



November 9, 2018

VIA EMAIL (consultation@bia.gov)

Hon. Tara Sweeney, Assistant Secretary of Interior – Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: *Legal Authority and Process for the Secretary of Interior to Take Land into Trust in Alaska; Support for Restricted Fee Indian Country in Alaska*

Dear Secretary Sweeney:

The following are Calista Corporation's comments on the Department of the Interior's request for comments on taking fee land into trust for the benefit of Alaska Natives.

Background. Calista Corporation is a regional Alaska Native Corporation established in 1971 under the Alaska Native Claims Settlement Act (ANCSA) as a means of creating economic opportunities for Alaska Native Shareholders in Southwest Alaska. Calista is the second largest of the original 13 regional Alaska Native Corporations, representing approximately 28,600 Shareholders and encompassing more than 6.5 million acres in the lower Yukon-Kuskokwim river delta ("Y-K Delta"). Our region includes 56 tribal governments and 46 village corporations.

Response to Questions.

1. How do you view the impact, if any, of ANCSA, the Federal Land Policy and Management Act of 1976 (FLPMA), and the Alaska National Interest Lands Conservation Act (ANILCA) on the Secretary's ability to take land-in-trust in Alaska?

There are three primary ways in which Alaska Natives own and occupy lands in Alaska. Alaska Native regional and village corporations own surface and subsurface lands in fee simple status that are subject to certain restrictions imposed by ANCSA ("ANCSA Restricted Lands"). Alaska tribal governments and corporations may also own land in fee simple status like non-Indians. And one Indian tribe, the Metlakatla Indian Community and Native allottees occupy lands held "in trust" by the federal government for their benefit. Currently, under the U.S. Supreme Court's decision in *Alaska v. Venetie*, 522 U.S. 520 (1998), Alaska Native owned fee lands, whether ANCSA restricted or not, are not considered Indian Country.

In 1936, Congress amended the Indian Reorganization Act ("IRA") to extend the authority of the Secretary of the Interior to take land into trust for the benefit of Alaska Natives ("Alaska IRA"). *See* 25 U.S.C. 5108, 5119. This authority has not been expressly repealed by ANCSA, FLPMA, or ANILCA. Accordingly, the Secretary retains unqualified authority to take land into trust for the benefit of Alaska Natives. This authority has been affirmed by the federal courts. *See Akiachak Native Cmty. v. Jewell*,



995 F. Supp. 2d I (D.D.C. 2013), *vacated on other grounds by Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100 (2016).

Moreover, the Secretary's authority to take land into trust is not limited by the U.S. Supreme Court's decision in *Carcieri v. Salazar*, which held that Section 5 of the IRA was inapplicable to Indian tribes not under federal jurisdiction as of 1934. *See* 555 U.S. 379 (2009). The reason for this inapplicability is that the *Carcieri* decision does not address taking land into trust for groups that either (1) fall under other definitions of "Indian" enumerated in Section 19 of the IRA, or (2) are the subject of separate legislation authorizing the Secretary to apply the IRA or to otherwise take land into trust for them. Alaska Native tribes fall into both of these categories. The Alaska IRA expressly made Section 5 of the IRA applicable to Alaska Native tribes and renders immaterial the question of whether we were "under [f]ederal jurisdiction" in 1934 as required by the Supreme Court's interpretation of the first definition of "Indian" in the IRA.

Accordingly, neither ANCSA, FLPMA, nor ANILCA impact the authority of the Secretary to take land into trust on behalf of Alaska Natives.

2. *What impact, if any, do the 1994 amendments to the Indian Reorganization Act (IRA) have on the Secretary's ability to promulgate rules specific to federally recognized tribes in Alaska?*

The 1994 Amendments to the IRA should have no effect on the Secretary's authority to promulgate rules specific to federally recognized tribes in Alaska.

3. *Should Congressional intent or legislative history play a role in determining whether the Secretary should accept land into trust in Alaska?*

No. Congress clearly authorized the Secretary under the Alaska IRA to take land into trust for the benefit of Alaska Natives.

4. *Is 25 CFR 151 (Part 151), Land Acquisitions, an appropriate process for tribes in Alaska to request the Department take land-in-trust?*

Yes. Pursuant to the 1994 Amendments to the IRA, tribal governments in Alaska should be treated like tribal governments in the lower 48.

5. *Are there challenges specific to tribes in Alaska that make the requirements of Part 151 particularly challenging to satisfy?*

Part 151 sets forth a time-consuming and potentially expensive process that is a challenge to all tribal governments. Efforts to streamline and expedite the process would benefit all tribal governments, including Alaska Native tribal governments.



6. *If the Department were to promulgate regulations governing land-into-trust acquisitions specific to federally recognized tribes in Alaska, how might those regulations differ from Part 151?*

Calista supports the development of an alternative method for acquiring lands under the sovereign jurisdiction of tribal governments. Rather than have the fee-to-trust process be the sole mechanism, Calista requests that the Secretary support the development of a process for converting fee-to-restricted fee lands.

Under the federal regulations governing fee-to-trust acquisitions, “trust land or land held in trust status” means “land the title to which is held in trust by the United States for an individual Indian or a tribe.” 25 C.F.R. § 151.2(d).

In contrast, “restricted land or land in restricted status” means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations. 25 C.F.R. § 151.2(e).

Both trust land and restricted fee land are Indian Country and under the sovereign jurisdiction of the tribal government with the protections of the Nonintercourse Act. 25 U.S.C. § 177. However, the difference is that the tribal government retains ownership of restricted fee land and the federal government retains less management authority over such land.

Currently, there is no general Congressional authorization for the Secretary to recognize fee land as restricted fee land for the benefit of a federally-recognized tribe. However, there is legislation pending that would authorize the conversion of trust land into restricted fee land, the American Indian Empowerment Act (H.R. 215). Secretary Zinke supports this legislation. At a hearing held on October 25, 2017, Principal Deputy Assistant Secretary John Tahsuda testified in favor of the bill and proposed recommended changes. <https://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=403172>

Converting trust lands to restricted fee lands – and regaining tribal land title – is a choice for tribal governments, not a requirement or mandate. If expanded to include Alaska, the American Indian Empowerment Act would create a streamlined procedure for these lands to be considered Indian Country without the need to relinquish fee title to the United States. It could be a “win-win” for Alaska Natives. It would expand tribal sovereignty over a tribal land base, but not at the expense of giving away title and control of the land to the federal government. It would not authorize the Interior Department’s control over leasing and regulation of Alaska Native lands. And it would avoid the paternalism associated with the fee-to-trust process that implies Native people cannot be trusted to own and regulate their own land. Alaska Natives already own our own land – we simply seek to have restored the sovereign authority over these lands taken away by ANCSA.

With the Department of the Interior’s history of supporting economic development within Indian Country and with Alaska Native Corporations, we are pleased to comment on the DOI’s proposed land into trust process in Alaska.



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If you have any questions, please contact Calista Corporation's Government Affairs Liaison, Jennine Jordan at jjordan@calistacorp.com or (907) 275-2953.

Sincerely,

Andrew Guy
President and CEO

cc: J. Jordan, Government Relations Liaison
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