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January 25, 2019

By Email: consultation@bia.gov

Ms. Tara Sweeney
Assistant Secretary—Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20249

Re: Alaska Land into Trust Consultation

Dear Assistant Secretary Sweeney,

The Craig Tribal Association ("Craig Tribe" or "Tribe") appreciates the opportunity to provide these comments on the authority and process for the Secretary of the Department of the Interior ("Interior") to take land into trust in Alaska. Although the federal government is partially shutdown, the deadline for submitting written comments is January 25, and it is unclear whether this deadline will be extended. Out of an abundance of caution the Tribe is submitting comments to meet the January 25 deadline. However, the Tribe reserves the right to submit additional comments in the event that the deadline is extended once the federal government reopens. As discussed below, the Craig Tribe opposes Interior's efforts to revisit land into trust in Alaska.

The Craig Tribe is a federally recognized Indian tribe and is listed on the most recent list of "Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." 83 Fed. Reg. 34863, 34867 (Jul. 23, 2018). The Craig Tribe is the first and only Indian tribe in Alaska thus far to benefit from Interior's 2014 Final Rule "Land Acquisitions in the State of Alaska," 76 Fed. Reg. 76,888 (Dec. 23, 2014) ("2014 Final Rule"), which allowed the Secretary to take land into trust for tribes in Alaska. The United States now holds in trust an approximately 1-acre parcel of land in trust ("trust parcel') for the benefit of the Craig Tribe. The trust parcel was previously owned in fee by the Tribe.[1] Restoring this parcel of land into trust for the benefit of the Tribe has had immeasurable positive benefits on the Tribe and its members.

[1] A Tribal building and parking lot are located on the trust parcel. The Tribal building provides offices for tribal services and a community hall for tribal members. The Tribe also uses the building for economic development and leases space to the Alaska Court System, Tribal Family Services, Head Start Program and an 8(a) subsidiary company in which the Tribe has a 50% ownership interest.

The 2014 Final Rule marked a significant and hard-fought victory for tribes in Alaska and was a direct result of federal litigation discussed below. The Tribe is not only dumbfounded but deeply disappointed by Interior's sudden suspension and withdrawal of Solicitor Opinion M-37043 "Authority to Acquire Land into Trust in Alaska", which occurred on June 29, 2018. *See* M-37053 "Withdrawal of M-37043 'Authority to Acquire Land into Trust in Alaska' Pending Review" (Jun. 29, 2018) ("M-Opinion"). Withdrawal of the M-Opinion has effectively halted all land into trust in Alaska and no pending applications to take land into trust have been approved in Alaska to date.[2]

Interior's withdrawal of the M-Opinion was closely followed by a "Dear Tribal Leaders" Letter that initiated tribal consultation on the Secretary's authority and process to take land into trust in Alaska. *See* "Dear Tribal Leaders" Letter from Principal Deputy Assistant Secretary—Indian Affairs John Tahsuda (Exercising the Authority of the Assistant Secretary—Indian Affairs) (Jul. 2, 2018). Based on the questions presented in the Letter, it now appears that Interior seeks to either reverse course and preclude tribes in Alaska from taking land into trust or create different rules for taking land into trust for tribes in Alaska. This is particularly concerning for several reasons.

First, any change would only further delay pending applications for land into trust in order to allow for Interior to develop a new or revised process. Second, the 2014 Final Rule has already been successfully implemented in Alaska. Under the 2014 Final Rule, the same land into trust process applies in Alaska as in the lower 48, so there is no need for an Alaska-specific rule. Third, as noted, the 2014 Final Rule is a direct result of federal litigation that challenged Interior's regulatory prohibition on the Secretary from taking land into trust for tribes in Alaska. *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013).

In *Akiachak*, the federal district court found the Alaska prohibition was illegal. In response to the court's ruling, Interior engaged in tribal consultation and, in 2014, amended its regulations to remove the Alaska prohibition. 79 Fed. Reg. 76,888. Since the 2014 Final Rule cleared the way for trust land acquisitions in Alaska, the D.C. Circuit dismissed the pending *Akiachak* appeal and vacated the district court's 2013 decision. *Akiachak Native Community v. Salazar*, 827 F.3d 100 (D.C. Cir. 2016). Then in January 2017, the Solicitor for Interior issued M-Opinion 37043, which reached the same legal conclusions as the district court's decision in *Akiachak* and the 2014 Final Rule. Consequently, the Craig Tribe and all tribes in Alaska firmly believed that the issue of trust land acquisitions in Alaska had been fully and finally settled as a result of the *Akiachak* litigation.

No mention is made of the *Akiachak* litigation in the Dear Tribal Leaders Letter. This is particularly concerning because the federal government induced the federal courts to dismiss the *Akiachak* litigation by representing that Interior agreed it was lawful to acquire trust lands in Alaska. Despite Interior's representation to the courts, the Solicitor's office has now announced that it is rethinking its position. This conduct may border on a fraud on the courts, as a federal agency cannot manipulate the litigation process in this manner. Interior now seeks to ignore not only its responsibility to tribes in Alaska, but also its responsibility to the courts. The Craig

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[2] In fact, the Craig Tribe is not aware of any pending applications for land into trust being processed to a final decision since the start of President Trump's Administration.

