, Nov. 10, 1969, 83 Stat. 190; Spokane Indian Reservation, Wash., Pub. L. No. 90-335, § 1(a)-(e), June 10, 1968, 82 Stat. 174, as amended by Pub. L. No. 93-286, May 21, 1974, 88 Stat. 142 (formerly 25 U.S.C. § 487); Swinomish Indian Reservation, Pub. L. No. 90-534, § 3, Sept. 28, 1968, 82 Stat. 884 (formerly 25 U.S.C. § 610b); Menominee Restoration Act, Pub. L. No. 93-197, Dec. 22, 1973, 87 Stat. 770, 772-3 (formerly 25 U.S.C. §§ 903-903g); Texas Band of Kickapoo Act, Pub. L. No. 97-429, § 5, Jan. 8, 1983, 92 Stat. 2270 (formerly 25 U.S.C. § 1300b-14);

by the Department to process tribal requests for the Secretary to place land-into-trust on behalf of a particular tribe under authority delegated by a given statute. Generally, 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 Part 151 process is also used by the Department to process trust land applications under other statutory authority such as discretionary tribal settlement or restoration act acquisitions.

Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, Oct. 10, 1980, 94 Stat. 1785 (formerly 25 U.S.C. §§ 1721-35); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, §§ 3(a) and 7(d), Nov. 18, 1977, 91 Stat. 1415 (formerly 25 U.S.C. §§ 711a and 711e(d)); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, Sept. 30, 1978, 92 Stat. 813 (formerly 25 U.S.C. §§ 1701-16); Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97-399, §§ 1-10, Dec. 31, 1982, 96 Stat. 2012 (formerly 25 U.S.C. §§ 1741-49); Pub. L. No. 97-459, 96 Stat. 2515; Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, Oct. 18, 1983, 97 Stat. 851 (formerly 25 U.S.C. §§ 1751-60); Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481, § 7, Oct. 17, 1984, 98 Stat. 2253, as amended by Pub. L. No. 105-256, § 5, Oct. 14, 1998, 112 Stat. 1897 (formerly 25 U.S.C. § 714e); White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, March 24, 1986, 100 Stat. 61; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, title II, §§ 203(a) and 206, Aug. 18, 1987, 101 Stat. 670 (formerly 25 U.S.C. §§ 733(a) and 736); Navajo and Hopi Indian Relocation Amendments Act, Pub. L. No. 93-531, § 1, Dec. 22, 1974, 88 Stat. 1716, as amended by Pub. L. No. 96-305, July 8, 1980, 94 Stat. 929 and Pub. L. No. 100-666, Nov. 16, 1988, 102 Stat. 3929 (formerly 25 U.S.C. §§ 640d-640d-31); Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, § 1-12, June 21, 1989, 103 Stat. 83 (formerly 25 U.S.C. §§ 1773-73j); Coquille Restoration Act, Pub. L. No. 101-42, §§ 3(e) and 5, June 28, 1989, 103 Stat. 92 as amended by Pub. L. No. 104-208, div. B, title V, § 501, Sept. 30, 1996, 110 Stat. 3009-537 (formerly 25 U.S.C. §§ 715a and 715c); Ponca Restoration Act, Pub. L. No. 101-484, § 4(c), Oct. 31, 1990, 104 Stat. 1167-8 (formerly 25 U.S.C. § 983b); Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, Nov. 3, 1990, 104 Stat. 1292 (formerly 25 U.S.C. §§ 1774-74h); Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, § 1-13, Nov. 2, 1994, 108 Stat. 4632 (formerly 25 U.S.C. § 1776-76k); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 1-10, Oct. 19, 1994, 108 Stat. 3501 (formerly 25 U.S.C. §§ 1775-75h); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, § 6, Sept. 21, 1994, 108 Stat. 2158 (formerly 25 U.S.C. § 1300k-4); Auburn Indian Restoration Act, Pub. L. No. 103-434, title II, §§ 202(e) and 204, Oct. 31, 1994, 108 Stat. 4533-4 (formerly 25 U.S.C. §§ 1300l(e) and 1300l-2); Paskenta Band Restoration Act, Pub. L. No. 103-454, title III, §§ 303(e) and 305, Nov. 2, 1994, 108 Stat. 4793-4 (formerly 25 U.S.C. §§ 1300m-1(e) and 1300m-3); Act to Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, § 6, Sept. 21, 1994, 108 Stat. 2154 (formerly 25 U.S.C. § 1300j-5); Miccosukee Settlement Act of 1997, Pub. L. No. 105-83, title VII, §§ 701-07, Nov. 14, 1997, 111 Stat. 1624 (formerly 25 U.S.C. §§ 1750-50e); Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, Dec. 15, 1997, 111 Stat. 2652; Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, Pub. L. No. 106-568, title VI, §§ 601-10, Dec. 27, 2000, 114 Stat. 2906 (formerly 25 U.S.C. § 1778-78h); Cherokee, Choctaw, And Chickasaw Nations Claims Settlement Act, Pub. L. No. 107-331, title VI, § 601-09, Dec. 13, 2002, 116 Stat. 2845 (formerly 25 U.S.C. §§ 1779-79g); Graton Rancheria Restoration Act, Pub. L. No. 106-568, title XIV, § 1405, Dec. 27, 2000, 114 Stat. 2940 (formerly 25 U.S.C. § 1300n-3); Shawnee Tribe Status Act of 2000, Pub. L. No. 106-568, title VII, § 707, Dec. 27, 2000, 114 Stat. 2915 as amended by Pub. L. No. 109-59, title X, § 10213, Aug. 10, 2005, 119 Stat. 1939 (formerly 25 U.S.C. § 1041e); Santo Domingo Pueblo Claims Settlement Act of 2000, Pub. L. No. 106-425, §§ 1-7, Nov. 1, 2000, 114 Stat. 1890, as added Pub. L. No. 106-434, § 3, Nov. 6, 2000, 114 Stat. 1913 (formerly 25 U.S.C. §§ 1777-77e); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, § 7, Apr. 3, 1980, 94 Stat. 320 as amended by Pub. L. No. 109-126, § 4, Dec. 7, 2005, 119 Stat. 2547 (formerly 25 U.S.C. § 766); Pueblo de San Ildefonso Claims Settlement Act of 2005, Pub. L. No. 109-286, §§ 1-18, Sept. 27, 2006, 120 Stat. 1218 (formerly 25 U.S.C. §§ 1780-80p).

