



December 19, 2018

The Honorable Tara Sweeney
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Submitted via email to consultation@bia.gov

Dear Ms. Sweeney:

Thank you for inviting Doyon, Limited (“Doyon”) to participate in consultation on the legal authority and process for the Secretary of the Interior to take land into trust in Alaska.

On June 29, 2018, the Principal Deputy Solicitor, exercising the authority of the Solicitor of the U.S. Department of the Interior, issued Memorandum M-37053, “Withdrawal of Solicitor Opinion M-37043, ‘Authority to Acquire Land into Trust in Alaska’ Pending Review.” Memorandum M-37053 withdrew a January 13, 2017 Solicitor’s opinion that concluded that neither the Alaska Native Claims Settlement Act (“ANCSA”), the Federal Land Policy and Management Act (“FLPMA”), nor the U.S. Supreme Court’s decision in *Carieri v. Salazar*, 555 U.S. 379 (2009), repealed or precluded the Secretary of the Interior’s ability to acquire land in trust for Alaska Natives. Memorandum M-37053 withdrew the earlier opinion so that the Department could “conduct the regulatory review process mandated by the President’s Chief of Staff” on January 20, 2017 and “prepare for consultation with the Indian and Alaska Native communities on an interim policy for off-reservation land-into-trust acquisitions within and outside of Alaska.”

As Doyon has shared with the Bureau of Indian Affairs (“BIA”) in the context of prior proposed federal actions relating to land into trust in Alaska, this matter raises issues of critical importance to Doyon and our shareholders. As Doyon further has shared, certain aspects of the existing generic Part 151 process are not appropriate for land into trust applications in Alaska. Proposed regulatory changes are attached to these comments. It is Doyon’s hope and expectation that Doyon’s concerns will be considered and addressed in the review contemplated by Solicitor’s Opinion M-37053 in a more meaningful and serious manner than they were in the past, and that BIA will commence a new rulemaking process to develop specific procedures for the taking of land into trust in Alaska that reflect the unique history of and statutory regime relating to Native land issues in the state.

I. Introduction and Summary

Doyon is one of the thirteen Native regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act (“ANCSA”), Pub. L. No. 92-203, 85 Stat. 688 (1971), as amended. Headquartered in Fairbanks, Doyon has more than 20,000 shareholders, many of whom reside in remote villages with few economic opportunities. Doyon is the largest private landowner in Alaska, with a land entitlement under ANCSA of more than 12.5 million acres. Thus far, pursuant to this entitlement, approximately 7.8 million acres of surface and subsurface estate (*i.e.*, fee-owned) and approximately 3.6 million acres of subsurface estate only (*i.e.*, subsurface estate under village corporation-owned land) has been conveyed to Doyon. Doyon’s mission is to promote the economic and social well-being of our shareholders and future shareholders, to strengthen our Native way of life, and to protect and enhance our land and resources.

As Doyon stated in our attached July 31, 2014 comments on the Proposed Rule issued by the Bureau of Indian Affairs (“BIA”) in May 2014 to delete the provision of the Department of the Interior’s land-into-trust regulations that generally excluded land acquisitions in trust in Alaska from the scope of those regulations, the implementation of the Part 151 land-into-trust regulations could have very serious consequences for Doyon’s ability to fulfill this mission. *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 24648 (May 1, 2014) (“Proposed Rule”). As Doyon explained, in enacting ANCSA, Congress sought to resolve Alaska Natives’ aboriginal land claims in a manner far different from the traditional model of tribes and reservations followed in the lower-48 states. ANCSA directed the establishment of Native corporations to provide for the economic and social needs—including the health, education, and welfare—of their Native shareholders.

To provide ANCs the means to fulfill these responsibilities, ANCSA provided for the conveyance to ANCs of 44 million acres of land, as well as the payment of \$962 million. The statute mandated the creation of twelve land-owning regional Native corporations in each of twelve regions of Alaska, along with a thirteenth for non-resident Alaska Natives. It also authorized the creation of village corporations in any “Native village” in Alaska. ANCSA generally provided for these village corporations to select and receive the surface estate of certain lands near their Native villages. It further provided for the regional corporations to select and receive the surface and subsurface interests in certain lands, including the subsurface estate under its region’s village corporation surface estate lands, thus creating a “split estate” land ownership structure near Native villages.

Realization of the economic development opportunities that would be open to ANCs through the use and development of this land base was a fundamental element of the settlement. The opportunity to develop the resources on and beneath these lands has been, and continues to be, critically important for producing jobs and other economic benefits for Native shareholders and others in the State, and it is fundamental to fulfilling the promises made to Alaska Natives in exchange for the extinguishment of their aboriginal land claims.

In our comments on the 2014 Proposed Rule, Doyon explained our substantial interest in the transfer of land into trust in Alaska, and we raised serious questions and concerns relating to how any BIA trust acquisition program is implemented in Alaska. Unfortunately, Doyon’s concerns

were dismissed, and in some cases simply ignored, by BIA when the agency issued its Final Rule in December 2014. *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 76888 (Dec. 23, 2014) (“Final Rule”). As a result, Doyon is as concerned with the implementation of the land into trust program now as we were then.

In particular, Doyon continues to have serious concerns that the taking of lands in Alaska into trust could frustrate Doyon’s ability to carry out our mission and realize the benefits of the ANCSA lands settlement. A substantial portion of the lands conveyed to Doyon under the ANCSA settlement are subsurface estate under lands owned by village corporations, along with lands interspersed among parcels of land owned by village corporations or other landowners. Allowing the surface estate overlying Doyon’s subsurface land interests to be taken into trust, without requiring our consent to ensure protection of our valid, existing rights to develop our lands, could prevent Doyon from making economically productive use of our lands. Moreover, access to Doyon lands for the development of resource projects, whether solely on Doyon fee lands where Doyon owns both the surface and subsurface estate, or where Doyon only owns the subsurface estate, is critical to the success of Doyon’s economic development efforts. Access to our lands for social, cultural, and other purposes is similarly critical to the interests of Doyon and our shareholders. Doyon continues to be very concerned that such access across lands placed into trust would not be guaranteed and reasonable, as well as that the existing regulatory regime as applied in Alaska could have the effect of benefitting a limited group of tribal members at the expense of the broader group of Doyon shareholders.

