DOI SELF-GOVERNANCE ADVISORY COMMITTEE

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June 30, 2018

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.

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July 2, 2018

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Assistant Secretary – Indian Affairs
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.