It is somewhat puzzling to the Tribe that the Department now feels the need to ask about the advantages of operating on land that is in trust given the success of the IRA, the success of the Indian Self-Determination, Education and Assistance Act, and the wide range of stories from the United States of tribal strength and recovery. Of course, Indian Country still suffers and includes some of the most impoverished, remote, and underserved populations in the country. However, the placement of land in trust for tribes has historically been a bright spot and it is helpful to go back to the adoption of the IRA to understand why tribal rights to obtain land in trust remain 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 restoring halting divestment and restoring land back into tribal ownership.

"Unquestionably, 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). As the Court in *Mescalero Apache* discussed:

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).

As Senator Wheeler, on the floor, put it:

"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.

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 v. Jones, 411 U.S. at 152. See Felix S. Cohen's Handbook of Federal Indian Law 1039-10041 (2012 ed.).

The Supreme Court has also stated:

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 – despite numerous challenges – that land cannot be placed into trust on behalf of tribes under the Secretary's authority.³ There is no statutory authority or court opinion that changes this long-standing fundamental objective of the IRA and we submit that, without new specific legislative authority, the Secretary of the Interior lacks authority to change it.

iii. Generally, the land-into-trust process should be made more efficient and timely.

The Seminole Tribe will strongly support new regulations that would make all aspects of the land-into-trust process more efficient. Often the staffing limitations (both realty and Solicitor staff) at the Regional level result in unnecessary delays. The Department should look closely at the existing land-into-trust process and develop reasonable timeframes for completing all bureaucratic functions necessary to making final decisions. Further, the Department should establish a specific timeframe for such final decisions. We are certain that the establishment of such specific defined timeframes would provide guidance to the Department staff and create strong incentives for prompt action on land into trust applications.

³ 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).

iv. The Department should not distinguish between on-reservation and off-reservation applications.

The IRA does not distinguish between "on-reservation" and "off-reservation" trust land. That language arose from the enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, (IGRA) in regard to what trust land would be eligible for gaming purposes under that act. We note that, where land is to be taken into trust for gaming off-reservation, the specific and onerous requirements mandated by IGRA for such acquisitions would have to be satisfied, even if the new regulations did not distinguish between "on-reservation" and "off-reservation" trust land acquisitions.