BIA’s response in the Final Rule that “[t]he Department has processed and approved land-into-trust applications from Indian tribes involving split estates under the Part 151 regulations in other parts of the United States,” that the rights to subsurface estate “are not affected by the acquisition of the surface estate into trust,” that the ANC could avail itself of Alaska National Interest Lands Conservation Act (“ANILCA”) Title XI’s access provisions, and “encourag[ing]” surface and subsurface owners to enter into surface use agreements regarding access, provides little comfort. 79 Fed. Reg. at 76893.

Doyon, therefore, very much appreciates the Department’s current effort to engage in a regulatory review of the land into trust program in Alaska and to consult with Alaska Natives on future policy in this area for Alaska. As Doyon explained in our comments on BIA’s Proposed Rule, certain aspects of the Part 151 regulations—which fail to appreciate and reflect the unique legal framework in Alaska under ANCSA and ANILCA—are ill-suited to govern applications to take lands in Alaska into trust. After engaging in further consultation with Alaska Native regional corporations and other Alaska Native tribal and corporation entities, Doyon urges the Department to undertake a new rulemaking process to develop regulations to specifically govern land into trust in Alaska. Consideration of these issues “on a case-by-case basis with respect to each application for land into trust,” as BIA said it would do in its Final Rule, is absolutely not the right way to address these issues, given their critical importance to Native interests—corporation, tribal, and individual—in Alaska. 79 Fed. Reg. 76893, 76895; *see also* 79 Fed. Reg. at 76894 (“If Interior encounters issues

unique to Alaska that are not addressed through the existing process as it processes applications, it will consider appropriate actions to address those issues at that time.”).

II. Specific Comments

Application of Section 151.11(b) Regarding Distance from Reservation

The existing Part 151 “off-reservation” criteria, which include distance from reservation boundaries, make no sense for a State in which there is only one reservation. ANCSA revoked all but one Alaska Native reservation in Alaska. Five years after the passage of ANCSA, Congress enacted the Federal Land Policy and Management Act (“FLPMA”), which repealed the Secretary of the Interior’s authority pursuant to section 2 of the 1936 Indian Reorganization Act (“IRA”) amendments to designate certain lands in Alaska as Indian reservations. Pub. L. No. 94-579, 90 Stat. 2743 (1976). BIA has said that applications by Alaska Native tribes will be subject to review under the “off-reservation” criteria in the regulations. 79 Fed. Reg. at 76894-95. Those criteria require the consideration of the “distance from the boundaries of the tribe’s reservation.” 25 C.F.R. § 151.11(b). With only one Alaska Native tribal entity to which this particular requirement could apply, the BIA must develop and issue revised regulations with criteria that make sense for Alaska and that reflect the reality that almost all tribal entities in Alaska do not have reservations. In this regard, Doyon suggests that, for tribal requests for the acquisition of lands in trust status in Alaska when the tribe does not have a reservation, in lieu of distance from the boundaries of the tribe’s reservation, the Secretary should consider the distance from the lands conveyed to the village corporation for the tribe pursuant to ANCSA.

ANC Notice and Opportunity to Comment

As discussed further in these comments, Alaska Native regional corporations may have a specific interest in certain land into trust applications by virtue of their ownership of the subsurface underlying the lands or interests in lands covered by the application. Given the breadth of their missions, regional corporations may have other important interests in applications covering lands or interests in lands within the boundaries of their regions as well.

In the Final Rule, in response to Doyon’s and other Alaska regional corporations’ comments on the Proposed Rule, the BIA stated that “in the spirit of the Department’s consultation policy with Alaska Native Corporations and the extensive notice provisions in Part 151, the Department will be interested in hearing the views of the corporations as to any application for land into trust before the Department on which corporations wish to comment.” 79 Fed. Reg. at 76893; *see also* 79 Fed. Reg. 76895 (“Regional and village corporations may submit comments during the application review process.”). Despite this statement, when Doyon sought consultation last year on the land acquisition application filed by the Gwichyaa Zhee Gwich’in Tribal Government, Doyon initially (and inexplicably) was told that the BIA’s consultation obligation extended only to tribal governments. Moreover, the Part 151 notice provisions are anything but “extensive” as they pertain to ANCs. They should be revised to specifically provide for notice and comment for ANCs.

Section 151.11(d) of the Part 151 regulations requires the Department, upon receipt of a tribe's written request to have lands taken into trust, to notify the state and local governments with jurisdiction over the lands to be acquired, and provide those governments with 30 days to provide written comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. However, there is no provision in the regulations requiring BIA to notify ANCs of land into trust requests or providing ANCs the opportunity to submit comments, even if they own the subsurface underlying the lands or interests in lands covered by the request.

In Executive Order ("EO") 13175, *Consultation and Coordination with Indian Tribal Governments*, the President required federal agencies to implement an effective process to ensure meaningful and timely consultation with tribes during the development of policies or projects that may have tribal implications. Tribal consultation is intended to ensure meaningful tribal participation in planning and decision making processes for actions with the potential to affect tribal interests. Although EO 13175 by its terms applies specifically to federally-recognized tribal governments, pursuant to Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267, Congress specifically extended these obligations to ANCs, requiring the Office of Management and Budget and all federal agencies to "consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175."

In accordance with this mandate, and in addition to its Policy on Consultation with Indian Tribes, in August 2012, the Department issued its Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations. In this Policy, the Department purported to "recognize and respect the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government." Thus, the Policy states that "[w]hen taking Departmental Action that has a substantial direct effect on ANCSA Corporations, the Department will initiate consultation with ANCSA Corporations." In recognition that "[f]ederal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices," it further commits that the Department will "identify consulting parties early in the planning process and provide a meaningful opportunity for ANCSA Corporations to participate in the consultation policy." The Consultation Guidelines of the Department's Tribal Consultation Policy that are incorporated by reference into the ANCSA Corporation Policy thus require the Bureau to consult as early as possible, and provide that the Bureau should give at least 30-days' notice prior to scheduling a consultation, except in exceptional circumstances.

