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Executive Secretariat - Indian Affairs (ESIA)

Mr. John Tahsuda
Acting Assistant Secretary of the Interior for Indian Affairs
Department of the Interior
1849 C Street N.W.
Washington D.C. 20240

Dear Acting Secretary Tahsuda,

As Chairman of the Mohegan Tribe, I am writing in response to your 'Dear Tribal Leader' letter of October 4, 2017, soliciting comments on draft proposed changes to 25 CFR Part 151 Sections 11 and 12 as put forth by the Department of the Interior. After reviewing the proposed changes, the Mohegan Tribe offers the following commentary.

- **The proposed regulatory changes are unnecessary and unwarranted.** To the best of our knowledge, the Mohegan Tribe is unaware of any request, demand, or outcry from federally-recognized Indian tribes for changes to the 25 CFR Part 151 land-into-trust regulations. The issues of 'off-reservation gaming' of the early and mid-2000s that these regulations purport to address have, with a few exceptions, largely disappeared from political and policy debate both in Indian Country and Washington. It has been 12 years since any legislation regarding off-reservation gaming has been introduced or had a hearing in Congress. At least from the tribal perspective, proposed changes to 25 CFR Part 151 are a solution in search of a problem that largely does not exist anymore. The Mohegan Tribe questions the need of pursuing this endeavor at a time when so many other basic tribal needs go unmet and unaddressed. We believe that Departmental time, energy, and resources can best be directed towards other, far more important efforts than pursuing 25 CFR Part 151 revisions.
- **The lack of adequate time and consideration of consultation with tribes is unacceptable.** In addition to proposing significant regulatory changes that have not been requested by tribal leaders, the Department has announced an inadequate timeline and logistical framework for consultation with tribal leaders. For months, tribal leaders and advocates have been hearing rumors of meetings within the

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Department to design revisions to 25 CFR Part 151, but have not been invited to participate or provide input into the process. On October 4th, 2017, you announced the proposed changes and put forth a highly-compressed consultation schedule. This schedule includes only 1 consultation held east of the Mississippi River, at the NCAI meeting in Milwaukee on October 18th. I would note that this one consultation is schedule to last a maximum of three hours, and is jointly devoted to another topic of high interest to tribal leaders on 'Licensed Indian Traders'. Including two high-interest topics in just one short session effectively guarantees that minimal opportunities will exist for tribal leaders to address the issues in this forum. Three further consultations are scheduled on the West Coast and in Arizona during a short time span in November. None of these consultations are being held on tribal lands, but instead, are taking place in large-cities where the participation of non-tribal entities is likely to be maximized. Meanwhile, entire regions of the country are ignored in the consultation process altogether. The tribe finds it puzzling that an alleged national-level problem would not warrant a consultation process that seeks to be inclusive of all regions of the nation.

- **Tribes are not asking for the 'benefit' of an expedited denial process for land-into-trust acquisitions.** The Department purports to justify some of these proposed changes by claiming that establishing a new two-step process to quickly turn down trust land applications is a benefit. The claim is that this process would spare tribes the time and expense of preparing all necessary elements of a land-into-trust application that is likely to ultimately be denied. This 'benefit' appears to reflect a patronizing attitude towards tribal governments that assumes that they are not sophisticated enough to properly weigh the merits of land acquisition requests. In our experience, decisions by a federally-recognized tribe to seek land are not undertaken lightly or impulsively. They are the product of extensive planning, thought, and consideration before ever being submitted for review. To our knowledge, no tribal governments are asking the Department to implement an expedited denial process to protect us from our own decision making. In fact, the only entities we are aware of that have sought such a policy are some non-tribal interests who have fought tribal land acquisitions and economic development no matter what form it takes.

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- **The proposal lacks an appeal of an expedited negative denial.** The draft changes contain no details about how a tribe may appeal an initial negative decision for a trust land acquisition. While the proposed regulations specify what criteria will be used for making such a decision, they provide no information or process on how a tribe can appeal a negative decision that they do not agree with. The Mohegan Tribe believes that this would give significant and largely unaccountable power to decision makers in Washington to reject applications, with no opportunity short of litigation to challenge their conclusions.
- **The Department of the Interior has a trust responsibility to tribes, not local governments.** Based on the language of the proposed regulations, it is fair to question whether the Department has forgotten that its trust responsibility is to federally-recognized tribes, not local units of government. Significant portions of these proposed changes appear to be written as though they were intended to meet the desires of local governments, not the needs of federally-recognized tribes. Tribes are sovereigns with a government-to-government relationship to the United States. Local and municipal governments are sub-sovereigns of state governments. Throughout the proposed changes, the concerns of local and municipal governments appear to be given increased weight vis-à-vis the needs of tribes. Draft requirement Part 151.11 (a)(1)(xi) provides that the Department will now require tribal applicants to provide evidence of mitigation of local community impacts, including inclusion of any intergovernmental agreements or an explanation of why such agreements do not exist. The practical effect of this requirement is to give local governments a near-veto power over tribal land acquisition. The experience of tribes nationwide has shown that obtaining such agreements from all parties involved is often difficult and in some cases impossible. Additionally, many situations exist where some local governments support a tribal trust land acquisition, while others in the same area do not. For example, a township and county might support a tribal land acquisition, while a town within both their borders may not. How would the Department propose to deal with these conflicting viewpoints? Furthermore, it is undeniable that in certain parts of the country long-standing differences exist between tribes and some local units of government. These animosities often have more to do with decades-old frictions as opposed to current issues, but can present insurmountable obstacles in reaching cooperative agreements. The changes in your draft proposal would put tribal progress hostage to these local disputes, and flies in

the face of trust responsibility the federal government has towards tribes. Ironically, the only entity that is left out of an expanded role or requirement for intergovernmental agreements in the draft regulations is other tribal governments – precisely the entity to which the federal government does owe a trust obligation – and one which surprisingly receives no mention in the proposed changes.

