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PORT GAMBLE S'KLALLAM TRIBE

Port Gamble S'Klallam Tribe Comments for the Land-into-Trust Consultation

I am writing on behalf of the Port Gamble S'Klallam Tribe (the "Tribe") to submit comments in response to the Department of the Interior's (DOI's) December 6, 2017, Dear Tribal Leader Letter concerning the trust acquisition regulations at 25 C.F.R. Part 151 ("trust acquisition regulations" or "land-into-trust regulations"). We also are submitting comments in response to the DOI's October 4, 2017, letter which contained draft revisions to 25 C.F.R. Part 151.11 and Part 151.12 ("October Letter"). In addition, I am providing the Tribe's thoughts on what DOI is framing as a "consultation" session on this issue held in Portland, Oregon, on January 25, 2018.

Acquiring land in trust is one of the most significant processes of the federal-tribal government-to-government relationship. Trust land provides tribal governments the ability to exercise territorial jurisdiction over their lands without interference from state and local governments. This furthers tribal sovereignty by allowing tribes the ability to decide how to use its lands: for economic development purposes or governmental and community purposes, such as for housing, health care facilities, schools, or other community development or infrastructure. Trust land insulates tribes from state and local government taxation, allowing tribes to have a limited tax base. Trust land also provides tribes the ability to protect land with historic or cultural significance. The Supreme Court itself has recognized that "there is a significant territorial component to tribal power."[1] Tribes cannot overstate the importance of acquiring trust land as a means for rebuilding tribal homelands and furthering tribal self-sufficiency. It is extremely important for our Tribe.

The Port Gamble S'Klallam Tribe is a sovereign nation comprised of over 1,200 citizens and located on Kitsap Peninsula in Northwest Washington State. The S'Klallam were called the Nux Sklai Yem ("Strong People"). We entered into a treaty relationship with the United States in the 1855 Point No Point Treaty. That Treaty enshrined our reserved hunting, fishing, and gathering rights as well as provided for appropriations for our use and benefit. The United States, therefore, has both treaty and trust obligations to us. The United States is to protect our lands and resources and provide for the well-being of our citizens. As our trustee, the United States must work with us to further our best interests.

The tribe is facing a shortage of housing, we have over 100 people on the waiting list. The tribe has a growing need for health and human services; every single one of our administrative buildings is over-crowded. The tribe seeks to grow its economic development enterprises which supports self-governance. **The Tribe relies on trust land to address all of these issues.** Since 2012, the Port Gamble S'Klallam Tribe has successfully placed 470 + acres

[1] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

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Every single trust application has been met with acceptance by local neighbors and county/state government; we have not had one single negative public comment. In fact, the local school district, sports teams, surrounding community organizations, and emergency personnel look to the tribe for sharing its resources, hosting large events, endorsing political initiatives, and participation in broader community events. The tribe is a good neighbor, and is generous with its trust land and the resources developed as a result.

The tribe is one the largest employers in Kitsap county – which helps stimulates the overall economy. With a small membership of only 1,200 people, we employ over 450 people, a majority of whom are non-Indian. However, we can do more in terms of providing for our members and being an economic generator for our region. The ability to acquire land-into-trust is a significant tool in our efforts to meet such objectives. With this backdrop, I set forth our comments in response to the DOI's December 6, 2017, letter and to its October Letter.

A. October Letter Draft Revisions Should Be Formally Withdrawn

As an initial comment, the DOI should formally withdraw its October Letter and the draft revisions to the land-into-trust regulations contained in that letter. The informal and unstructured offering of those draft revisions to 25 CFR Part 151 ("Part 151") is not in line with previous rulemaking procedures used by the DOI, and does not involve the level of government-to-government consultation required for proposed amendments to such a significant rule. Over the past 25 years, the DOI has made strong efforts to make tribal consultation meaningful and timely. Generally, the DOI has engaged in a tribal input process prior to issuing draft regulatory revisions. In this case, however, the DOI simply attached its proposed revisions to Part 151 to a letter and sent them out to Tribal Leaders.