Contrary to the suggestion in the Final Rule, Part 151's notice provisions—as they may be relevant to ANCs—are not "extensive." They mandate notice and comment for state and local governments. They do not mandate notice and comment for ANCs. They should.

Notice to, and Consent by, Owners of Subsurface Estate

The lack of participation for regional corporations in the existing Part 151 process takes on heightened importance when the regional corporation is also the owner of the subsurface interest underlying the surface interests that are the subject of the request for lands to be taken into trust.

The existing Part 151 regulations do not address the critically important issues deriving from ANCSA's statutory scheme providing for split ownership of surface and subsurface rights in Alaska. Section 5 of the IRA authorizes the Secretary of the Interior to acquire interests in "lands, water rights, or surface rights to lands." 25 U.S.C. § 465. The Department's land into trust regulations similarly authorize the acquisition in trust of unrestricted "real property or any interest therein" owned by an individual Indian or tribe. 25 C.F.R. §§ 151.2, 151.4.

In the Final Rule, BIA explained that the "[t]he Department has processed and approved land-into-trust applications from Indian tribes involving split estates under the Part 151 regulations in other parts of the United States," and "[i]n a number of cases, the Department has acquired a surface estate into trust at the request of a petitioning tribe that owned the surface estate." 79 Fed. Reg. at 76893. While that may be the case, as a result of the unique statutory framework governing Native land issues in Alaska under ANCSA and ANILCA, the implications of taking surface estate in trust in Alaska are broader than and in important respects different from those faced in the lower 48 states, and they warrant special consideration.

In the event that the Department decides to consider applications for split estate lands, an additional section must be added to the regulations to provide notice to and require consent by Alaska Native regional corporations owning a subsurface interest in the lands to be acquired. The required notice would provide such an affected corporation the opportunity to provide written comments on the acquisition's potential impacts on its interests and seek the corporation's consent to the acquisition—consent without which the application would not be approved. Such a change is critical to ensuring the realization of the policies and goals set forth by ANCSA.

Access to Doyon lands for the development of resource projects is essential to fulfill the purposes for which Doyon was established under ANCSA. This is similarly the case for other regional ANCs. Congress intended that ANCs benefit from the land they selected. This requires that regional corporations have the right to access, develop, and benefit from the resources within the subsurface estate. Any action by the Department that would allow lands to be taken into trust in Alaska therefore must provide affirmative assurances that Doyon and the other regional corporations retain our full rights to access and develop our resources. These rights are fundamental to the purposes of the ANCSA land claims settlement.

In addition to being of importance to the individual regional corporations and their shareholders, the exploration for and development of resources from ANC subsurface interests provides broad economic benefit throughout the State of Alaska. As the largest private landowners in Alaska, ANCs and their subsidiaries are among the most active generators of economic activity in the state. The economic interest in revenues derived from the subsurface estate extends beyond the specific regional corporation subsurface owner to other regional corporations, village corporations, and at-large shareholders in regional corporations. Under Section 7(i) of ANCSA, 70 percent of all revenues received by each regional corporation from the subsurface estate are divided annually by the regional corporation among all twelve regional corporations in proportion to the number of Alaska Natives enrolled in each region. 43 U.S.C. § 1606(i). Section 7(j) of ANCSA further requires

each regional corporation to distribute at least 50 percent of revenues and net income among its region's village corporations and at-large (*i.e.*, non-village resident) stockholders. 43 U.S.C. § 1606(j).

Under the existing regulatory regime, a village corporation could transfer its surface estate to a tribe, which, in turn, could apply to have the land taken into trust on its behalf. Under ANCSA, the right of the regional corporation to explore, develop, or remove minerals from its subsurface estate within the boundaries of a Native village is subject to the consent of the village corporation.

The increased involvement of tribal entities and the federal government in land use decisions could make it exceedingly difficult for regional corporations to explore for, develop, and remove their subsurface resources, and obtain needed access for these activities, in other areas as well. Owing to the highly interspersed pattern of land ownership in Alaska, these potential implications of taking lands into trust for Doyon's economic development prospects would be pervasive.

Furthermore, in the situation where any village corporation lands conveyed to tribes are placed into trust, access across surface lands and access to subsurface lands are then subject to unknown, or as yet undeveloped, policies of the tribes. Tribes can create laws, taxes, policies, ordinances, fees, and other requirements that would benefit the tribe and tribal members, holding up development for their own benefit. Civil jurisdiction would lie with the tribes and these yet-to-be-developed laws. All of these factors would be viewed by developers and investors as uncertainties that add risk and cost to potential development, making such development of the regional corporations' subsurface rights untenable. These unknown policies may benefit the tribal members, but would come at a cost to the regional corporations' shareholders, who are all current co-owners of the land.

In this regard, it is important for the Department and BIA to understand that the taking of land into trust in these situations, under the existing Part 151 process, has the potential to limit current benefits for Doyon's over 20,000 shareholders to a limited number of tribal members. The potential benefits to the tribe and tribal members of placing lands into trust do not necessarily inure to village corporation shareholders; and they certainly do not inure to all regional corporation shareholders.

These regional corporation shareholders are not equal members in any of the tribes located within the Doyon region, as there is no tribe within the Doyon region whose membership includes all Doyon shareholders. While there is generally a high correlation between tribal members and village corporation shareholders of the associated tribe and the tribe's descendants, no similar correlation exists at the regional level. Doyon has over 20,000 shareholders with an indirect interest in the subsurface of the lands that a tribe or a village corporation may be considering for trust status. While any given Doyon shareholder may be a tribal member, that shareholder may not be a member of the tribe considering trust status. If and when former ANCSA land or land transferred from a village corporation to a tribe is placed into trust, and the tribe then seeks to block development of the subsurface, or if such development is delayed by BIA approval processes as a result of lands being taken into trust, any benefit to a limited number of tribal members could come at a substantial

economic cost to Doyon's more than 20,000 shareholders. Both Doyon and the Department have a duty to these regional corporation shareholders who will be impacted by the implementation of the fee-to-trust program.