Tribe opposes Interior's efforts to revisit land into trust in Alaska. The Tribe requests that Interior make good on its representations to the federal courts and Indian country by continuing to process and approve land into trust applications in Alaska in accordance with 25 C.F.R. pt. 151.

Below we respond to each of the questions outlined in the Dear Tribal Leaders Letter.

1. **How do you view the impact, if any, of the Alaska Native Claims Settlement Act ("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 into trust in Alaska?**

This is a legal question that has already been largely answered by both the *Akiachak* decision and M-Opinion 37043. Those decisions fully analyze and discuss both ANCSA's and FLPMA's impact on the authority of the Secretary to take land into trust in Alaska. Those decisions reached the correct outcome – that nothing in ANCSA or FLMPA impacts the Secretary's authority to take land into trust in Alaska. As such, the Secretary can and must implement its authority under the Indian Reorganization Act ("IRA") to take land into trust in Alaska. 25 U.S.C. §§ 465; 473a (extending Section 5 of the IRA to Alaska).

To the extent that Interior is seeking to get out from under those opinions by now raising ANILCA, Interior has provided no basis or justification for how ANILCA changes the outcome here. ANILCA was enacted in 1980. *See* Pub. L. No. 96-487, 94 Stat. 2371 (Dec. 2, 1980). ANILCA implements and amends provisions of ANCSA, but it does not change the purpose and scope of ANCSA. The district court's decision in *Akiachak* squarely addresses whether the purpose and scope of ANCSA preclude the Secretary from taking land into trust in Alaska. Moreover, Interior accepted the *Akiachak* court's decision and removed the prohibition on taking land into trust in Alaska. As noted above, Interior sought dismissal of its appeal in *Akiachak* and requested that the district court's decision be vacated, based on its acceptance of the result in *Akiachak* and conforming changes to the Part 151 regulations. Interior cannot now seek to raise new arguments or facts in an attempt to administratively relitigate this issue to get a different outcome.

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

In 1994, Congress amended the IRA to add the "privileges and immunities" provisions, which prohibit the federal government from treating federally recognized tribes differently. Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709 (1994) (codified at 26 U.S.C. § 476).[3] Because these

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[3] Those provisions state:

> (f) Privileges and immunities of Indian tribes; prohibition on new regulations. Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

amendments prohibit Interior from treating tribes differently, these provisions make clear that tribes in Alaska must be treated the same as those in the lower 48. The 1994 amendments plainly mean that the Secretary does not have the ability to promulgate rules specific to tribes in Alaska if those rules diminish the rights of Alaska tribes to have land taken into trust on the same basis as all other tribes. As such, Interior should continue to process land into trust applications in Alaska under the existing Part 151 regulations.

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

This is a legal question that depends on the statutory question being presented, principles of statutory construction, and applicable case law. It cannot be answered or addressed based on the question posed here. However, to the extent congressional intent or legislative history is relevant in connection with statutory interpretation questions relating to land into trust issues in Alaska, the federal court in *Akiachak* and the M-Opinion discussed in Question 1 have already addressed this question.

4. **Is 25 C.F.R. pt. 151, Land Acquisitions, an appropriate process for tribes in Alaska to request the Department take land into trust?**

Yes. As noted above, the Part 151 regulations have already been successfully applied in Alaska. No changes are needed. Interior has never articulated any rational reason for a different process in Alaska, as the Part 151 regulations have been applied throughout the lower 48 for years.

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

The challenges faced by Alaska tribes are all currently related to Interior's recent withdrawal of M-Opinion 37043 and its de facto halt of all pending land into trust decisions in Alaska. To the extent that Part 151 is a new process for tribes in Alaska, Interior should be offering technical training and workshops to assist tribes and Alaska BIA staff in understanding the Part 151 process.

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?**

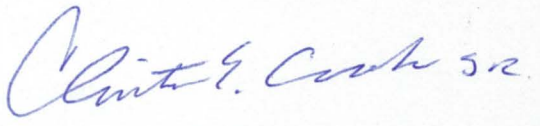
Interior should not promulgate Alaska specific regulations for the land into trust process. Rather, Interior should continue to process land into trust applications under Part 151 and provide adequate training for tribes and BIA staff in the region.

Conclusion

The United States has a unique trust responsibility to Indian tribes that is grounded in treaties, executive orders and federal laws. Federal case law confirms that the trust responsibility includes fiduciary obligations for the management of trust lands and natural resources, including the duties to act with good faith and loyalty. Consistent with this trust duty, Interior must continue, in good faith, to carry out the representations made to both the federal courts in *Akiachak* and to Indian country and implement the 2014 Final Rule in Alaska. As Interior well knows, the IRA was enacted for the general benefit of Indians and was intended to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari,* 417 U.S. 535, 542 (1974). Restoring and rebuilding tribal homelands is essential to tribal self-determination and the ability of tribes to become economically self-sufficient. Indeed, the Craig Tribe can certainly attest to the importance of restoring and rebuilding its homeland as the first tribe in Alaska to benefit from the 2014 Final Rule.

For these reasons, the Craig Tribe urges Interior to reinstate M-Opinion 37043 and continue to dutifully implement the 2014 Final Rule in Alaska. Thank you.

Sincerely,



Clinton Cook, Sr.
Tribal President