In fact, the language 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. The presumption that an "on-reservation" acquisition is somehow the "preferred" acquisition is the very type of bureaucratic control and paternalism that Congress was directing the Department to move away from when it passed the IRA. 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 Department. *Id.* Today, tribes are more capable than ever to make those types of informed decisions and the Department should defer to tribal expertise and process all applications in the same manner regardless of location or purpose.

Indeed, the notion that "economic development" applications should be cordoned off from "non-economic development" purposes applications is directly in contrast with the purpose of the IRA. "The intent and purpose of the Reorganization Act was '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 Congressional intent and should be rectified in any revisions to Part 151. The Department should not engage in the politics and rhetoric around gaming applications and simply process these applications in a uniform and efficient manner that meets the statutory requirements of the IRA or other authorizing statute and complies with other applicable federal law – as intended by Congress. If there is no proposed change in use of the property, then the Department should ensure that a Categorical Exclusion to NEPA requirements is adopted and efficiently applied.

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

The Tribe strongly believes that requiring cooperative agreements outside of the NEPA process creates a "pay-to-play" scenario whereby tribes simply seeking to increase their land base are forced into unfavorable agreements with state or local jurisdiction in exchange for their support or neutrality on a land-into-trust application. Given the checker-boarding effect of the Dawes Act, many reservations have non-tribal fee land

within their borders and it is simply good governance for the governments with jurisdiction over or around those parcels 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 over tribal land held both in trust and in fee or restricted status. While these agreements are often done outside of the trust land application process, sometimes they are also reached during the NEPA review portion of the land-into-trust process to mitigate traffic or other concerns.⁴ Importantly, however, these are agreements that are only appropriately reached if the contracting parties are on equal footing 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 would be severely prejudicial to tribes. Under this approach tribes would be subject to either acquiescing to the demands of other jurisdictions or being forced to lose their rights under the IRA to grow their land base.

vi. The United States trust responsibility and fiduciary duty flows only to tribes – not to public citizens, state or local governments.

Again, the IRA does not require the Department 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 only possible place to consider citizen, state or local concerns is strictly within the NEPA review process, and there, once the environmental concerns are adequately mitigated, then the citizen, state or local jurisdiction concerns should not interfere with the fiduciary duty of the Secretary to acquire land-into-trust on behalf of the applicant tribe.

C. Comments to Draft Revisions in October Letter

i. The October Letter Draft Revisions proposed two-tier review and approval process does not respect tribal self-determination and sovereignty.

Of considerable concern to the Tribe was the addition of a two-tier review and approval process in the proposed October Letter Draft Revisions. Unilateral denial without conducting a complete review of the application will result in significant additional costs for the Tribe – not less. A tribe whose application is denied in the first review will have to expend valuable resources to appeal the decision which – if they succeed in overturning the initial decision – will require them to continue proceeding through the remainder of the process. Many tribes may not have the resources to sustain the application through such delay and cost and then would be deprived of their right to homelands. We know that delay is a common tactic utilized by well-funded tribal land

⁴ See <https://www.walkingoncommonground.org/> for many examples of intergovernmental agreements between tribes and state and local governments.

acquisition opponents and delays caused by the proposed two-tier review and approval process would only serve to unfairly 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 that placing a parcel of land into trust – no matter where located or whether that land is a "commutable" distance in the opinion of an unnamed bureaucrat – then the Department should respect that tribe's decision and process the application with all due deliberation.

- ii. **Reinstatement of 30-day stay before placing land into trust will increase cost for tribes requiring them to use their "limited resources" – precisely what these revisions purport to avoid.**

Finally, the repeal of the so-called "Patchek 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 Pottawatomis Indians v. Patchak*, 567 U.S. 209 (2012) that the law does not bar Administrative Procedure Act challenges to the Department of the Interior'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 6 years after the decision has been made. Alternatively, restoring 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 that economic development opportunity while the challenges -- even challenges that are not based on substantial grounds -- are litigated.

Conclusion

On behalf of the Seminole Tribe of Florida, we appreciate the opportunity to comment on the Department's draft revisions. We strongly urge you to carefully consider the Tribe's concerns and Congress' intent, when passing the IRA, to return land to tribal ownership in light of your federal fiduciary responsibilities.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP


By: Jerry C. Straus


By: Joseph H. Webster

cc: Jim Shore, Esq.