Land Protections

Lands owned by ANCs pursuant to conveyances under ANCSA, as well as certain other ANC-owned lands, benefit from special treatment under various federal laws. For example, section 907(d) of ANILCA provides that undeveloped ANCSA lands (*i.e.*, lands that "are not developed or leased or sold to third parties") are immune from (1) adverse possession and similar claims based upon estoppel; (2) real property taxes by any governmental entity; (3) judgments resulting from a claim based upon or arising out of title 11 of the U.S. Code or any successor statute (the Bankruptcy Code), other insolvency or moratorium laws, or other laws generally affecting creditors' rights; and (4) judgment in any action at law or equity to recover sums owed or penalties incurred by the ANC. 43 U.S.C. § 1636(d)(1)(A). These protections, commonly referred to as the "Land Bank" protections, generally protect undeveloped ANCSA lands from alienation; however, unlike a tribe whose land has been taken into trust, the ANC retains the sole discretion to develop the land (which would withdraw the land from these protections) or alienate the land by, for example, leasing or selling the land to a third party.

If an ANC were to transfer land to a tribe for the purpose of applying to place those lands into trust, presumably there would be an interim period between the transfer of lands from the ANC to tribal entities, and the placement of land into trust, during which time those lands would not be subject to the protections of either ANCSA or trust status. The Department should consult with tribal entities and ANCs on this specific issue, and consider how this concern might be addressed to avoid placing ANCSA lands at risk in connection with efforts to have such lands taken into trust.

III. Conclusion

The use and development of lands and resources in Alaska that are within or near federal lands is subject to a unique and complex statutory regime designed to protect Alaska's natural resources and to ensure economic development opportunities for Alaska Natives and other private landowners in the State. Recognition of, and respect for, this regime in the development and implementation of federal regulations that may apply in Alaska is critical to the economic and historical and cultural interests of Doyon and our shareholders and, more broadly, to realization of the economic development opportunities that Congress contemplated would be open to ANCs as a fundamental element of the settlement of aboriginal land claims set forth in ANCSA.

Doyon generally does not oppose allowing land to be taken into trust in Alaska, especially non-ANCSA lands including allotments and town sites within the village boundaries. However, certain aspects of the Part 151 regulations are ill-suited to govern applications to take lands in Alaska into trust, and those regulations as currently written should not be applied to applications to take lands in Alaska into trust. The Department must undertake an additional public rulemaking to change Part 151 Regulations in order to address issues that are specific to Alaska.

Moreover, as a result of the important responsibilities entrusted to ANCs by Congress under ANCSA, the split estate issue has critically important implications for land into trust in Alaska that are unique and different from BIA's experience with split estate issues in the lower 48 states. Accordingly, Doyon opposes the taking of land into trust where Doyon is the owner of the subsurface estate, unless Doyon provides prior affirmative consent to the request. BIA should adopt regulations that require the consent of an ANC subsurface owner before approving any application to take lands into trust in Alaska involving split estate lands.

We look forward to continuing to engage in meaningful consultation with the Department as it moves forward with its consideration of these important issues. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "ASCHUTT". The signature is stylized with a large initial "A" and "S", and the rest of the name is written in a cursive, somewhat abbreviated style.

Aaron M. Schutt
President and CEO
Doyon, Limited

Attachments:

Part 151 Regulations – Redline of Suggested AK Specific Changes
Doyon Comments on Land Into Trust Proposed Rule 07.31.2014

PART 151—LAND ACQUISITIONS

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AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, 1495, and other authorizing acts.

CROSS REFERENCE: For regulations pertaining to: The inheritance of interests in trust or restricted land, see parts 15, 16, and 17 of this title and 43 CFR part 4; the purchase of lands under the BIA Loan Guaranty, Insurance and Interest Subsidy program, see part 103 of this title; the exchange and partition of trust or restricted lands, see part 152 of this title; land acquisitions authorized by the Indian Self-Determination and Education Assistance Act, see parts 900 and 276 of this title; the acquisition of allotments on the public domain or in national forests, see 43 CFR part 2530; the acquisition of Native allotments and Native townsite lots in Alaska, see 43 CFR parts 2561 and 2564; the acquisition of lands by Indians with funds borrowed from the Farmers Home Administration, see 7 CFR part 1823, subpart N; the acquisition of land by purchase or exchange for members of the Osage Tribe not having certificates of competency, see §§117.8 and 158.54 of this title.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§151.1 Purpose and scope.

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations.

[79 FR 76897, Dec. 23, 2014]

§151.2 Definitions.

- (a) *Secretary* means the Secretary of the Interior or authorized representative.

(b) *Tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) *Individual Indian* means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where "Tribe" includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) *Trust land or land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) *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.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) *Land* means real property or any interest therein.

(h) *Tribal consolidation area* means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

[\(i\) *Native Corporation* means Native Corporation as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. 1602.](#)

[\(j\) *Regional Corporation* means Regional Corporation as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. 1602.](#)

[\(k\) *Village Corporation* means Village Corporation as defined in the Alaska Native Claims Settlement Act, 43 U.S.C. 1602.](#)

§151.3 Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

§151.4 Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

§151.5 Trust acquisitions in Oklahoma under section 5 of the I.R.A.

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

§151.6 Exchanges.

An individual Indian or tribe may acquire land in trust status by exchange if the acquisition comes within the terms of this part. The disposal aspects of an exchange are governed by part 152 of this title.

§151.7 Acquisition of fractional interests.

Acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if:

- (a) The buyer already owns a fractional interest in the same parcel of land; or
- (b) The interest being acquired by the buyer is in fee status; or
- (c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or
- (d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or
- (e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

§151.8 Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

§151.9 Requests for approval of acquisitions.