At a consultation session in October 2017, during the National Congress of American Indians (NCAI) Annual Conference, all tribal representatives but one vehemently opposed the DOI's proposed revisions to the land-into-trust regulations and the process DOI used to develop them. The DOI retreated and began anew with its December 6, 2017, letter. As the DOI notes in the December Letter, it is more appropriate to begin this process with a broader discussion of Part 151 and the land-into-trust process than the approach taken in the DOI's October Letter. This is a step in the right direction. But the process being used is still not consultation. We appreciated the opportunity to speak to Acting Assistant Secretary Tahsuda and Director Bryan Rice at the listening session they held in Portland on January 25, 2018. But, as nearly every tribal leader and representative who spoke pointed out, such listening sessions are not government-to-government consultation, and they are not the appropriate basis for considering such significant amendments to regulations that are absolutely critical to Indian Country generally, and to our Tribe specifically. To ensure true government-to-government consultation, the DOI should take a step back, formally withdraw the October Letter, and, initiate government-to-government consultation. Without such a withdrawal, there can be no genuine discussion about the issues and policies because the DOI's views and positions are still on the table, albeit in the background. The letter must be withdrawn to facilitate an authentic policy discussion.

We note that AAS Tahsuda stated that the impetus for the proposed changes came not only from representatives of cities, counties, and state governments, but also from tribes. Yet despite a number of tribal leaders asking which tribes asked for the proposed changes, that information was not forthcoming. Nor do the changes appear to provide any benefit to tribes, though they would give cities, counties, and state governments much more, and inappropriate, leverage over tribes in the land into trust process.

B. Comments on DOI's December Letter

In its December 6, 2017 letter, the DOI asked a series of questions to prompt tribal comments. We first want to note that the questions are framed in a way that improperly constrains the issues to be considered and the focus of any discussions. The questions presuppose a need to change the existing regulations and process, and in a certain direction, implying that DOI has already made a decision as to the direction it intends to move on this critical matter. AAS Tahsuda stated that many of these questions came from tribal leaders, but, again, no information was provided (despite multiple requests) as to which tribal leaders were pushing for these questions or the changes implied by the way the questions are framed. The following are our comments to the DOI's December letter.

i. The objective of the land-into-trust program should be to efficiently facilitate the acquisition of tribal homelands as intended by Congress when enacting the Indian Reorganization Act and other land acquisition statutes such as tribal land settlement or restoration acts.

Congress has authorized the Secretary of Interior ("Secretary") to place land into trust for the benefit of a tribe in over fifty separate statutes.[2] The DOI uses the Part 151 process to