- **Calculation of economic Benefits to the local community should not be a required element of gaming trust land applications.** Draft requirement Part 151.11 (a)(1)(viii) would require tribes to identify benefits to the local community, if any, of a proposed gaming project. Again, the trust obligation of the federal government is to the tribe, not the local community. While tribal gaming nationwide has been a great boon to both tribal and non-tribal communities, it is not proper federal policy to require in regulation that decisions made by the federal government with regards to their government-to-government relationship with tribes should in any way be made contingent on whether the Department believes the non-tribal local community will benefit.
- **The proposed metrics for calculating the economic benefits of gaming trust land acquisition for a tribe are not universally applicable or accurate indicators.** When calculating whether a gaming facility will benefit a tribe and its members, the only sensible approach is a holistic one. Despite this, the metrics put forth as new requirements under 151.11 (a)(1)(ix) and 151.11 (a)(1)(x) focus primarily on unemployment rates for tribal members. While lowering a tribe's unemployment rate is certainly a desirable outcome, it should not be used as a definitive test of tribal benefit as is proposed. Economic development on trust lands support all aspects of tribal government and individual tribal member's lives. For example, if a tribal gaming operation did not create a single job on the reservation for tribal members, yet allowed the tribal government to provide full housing, health care, day care, and college education to all its members free of charge, how could this not be judged as being of great benefit to the tribe and its members? Under the proposed unemployment rate standard, such a project would likely not meet the tribal member benefit test, yet who could argue that its effects would be life-changing for all members of the tribe? Proposing to base judgments on such narrow metrics as envisioned by 151.1 (a)(1)(ix) and 151.11 (a)(1)(x) is a one-size-fits-all approach that does not appear take in account many other relevant factors. Indeed, imposing an

evaluation standard in judging economic benefit that is heavily weighted towards unemployment rates is more likely to open new avenues of rhetorical attack for tribal opponents to criticize a land acquisition than it is to provide a tangible measure of real economic benefit to the tribe.

- **Uniform land connection standards are difficult to implement and satisfy.** A new requirement spelled out in 151.11 (a)(1)(i) that a tribe specify its historic and modern-day connection to a proposed land acquisition may be attractive in theory, but in practice, it will be extremely difficult to implement and apply on a uniform basis. Each of the over 500 tribal nations throughout our country have a different story and history, which varies greatly by geography, history, and point of first contact with non-native settlement. The experiences of tribes such as Mohegan in the Northeastern US, many of which were nearly or completely wiped out by European settlement, are different than those of the Great Plains or Southwest. California tribal nations have a particularly complex history, with many rancherias consisting of members drawn from multiple historic tribes from vast areas of the state. For example, a single, small rancheria in the Sierra Nevada foothills may consist of descendants of Pomo, Mono, Wintun, and other tribes. Collectively, these tribes covered a geographic area that encompassed nearly half the modern state of California. Under proposed standards for historic and modern-day connections to the land, how would their proposal be evaluated? It is unrealistic to believe that any fixed set of one-size-fits-all standards for the wide variety of situations that exist with regards to tribal lands can be put in place.
- **Imposition of a 30-day minimum waiting period before land is placed into trust is extremely detrimental to tribes.** Perhaps the single worst aspect of the proposed new regulations is the requirement that land being placed into trust for ANY purpose have at least a 30-day delay after Department approval, as specified in proposed parts 151.12 (c)(2)(ii) and 151.12 (d)(2)(iv). In the view of the Mohegan Tribe, the sole discernable purpose of this provision is to make tribal trust land acquisitions more vulnerable to litigation from other units of government and private parties. In no way can this requirement be viewed as advantageous to any tribe, and in fact, will serve to dramatically increase litigation by hostile parties on all trust land acquisitions. The ill-effects of the litigation encourage by proposed parts 151.12 (c)(2)(ii) and 151.12 (d)(2)(iv). will include creating disincentives for financial

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institutions to provide funding for tribal land acquisitions due to litigation risk, virtually guarantee that every land into trust acquisition will be challenged in court at great expense to tribes, and substantially increase the costs incurred by the American taxpayer to fund the Department's defense of its actions. The inclusion of this provision benefits only the opponents of tribes. It is a gross abrogation of the trust obligation of the federal government to protect tribal interests and to spend the taxpayer's money wisely. It is confusing that a Department that professes to be committed to tribal sovereignty and its trust obligations would even contemplate such a measure, and we ask that it be immediately removed from the proposal.

The Mohegan Tribe urges the Department to quickly withdraw this ill-conceived set of proposed regulations, and instead focus on implementing policy initiatives that will be of real benefit to American Indian nations.

Sincerely,



Kevin P. Brown, "Red Eagle"
Chairman