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

§151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) 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;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in §151.10 (a) through (c) and (e) through (h);

(b) 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 paragraph (d) of this section. [For tribal requests for the acquisition of lands in trust status in Alaska when the tribe does not have a reservation, in lieu of distance from the boundaries of the tribe's reservation, the Secretary shall consider the distance from the lands conveyed to the Village Corporation for the tribe pursuant to the Alaska Native Claims Settlement Act.](#)

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to §151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. [The Secretary shall provide similar notice to any Regional Corporation for the region in which the lands covered by the request are located and any other Native Corporation potentially affected by the requested acquisition. The notice shall inform the Regional Corporation or other Native Corporation that it will be given 30 days in which to provide written comment on the requested acquisition.](#)

(e) An individual Indian or tribe may acquire surface estate conveyed to a Native Corporation pursuant to the Alaska Native Claims Settlement Act in trust status only when the Regional Corporation to which the subsurface underlying such surface estate was conveyed pursuant to that Act consents in writing to the acquisition; provided, however, that such consent shall not be required if the individual Indian or the tribe already owns both the surface and subsurface estate in the parcel of land to be acquired. If the Regional Corporation fails or refuses to respond to a written request for consent within 180 days after the Regional Corporation's receipt of such request, the consent requirement of this subsection shall be waived with respect to such request. No request for acquisition to which this subsection applies shall be granted until the consent required by this subsection has been obtained or has been waived as provided in the preceding sentence. No such application shall be granted if consent has been denied by the Regional Corporation. The Regional Corporation may include conditions in its consent, in which case such conditions must be incorporated into any decision by the Secretary to approve the request.

[60 FR 32879, June 23, 1995, as amended at 60 FR 48894, Sept. 21, 1995]

§151.12 Action on requests.

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Secretary, or the Assistant Secretary—Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant and any entity that provided written comments pursuant to §151.10 or §151.11 with the decision;

(ii) Promptly publish in the FEDERAL REGISTER a notice of the decision to acquire land in trust under this part; and

(iii) Immediately acquire the land in trust under §151.14 on or after the date such decision is issued and upon fulfillment of the requirements of §151.13 and any other Departmental requirements.

(d) A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of any right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant [and any entity that provided written comments pursuant to §151.10 or §151.11](#) with the decision;

(ii) Promptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to part 2 of this chapter, by mail or personal delivery to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made, [including any entity that provided written comments pursuant to §151.10 or §151.11](#); and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust under §151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of §151.13 and any other Departmental requirements.

(3) The administrative appeal period under part 2 of this chapter begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section;

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2.

[78 FR 67937, Nov. 13, 2013]

§151.13 Title review.

(a) If the Secretary determines that she will approve a request for the acquisition of land from unrestricted fee status to trust status, she shall require the applicant to furnish title evidence as follows:

(1) The deed or other conveyance instrument providing evidence of the applicant's title or, if the applicant does not yet have title, the deed providing evidence of the transferor's title and a written agreement or affidavit from the transferor, that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust; and

(2) Either:

(i) A current title insurance commitment; or

(ii) The policy of title insurance issued to the applicant or current owner and an abstract of title dating from the time the policy of title insurance was issued to the applicant or current owner to the present.

(3) The applicant may choose to provide title evidence meeting the title standards issued by the U.S. Department of Justice, in lieu of the evidence required by paragraph (a)(2) of this section.

(b) After reviewing submitted title evidence, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities that the Secretary identified and may seek additional information from the applicant needed to address such issues. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and she shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable.

[81 FR 30177, May 16, 2016]

§151.14 Formalization of acceptance.

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

[45 FR 62036, Sept. 18, 1980. Redesignated at 60 FR 32879, June 23, 1995]

§151.15 Information collection.

(a) The information collection requirements contained in §§151.9; 151.10; 151.11(c), and 151.13 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076-0100. This information is being collected to acquire land into trust on behalf of the Indian tribes and individuals, and will be used to assist the Secretary in making a determination. Response to this request is required to obtain a benefit.

(b) Public reporting for this information collection is estimated to average 4 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 337-SIB, 18th and C Streets, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs [Project 1076-0100], Office of Management and Budget, Washington, DC 20502.

[60 FR 32879, June 23, 1995; 64 FR 13895, Mar. 23, 1999]



July 31, 2014

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

RE: Land Acquisitions in the State of Alaska; Proposed Rule
RIN 1076-AF23

Dear Ms. Appel:

Thank you for providing Doyon, Limited (“Doyon”) the opportunity to submit the following comments in response to the proposed rule issued by the Bureau of Indian Affairs (“BIA”) on May 1, 2014 to delete the provision of the Department of the Interior’s land-into-trust regulations that generally excludes from the scope of the regulations land acquisitions in trust in the State of Alaska. *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. 24648 (May 1, 2014) (“Proposed Rule”).

I. Introduction and Summary

Doyon is one of the thirteen Native regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act (“ANCSA”), Pub. L. No. 92-203, 85 Stat. 688 (1971), as amended. Headquartered in Fairbanks, Doyon has more than 19,000 shareholders, many of whom reside in remote villages with few economic opportunities. Doyon is the largest private landowner in Alaska, with a land entitlement under ANCSA of more than 12.5 million acres. Thus far, pursuant to this entitlement, approximately 7.8 million acres of surface and subsurface estate (*i.e.*, fee-owned) and approximately 3.6 million acres of subsurface estate only (*i.e.*, subsurface estate under village corporation-owned land) has been conveyed to Doyon. Doyon’s mission is to promote the economic and social well-being of its shareholders and future shareholders, to strengthen its Native way of life, and to protect and enhance its land and resources.

The Proposed Rule and its implementation, if finalized, could have very serious consequences for Doyon’s ability to fulfill this mission. Doyon has a number of important concerns regarding the Proposed Rule and its potential implementation, as well as regarding the Department’s continuing obligation to consult with the Alaska Native corporations regarding these matters.

In enacting ANCSA, Congress sought to resolve Alaska Natives' aboriginal land claims in a manner far different from the traditional model of tribes and reservations followed in the lower-48 states. Congress in ANCSA directed the establishment of Native, for-profit corporations, and empowered them to promote the economic and social well-being of their shareholders—utilizing the land and seed capital provided by the ANCSA settlement. A substantial portion of the lands conveyed to Doyon under this settlement are subsurface estate under lands owned by villages corporations, along with lands interspersed among parcels of land owned by village corporations or other landowners. Allowing the surface estate overlying Doyon's subsurface land interests to be taken into trust, without requiring our consent to ensure protection of our valid, existing rights to develop our lands, could prevent Doyon from making economically productive use of our lands.