[2] Indian Financing Act of 1974, 25 U.S.C. §§ 1466, 1495; Indian Land Consolidation Act, 25 U.S.C. § 2202; Pub. L. No. 106-462, Title I, § 103(6), 114 Stat. 2002, 25 U.S.C. § 2216(c) (2000) (originally enacted as Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Title II, § 217); Rocky Boy's Indian Reservation, Mont., Pub. L. No. 85–773, Aug. 27, 1958, 72 Stat. 931 (formerly 25 U.S.C. § 465); Payson Band, Yavapai-Apache Indian Reservation, Pub. L. No. 92–470, Oct. 6, 1972, 86 Stat. 783 (formerly 25 U.S.C. § 465); 25 U.S.C. § 5322(a)(3); Federal Property and Administrative Services Act, 40 U.S.C § 523(a)-(b), Pub. L. No. 107-217 § 1, Aug. 21, 2002, 116 Stat 1083 (formerly 40 U.S.C. § 483(a)(1)-(2)); Oklahoma Indian Welfare Act, 25 U.S.C. § 5201, June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (formerly 25 U.S.C § 501); Shoshone Tribe: Distribution of Judgment Fund Act, July 27, 1939, ch. 387, § 4, 53 Stat. 1129 (formerly 25 U.S.C. § 574); Cheyenne River Sioux Tribe, Pub. L. No. 88-418, Aug. 11, 1964, 78 Stat. 389; Yakima Tribes, July 28, 1955, ch. 423, § 1, 69 Stat. 392; Pub. L. No. 88–540, § 1, Aug. 31, 1964, 78 Stat. 747; Pub. L. No. 100–581, title II, § 213, Nov. 1, 1988, 102 Stat. 2941; Pub. L. No. 101–301, § 1(a)(3), (b), May 24, 1990, 104 Stat. 206 (formerly 25 U.S.C. § 608); Seminole Indian Reservation, Act July 20, 1956, ch. 645, 70 Stat. 581 (formerly 25 U.S.C. § 465); Isolated Tracts Act, Pub. L. No. 88-196, Dec. 11, 1963, 77 Stat. 349, amended by Pub. L. No. 91-115, Nov. 10, 1969, 83 Stat. 190; Spokane Indian Reservation, Wash., Pub. L. No. 90–335, § 1(a)–(e), June 10, 1968, 82 Stat. 174, as amended by Pub. L. No. 93–286, May 21, 1974, 88 Stat. 142 (formerly 25 U.S.C. § 487); Swinomish Indian Reservation, Pub. L. 90–534, § 3, Sept. 28, 1968, 82 Stat. 884 (formerly 25 U.S.C. § 610b); Menominee Restoration Act, Pub. L. No. 93-197, Dec. 22, 1973, 87 Stat. 770, 772-3 (formerly 25 U.S.C. §§ 903-903g); Texas Band of Kickapoo Act, Pub. L. No. 97-429, § 5, Jan. 8, 1983, 92 Stat. 2270 (formerly 25 U.S.C. § 1300b-14); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96–420, Oct. 10,

administer tribal requests for the Secretary to place land into trust on behalf of a particular tribe under authority delegated by a given statute. The majority of trust land applications cite to the Secretary's authority under the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, ("IRA"). However, the DOI also uses the Part 151 process to administer trust land applications under other statutory authority such as discretionary tribal settlement or restoration act acquisitions.

We are very concerned that the DOI asks about the advantages of operating on land that is in trust given the well-known and demonstrated success of the IRA, the success of the Indian Self-Determination, Education and Assistance Act, and the wide range of examples of tribal