Access to Doyon lands for the development of resource projects, whether solely on Doyon fee lands where Doyon owns both the surface and subsurface estate, or where Doyon only owns the subsurface estate, is critical to the success of Doyon's economic development efforts. Doyon is alarmed that such access across lands placed into trust would not be guaranteed.

It is critical to understand that the Proposed Rule has the potential to limit current benefits to Doyon's shareholders and give to a limited number of tribal members the right to tax and regulate lands transferred from a village corporation to a tribe and placed into trust. Doyon is deeply concerned that development on split estate lands may be blocked by a tribe, or delayed by BIA's approval process. The effect would be to benefit a limited group of tribal members at the expense of the broader group of Doyon shareholders.

Doyon also has concerns regarding the implementation of the Proposed Rule. In the event that the Department chooses to move forward with finalizing the Proposed Rule, certain aspects of the Part 151 regulations are ill-suited to govern applications to take lands in Alaska into trust and those regulations as currently written should not be applied to applications to take lands in Alaska into trust. The Department must undertake an additional public rulemaking to change Part 151 Regulations in order to address issues that are specific to Alaska.

Finally, as expressed further below, Doyon cannot overstate the importance of the Department's obligation to consult with the Alaska Native corporations regarding these matters under Executive Order 13175, as specifically extended to the Alaska Native corporations by Congress. All Alaska Native entities are not the same, and the land-owning Alaska Native corporations—and between and among them, the village corporations and regional corporations—can and do sometimes have differing interests. This is particularly true with matters relating to land ownership, which are at the heart of ANCSA. While the Department's government-to-government consultation obligation to tribal entities is obviously vital, so too is its obligation to consult with the Alaska Native corporations.

II. Comments

Respecting and Protecting Alaska Native Regional Corporation Land Interests

ANCSA mandated the creation of twelve land-owning regional Native corporations in each of twelve regions of Alaska. 43 U.S.C. § 1606. ANCSA also authorized the creation of village corporations in any "Native village" in Alaska. 43 U.S.C. § 1607.

ANCSA provided for village corporations to select and receive the surface estate of certain lands near their Native villages. 43 U.S.C. §§ 1611(a) and (b).¹ It further provided for regional corporations to select and receive the surface and subsurface interests in certain lands. 43 U.S.C. §§ 1611(c), 1613(h)(1) and 1613(h)(8).² This included each regional corporation receiving the subsurface estate under its region's village corporation surface estate lands, 43 U.S.C. § 1613(f), thus creating a "split estate" land ownership structure near Native villages.

ANCSA required the establishment of Alaska Native corporations to provide for the economic and social needs, including the health, education, and welfare, of their Native shareholders. To provide Alaska Native corporations the means to fulfill these responsibilities, ANCSA provided for the conveyance to the Alaska Native Corporations of 44 million acres of land, as well as the payment of \$962 million dollars. Realization of the economic development opportunities that would be open to the Alaska Native corporations through the use and development of this land base was a fundamental element of the settlement. The opportunity to develop the resources on and beneath these lands has been, and continues to be, critically important for producing jobs and other economic benefits for Native shareholders and others in the State, and is fundamental to fulfilling the promises made to Alaska Natives in exchange for the extinguishment of their aboriginal land claims.

Impacts to Exploration and Development on ANCSA Land

The exploration and development of these subsurface interests provides broad economic benefit throughout the State of Alaska. As the largest private landowners in the State, Alaska Native corporations and their subsidiaries are among the most active generators of economic activity in the State. The economic interest in revenues derived from the subsurface estate extends beyond the regional corporation to other regional corporations, village corporations, and at-large shareholders in regional corporations. Specifically, under Section 7(i) of ANCSA, 70 percent of all revenues received by each regional corporation from the subsurface estate are divided annually by the regional corporation among all twelve regional corporations in proportion to the number of Alaska Natives enrolled in each region. 43 U.S.C. § 1606(i). Section 7(j) of ANCSA further requires each regional corporation to distribute at least 50% of revenues and net income among its region's village corporations and at-large (i.e., non-village resident) stockholders. 43 U.S.C. § 1606(j).

Under the Proposed Rule, a village corporation could transfer its surface estate to a tribe, which, in turn, could apply to have the land taken into trust on its behalf. Under ANCSA, as explained above, the right of the regional corporation to explore, develop, or remove minerals from its subsurface estate within the boundaries of a Native village is subject to the consent of the village corporation.

The increased involvement of tribal entities and the federal government in land use decisions could make it exceedingly difficult for regional corporations to explore for, develop, and remove their subsurface resources, and obtain needed access for these activities, in other areas as well. Owing to the highly interspersed pattern of land

¹ Southeast Alaska was treated differently under ANCSA. Southeast Alaska villages are authorized to select land under Section 16 of ANCSA. 43 U.S.C. § 1615.

² The regional corporation for Southeast Alaska (Sealaska Corporation) was authorized to select land only under Section 14(h)(1) and (8) of ANCSA.

ownership in Alaska, these potential implications of taking lands into trust for Doyon's economic development prospects would be pervasive.

Section 5 of the IRA authorizes the Secretary of the Interior to acquire interests in "lands, water rights, or surface rights to lands." 25 U.S.C. § 465. The Department's land-into-trust regulations similarly authorize the acquisition in trust of unrestricted "real property or any interest therein" owned by an individual Indian or tribe. 25 C.F.R. §§ 151.2, 151.4. BIA has, in the past, taken partial land interests into trust, in reliance on Section 5 of the IRA. *See, e.g.*, 77 Fed. Reg. 31,871 (May 30, 2012) (228.04 acres of lands taken into trust for Ione Band of Miwok Indians of California "under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465" where land was subject to split estates).

Access to Doyon lands for the development of resource projects is essential to fulfill the purposes for which Doyon was established under ANCSA. Congress intended that Alaska Native corporations benefit from the land they selected. This requires that regional corporations have the right to access, develop, and benefit from the resources within the subsurface estate. Any action by the Department that would allow lands to be taken into trust in Alaska therefore must provide affirmative assurance that Doyon and the other regional corporations retain their full rights to access and develop their resources. These rights are fundamental to the purposes of the ANCSA land claims settlement.