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1980, 94 Stat. 1785 (formerly 25 U.S.C. §§ 1721-35); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, §§ 3(a) and 7(d), Nov. 18, 1977, 91 Stat. 1415 (formerly 25 U.S.C. §§ 711a and 711e(d)); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95–395, Sept. 30, 1978, 92 Stat. 813 (formerly 25 U.S.C. §§ 1701-16); Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97–399, §§ 1-10, Dec. 31, 1982, 96 Stat. 2012 (formerly 25 U.S.C. §§ 1741-49); Pub. L. No. 97- 459, 96 Stat. 2515; Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98–134, Oct. 18, 1983, 97 Stat. 851 (formerly 25 U.S.C. §§ 1751-60); Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481, § 7, Oct. 17, 1984, 98 Stat. 2253, as amended by Pub. L. No. 105-256, § 5, Oct. 14, 1998, 112 Stat. 1897 (formerly 25 U.S.C. § 714e); White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, March 24, 1986, 100 Stat. 61; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, title II, §§ 203(a) and 206, Aug. 18, 1987, 101 Stat. 670 (formerly 25 U.S.C. §§ 733(a) and 736); Navajo and Hopi Indian Relocation Amendments Act, Pub. L. No. 93-531, § 1, Dec. 22, 1974, 88 Stat. 1716, as amended by Pub. L. No. 96-305, July 8, 1980, 94 Stat. 929 and Publ. L. No. 100-666, Nov. 16, 1988, 102 Stat. 3929 (formerly 25 U.S.C. §§ 640d- 640d-31); Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101–41, § 1-12, June 21, 1989, 103 Stat. 83 (formerly 25 U.S.C. §§ 1773-73j); Coquille Restoration Act, Pub. L. No. 101-42, §§ 3(e) and 5, June 28, 1989, 103 Stat. 92 as amended by Pub. L. No. 104–208, div. B, title V, § 501, Sept. 30, 1996, 110 Stat. 3009–537 (formerly 25 U.S.C. §§ 715a and 715c); Ponca Restoration Act, Pub. L. No. 101-484, § 4(c), Oct. 31, 1990, 104 Stat. 1167-8 (formerly 25 U.S.C. § 983b); Seneca Nation Settlement Act of 1990, Pub. L. No. 101–503, Nov. 3, 1990, 104 Stat. 1292 (formerly 25 U.S.C. §§ 1774-74h); Crow Boundary Settlement Act of 1994, Pub. L. No. 103–444, § 1-13, Nov. 2, 1994, 108 Stat. 4632 (formerly 25 U.S.C. § 1776-76k); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103–377, § 1-10, Oct. 19, 1994, 108 Stat. 3501 (formerly 25 U.S.C. §§ 1775-75h); Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub L. No. 103-324, §6, Sept. 21, 1994, 108 Stat. 2158 (formerly 25 U.S.C. § 1300k-4); Auburn Indian Restoration Act, Pub. L. No. 103-434, title II, §§ 202(e) and 204, Oct. 31, 1994, 108 Stat. 4533-4 (formerly 25 U.S.C. §§ 1300l(e) and 1300l-2); Paskenta Band Restoration Act, Pub. L. No. 103-454, title III, §§ 303(e) and 305, Nov. 2, 1994, 108 Stat. 4793-4 (formerly 25 U.S.C. §§ 1300m-1(e) and 1300m-3); Act to Restore Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, §6, Sept. 21, 1994, 108 Stat. 2154 (formerly 25 U.S.C. § 1300j-5); Miccosukee Settlement Act of 1997, Pub. L. No. 105–83, title VII, §§ 701-07, Nov. 14, 1997, 111 Stat. 1624 (formerly 25 U.S.C. §§ 1750-50e); Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, Dec. 15, 1997, 111 Stat. 2652; Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, Pub. L. No. 106–568, title VI, §§ 601-10, Dec. 27, 2000, 114 Stat. 2906 (formerly 25 U.S.C. § 1778-78h); Cherokee, Choctaw, And Chickasaw Nations Claims Settlement Act, Pub. L. No. 107–331, title VI, § 601-09, Dec. 13, 2002, 116 Stat. 2845 (formerly 25 U.S.C. §§ 1779-79g); Graton Rancheria Restoration Act, Pub. L. No. 106-568, title XIV, § 1405, Dec. 27, 2000, 114 Stat. 2940 (formerly 25 U.S.C. § 1300n-3); Shawnee Tribe Status Act of 2000, Pub. L. No. 106–568, title VII, § 707, Dec. 27, 2000, 114 Stat. 2915 as amended by Pub. L. No. 109–59, title X, § 10213, Aug. 10, 2005, 119 Stat. 1939 (formerly 25 U.S.C. § 1041e); Santo Domingo Pueblo Claims Settlement Act of 2000, Pub. L. No. 106–425, §§ 1-7, Nov. 1, 2000, 114 Stat. 1890, as added Pub. L. No. 106–434, § 3, Nov. 6, 2000, 114 Stat. 1913 (formerly 25 U.S.C. §§ 1777-77e); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96–227, § 7, Apr. 3, 1980, 94 Stat. 320 as amended by Pub. L. No. 109–126, § 4, Dec. 7, 2005, 119 Stat. 2547 (formerly 25 U.S.C. § 766).; Pueblo de San Ildefonso Claims Settlement Act of 2005, Pub. L. No. 109–286, §§ 1-18, Sept. 27, 2006, 120 Stat. 1218 (formerly 25 U.S.C. §§ 1780-80p).

strength and recovery – all related to and often dependent on the ability to exercise tribal jurisdiction and self-governance on tribal trust lands. Of course, Indian Country still suffers and includes some of the most impoverished, remote, and underserved populations in the country. The placement of land in trust for tribes, however, has been a success story and it is helpful to return to the adoption of the IRA to understand why land in trust is so important.