Furthermore, in the situation where any village corporation lands conveyed to tribes are placed into trust, access across surface lands and access to subsurface lands are then subject to unknown, or as yet undeveloped policies of the tribes. Tribes can create laws, taxes, policies, ordinances, fees and other requirements which would benefit the tribe and tribal members, holding up development for their own benefit. Civil jurisdiction would lie with the tribes and these yet-to-be-developed laws. All of these factors would be viewed by developers and investors as uncertainties that add risk and cost to potential development making such development untenable. These unknown policies again may benefit the tribal members, but would come at a cost to the regional corporations' shareholders, who are all current co-owners of the land.

The Reallocation of Benefits from Shareholders to Tribal Members

It is critical to understand that the Proposed Rule has the potential to limit current benefits for Doyon's over 19,000 shareholders to a limited number of tribal members. The potential benefits to the tribe and tribal members of placing lands into trust do not necessarily inure to village corporation shareholders; and they certainly do not inure to all regional corporation shareholders.

These shareholders are not equal members in any of the tribes located within the Doyon region, as there is no tribe within the Doyon region whose membership includes all Doyon shareholders. While there is generally a high correlation between tribal members and village corporation shareholders of the associated tribe and the tribe's descendants, no similar correlation exists at the regional level. Doyon, Limited has over 19,000 shareholders with an indirect interest in the subsurface of the lands that a tribe or a village corporation may be considering for trust status. While any given Doyon shareholder may be a tribal member, that shareholder may not be a member of the tribe considering trust status. Both Doyon, Limited and the Department of the Interior have a duty to the shareholders who will be impacted by the implementation of the rule.

Therefore, implementing the Proposed Rule also has potential impacts on shareholders in the event that former ANCSA land, or land transferred from a village corporation to a tribe, is placed into trust. Doyon is deeply concerned that, if and when development on split estate owned lands is blocked by a tribe, or when an economic development project is delayed by BIA approval processes, as a result of lands being taken into trust, any benefit to a limited number of tribal members will come at a substantial economic cost to Doyon's 19,000 shareholders.

Application of the Part 151 Procedures in Alaska

In the event that the Department moves forward with finalization of the Proposed Rule, it is absolutely critical that the Part 151 regulations be modified to protect the interests of holders of ANCSA subsurface estates. Specifically, the regulations should be revised to require, for any application to take ANCSA split-estate lands into trust, the express consent of the owner of the subsurface estate.

The Proposed Rule explains that although repealing the Alaska Exception would allow DOI to accept land-into-trust applications from Alaska Natives, it "would not require the BIA to approve applications for trust acquisitions in Alaska. The Secretary would retain full discretion to analyze and determine whether to approve any particular trust application, and such a determination would include consideration of the substantive criteria enumerated in part 151." 79 Fed. Reg. at 24,652. The Proposed Rule further recognizes that "applying those factors in Alaska requires the consideration of unique aspects of Native Alaska Villages and Native land tenure in Alaska, such as the ANCSA-created ownership and governance of land by Regional and Village Corporations." Accordingly, the Proposed Rule states that, "before applying the part 151 procedures in Alaska, the Department intends to engage in further government-to-government consultations on how those procedures are best applied in Alaska" and solicits comments on how DOI's generic land-into-trust procedures should be applied in Alaska as part of the rulemaking. *Id.*

Unless DOI were to adopt special rules for Alaska in response to public comment, Alaska Natives would have to follow the same procedures, as set forth in Part 151, that Indians and Indian tribes in the lower-48 states must follow when requesting that lands be placed in trust. The legal framework in Alaska under ANCSA and ANILCA³ raises significant and unique issues that the Department must seriously consider before and in deciding whether and, if so, when to take lands into trust in Alaska. In this regard, simply requesting comments in the Proposed Rule as to how the Part 151 procedures should be applied in Alaska is not a sufficient means of addressing that question. Rather, in the event it finalizes the Proposed Rule as proposed, after taking these comments and fully consulting with Alaska tribal entities and Alaska Native corporations regarding this specific question, the Department must undertake an additional public rulemaking process to address any additional changes that should be made to the Part 151 regulations for applications to take land into trust in Alaska.

Application of section 151.11(b) regarding distance from reservation

ANCSA revoked all but one Alaska Native reservation in Alaska. Five years after the passage of ANCSA, Congress enacted the Federal Land Policy and Management Act

³ Alaska National Interest Lands Conservation Act, Public Law 96-487, 94 Stat. 2371, as amended.

("FLPMA"), which repealed the Secretary of the Interior's authority pursuant to section 2 of the 1936 IRA amendments to designate certain lands in Alaska as Indian reservations. Pub. L. No. 94-579, 90 Stat. 2743 (1976).⁴ Accordingly, Doyon presumes that most applications to take lands into trust in Alaska would be governed by the requirements for off-reservation requests, currently set forth in section 151.11, rather than on-reservation requirements set forth in section 151.10. These requirements, however, require the consideration of the "distance from the boundaries of the tribe's reservation." 25 C.F.R. § 151.11(b). Given that there is only one Alaska Native tribal entity to which this requirement could apply, it is not clear how the Department would apply this requirement with regard to lands in Alaska.

Notice to, and consent by, owners of subsurface estate

In addition, section 151.11(d) requires the Department, upon receipt of a tribe's written request to have lands taken into trust, to notify the state and local governments with jurisdiction over the lands to be acquired, and provide those governments with 30 days to provide written comments on the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. Doyon proposes, in the event that the Department decides to consider applications for split estate lands, an additional section must be added to provide similar notice to Alaska Native regional corporations owning a subsurface interest in the lands to be acquired. The purpose of such notice would be to provide such corporations an opportunity to provide written comments on the acquisition's potential impacts on their interests and obtain the corporations' consent to the acquisition—without which consent the application would not be approved.

Other Comments

The elimination of the provision making the Department's land-into-trust regulations inapplicable to lands in Alaska also raises other issues not at all addressed in the Proposed Rule.