The IRA reflected a drastic sea change from a policy of divesting tribal lands under the Indian General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388 (1886), to a policy of halting divestment and restoring land back into tribal ownership.

"Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). As the Court in *Mescalero Apache* discussed:

> The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934). See also S.Rep.No.1080, 73d Cong., 2d Sess., 1 (1934).
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> As Senator Wheeler, on the floor, put it:
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> > "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians." 78 Cong.Rec. 11125.
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> Representative Howard explained that:
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> > "The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Id.*, at 11732.

Mescalero Apache Tribe v. Jones, 411 U.S. at 152. *See* Felix S. Cohen's Handbook of Federal Indian Law 1039-10041 (2012 ed.).

> The Supreme Court has also stated:
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> The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. See 48 Stat. 984, 25 U.S.C. § 461 *et seq.* Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. See §§ 461, 462. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership,

see § 463, and for acquiring, on behalf of the tribes, lands "within or without existing reservations." § 465.

Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255 (1992).

To date, Congress has not changed this fundamental purpose of the IRA nor has the Supreme Court held that the statute exceeds Congress' authority – despite numerous challenges asserting that land should not be placed into trust on behalf of tribes under the Secretary's authority.[3] No statutory authority or court opinion has change the long-standing objective of the IRA. It remains.

Indian Country still suffers from the devastation wrought by previous Federal Indian policies, in particular, the Dawes Act, but also broken treaty promises and inadequate protection of trust assets. Indian Country includes some of the most impoverished, remote, and underserved populations in the United States. Tribes' ability to place land in trust has been a critical tool for us to govern and use our lands for the benefit of our members, which oftentimes results in benefits for our neighbors also.

The DOI's objectives with its land-into-trust program should clearly be to carry out and achieve the objective of the IRA: to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism. The DOI's objectives with its land-into-trust program should also be to carry out the objectives of the other statutes authorizing the Secretary to place land-into-trust for tribes. The DOI's objectives should be to promote tribal self-determination, self-governance and self-sufficiency. The DOI should be working to accomplish the fulfillment of its treaty obligations and trust responsibility to tribes. With this, the DOI should also be working with tribes to eradicate the negative disparities in economic, health and social conditions found in Indian Country as compared with mainstream America. The acquisition of land in trust helps in this effort because tribes can use trust lands for economic and community development projects that raise the quality of life for their members.

ii. Generally, the land-into-trust process should be made more efficient.

All aspects of the land-into-trust process could be made more efficient. The DOI is slow to act on all land-into-trust applications. Often the staffing limitations (both realty and Solicitor staff) at the Regional level result in unnecessary delays. We recommend that the DOI dedicate more resources and personnel in both the realty and Solicitor's office at the Regional level.

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[3] *See generally, Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 563 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433, 197 L. Ed. 2d 660 (2017); *Big Lagoon Park Co., Inc. v. Acting Sacramento Area Dir., Bureau of Indian Affairs*, 32 IBIA 309, 312 (1998); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016) *aff'd sub nom. Stand Up for California! v. United States Dep't of Interior*, No. 16-5327, 2018 WL 385220 (D.C. Cir. Jan. 12, 2018).

Further, we recommend that the DOI look closely at the land-into-trust process and develop reasonable timeframes for completing the bureaucratic functions necessary to making the final decision. Further, the DOI should establish a timeframe for reaching a final decision. Such defined timeframes will provide guidance to the DOI staff in their work and to the tribal applicant regarding the progress of its application.

iii. The Department should not distinguish between on-reservation and off-reservation applications.

Every single land-into-trust application that the Port Gamble S'Klallam Tribe has submitted has been for "off-reservation" acquisitions. Our reservation is small, and it is entirely composed of trust lands. So there are no "on-reservation" land into trust acquisitions available for our Tribe. Yet we need additional land to supplement our economic and service base, to meet the needs of our membership for jobs, health care, housing and other critical services. And those additional lands have provided benefits not only to the Tribe but to the surrounding community.