Lands owned by Native corporations pursuant to conveyances under ANCSA, as well as certain other Native corporation-owned lands, benefit from special treatment under various federal laws. For example, section 907(d) of ANILCA, provides that undeveloped ANCSA lands (*i.e.*, lands that "are not developed or leased or sold to third parties") are immune from (1) adverse possession and similar claims based upon estoppel; (2) real property taxes by any governmental entity; (3) judgments resulting from a claim based upon or arising out of title 11 of the U.S. Code or any successor statute (the Bankruptcy Code), other insolvency or moratorium laws, or other laws generally affecting creditors' rights; and (4) judgment in any action at law or equity to recover sums owed or penalties incurred by the Native corporation. ANILCA, 43 U.S.C. § 1636(d) (1) (A). These protections, commonly referred to as the "Land Bank" protections,⁵ generally protect undeveloped

⁴ This authority to create Alaska reservations was conferred in 1936, Act of May 1, 1936, § 2, 49 Stat. 1250-51, and repealed by FLPMA in 1976. FLPMA § 704(a), 90 Stat. 2792.

⁵ Section 907 of ANILCA, in its original form, established a Land Bank program, which authorized the Secretary of the Interior and Native corporations to enter into agreements under which undeveloped lands owned by the corporations would be placed into a "Land Bank" and subject to certain protections. In the years after ANILCA was enacted, only two Land Bank agreements were executed. In 1988, Congress amended ANILCA to automatically extend the protections of the Land Bank program to all land and interests therein owned by Native corporations, provided such land and interests are not developed or leased or sold to third parties. Pub. L. No. 100-241 (Feb. 3, 1988) (codified as amended at 43 U.S.C. §§ 1631-1642).

ANCSA lands from alienation; however, unlike a tribe whose land has been taken into trust, the Native corporation still retains the sole discretion to develop the land (which would withdraw the land from these protections) or alienate the land by, for example, leasing or selling the land to a third party.

If an Alaska Native corporation were to transfer land to a tribe for the purpose of applying to the Department to place those lands into trust, there presumably would be an interim period between the transfer of lands from the Native corporation to tribal entities, and the placement of land into trust, during which time those lands would not be subject to the protections of either ANCSA or trust status. The Department should seek public comment and consult with tribal entities and Alaska Native corporations on this specific issue, and consider how this concern might be addressed to avoid placing ANCSA lands at risk in connection with efforts to have such lands taken into trust.

Consultation

In Executive Order (EO) 13175, *Consultation and Coordination with Indian Tribal Governments*, the President required federal agencies to implement an effective process to ensure meaningful and timely consultation with tribes during the development of policies or projects that may have tribal implications. Tribal consultation is intended to assure meaningful tribal participation in planning and decision making processes for actions with the potential to affect tribal interests. Although EO 13175 itself applies specifically to federally-recognized tribal governments, pursuant to Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267, Congress specifically extended these obligations to Alaska Native corporations, requiring the Office of Management and Budget (OMB) and all Federal agencies to “consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175.”

In accordance with this mandate, in August 2012, the Department issued its Policy on Consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations. In this Policy, the Department purported to “recognize and respect the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government.” Thus, the Policy states that “[w]hen taking Departmental Action that has a substantial direct effect on ANCSA Corporations, the Department will initiate consultation with ANCSA Corporations.” In recognition that “Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices,” it further commits that the Department will “identify consulting parties early in the planning process and provide a meaningful opportunity for ANCSA Corporations to participate in the consultation policy.” The Consultation Guidelines of the Department’s Tribal Consultation Policy that are incorporated by reference into the ANCSA Corporation Policy thus require the Bureau to consult as early as possible, beginning at the Initial Planning Stage, and provide that the Bureau should give at least 30-days’ notice prior to scheduling a consultation, except in exceptional circumstances. Doyon firmly believes that if there had been an opportunity to consult prior to the publication of the Proposed Rule, many concerns raised in our public comments could have been addressed prior to publication.

It is absolutely critical that Alaska Native corporations be provided the opportunity to meaningfully participate in the development and implementation of policies that could impact our ability to fulfill the purposes for which we were established under ANCSA and to protect and advance the economic, social, and cultural interests of our shareholders. This

need to engage meaningfully with Alaska Native corporations is especially important where, as here, the Department's actions will have a direct impact on ANCSA land interests.

We recognize and appreciate that the Department states that it will continue to consult with Alaska Native tribes and corporations regarding the prospective application of land-into-trust regulations in Alaska after the comment period for the Proposed Rule closes. The Proposed Rule and any rules that would govern the taking of lands into trust in Alaska require careful consideration in the context of the unique statutory framework governing land and other Native issues in Alaska under ANCSA and ANILCA, and the complex interrelationships between the various types of Native groups in the State, including ANCSA regional corporations, village corporations, tribal entities, and others. In accordance with the Department's consultation obligations, Doyon looks forward to meaningful and good-faith consultation with the Department on these critically important issues as the Department further considers whether and, if so, under what procedures and criteria to accept lands into trust in Alaska.

III. Conclusion

The use and development of lands and resources in Alaska that are within or near federal lands is subject to a unique and complex statutory regime designed to protect Alaska's natural resources and to ensure economic development opportunities for Alaska Natives and other private landowners in the State. Recognition of, and respect for, this regime in the development and implementation of federal regulations that may apply in Alaska is critical to the economic and historical and cultural interests of Doyon and its shareholders and, more broadly, to realization of the economic development opportunities that Congress contemplated would be open to the Alaska Native Corporations as a fundamental element of the settlement of aboriginal land claims set forth in ANCSA.

Doyon generally does not oppose allowing land to be taken into trust in Alaska, especially non-ANCSA lands including allotments and town sites within the village boundaries. However, Doyon opposes the taking of land into trust where Doyon is the owner of the subsurface estate, unless Doyon consents to the land being taken into trust, assessing applications on a case-by-case basis. Thus, Doyon maintains that consent of the subsurface owner must be required before final approval of any application to take lands into trust in Alaska.

We look forward to continuing to engage in meaningful consultation with the Department as it moves forward with its consideration of these important issues.

Thank you for your consideration of these comments.

Sincerely,



Aaron Schutt
President/CEO
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