The IRA does not distinguish between "on-reservation" and "off-reservation" trust land. That language arose from the enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, with regard to what trust land would be eligible for gaming purposes.[4] In fact, the text of the IRA and associated Congressional reports indicate that the IRA "seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council . . . ." 78 Cong.Rec. 11125. The presumption that an "on-reservation" acquisition is somehow the "preferred" acquisition is the very type of bureaucratic control and paternalism that Congress was directing the Department to move away from when it passed the IRA. The IRA was specifically intended to put tribal decisions, including decisions about trust land acquisitions, into the hands of tribes without second-guessing by the Department. *Id.* Today, tribes are more capable than ever to make those types of informed decisions and the Department should defer to tribal expertise and process all applications in the same manner regardless of location or purpose.

Indeed, the notion that "economic development" applications should be cordoned off from "non-economic development" applications is directly in contrast with the purpose of the IRA. "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life . . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152, *citing* H.R.Rep.No.1804. Congress *intended* the land acquisitions to facilitate all types of tribal economic development. The erosion of this central fundamental purpose is outside Congressional intent and if there any revisions at all to Part 151, this is what should be rectified. The DOI should not engage in the politics and rhetoric around gaming applications and simply process these applications in a uniform and efficient manner that meets the statutory requirements of the IRA or other authorizing statute and complies with other applicable federal law – as intended by Congress. If

[4] We note that Section 2719(c) of the Indian Gaming Regulatory Act states, "Nothing in this section shall affect or diminish the authority or responsibility of the Secretary to take land into trust." The DOI should not be injecting gaming concerns into the Part 151 process, nor should it be conflating the Part 292 process with the Part 151 process.

there is no proposed change in use of the property, then the DOI should ensure that a Categorical Exclusion to NEPA requirements is adopted and efficiently applied.

iv. Memoranda of Understanding and/or Cooperative Agreements should not be required in a land-into-trust application.

I want to first note that the Port Gamble S'Klallam Tribe has submitted five land-into-trust applications, all for "off-reservation" acquisitions. We have always had the full support of the local community, and we have never once had a negative comment expressed by the county or state government in the public comment process. The existing process has always been sufficient to work through any issues.

The IRA does not require the cooperation of state and local governments, nor does it give them a role in the land-into-trust process. We strongly believe that requiring cooperative agreements outside of the NEPA process creates a "pay-to-play" scenario whereby tribes simply seeking to increase their land base for a variety of reasons will be forced into unfavorable agreements with state and/or local government in exchange for their support or neutrality on a land-into-trust application. Given the checker-boarding effect of the Dawes Act, many reservations have non-tribal fee land within their borders and it is simply good governance for the governments with jurisdiction over or around those parcels to work together for the provision of public health and safety services such as water, fire, emergency services and law enforcement. Tribes often reach such agreements with their surrounding state and local jurisdictions over tribal land held both in trust and in fee or restricted status. While these agreements are often done outside of the trust land application process, sometimes they are also reached during the NEPA review portion of the land-into-trust process to mitigate traffic or other concerns.[5] Importantly, however, these are agreements appropriately reached by contracting parties on equal footing to obtain a certain desired result in the interest of both parties. To require these types of agreements to be included in the land-into-trust process would place a tribe on unequal footing and subject it to either acquiescing to the demands of the other jurisdiction or being forced to not growing their land base for any number of reasons. Such a requirement could essentially give state and local governments veto power over the tribal land-into-trust decision process, at odds with the intent of the IRA and the concept of tribal self-determination.

This point was made repeatedly by tribal leaders and representatives at the January 25 meeting in Portland, Oregon. AAS Tahsuda responded by stating that the language of the regulation is not intended to ***require*** an MOU with local governments. But there are two things he says that give rise to this proposed requirement. He noted that for any off-reservation land-into-trust acquisition, Interior is required to give consideration to impacts on state and local governments. He said that one effective way to determine impacts to local governments is to show that there is an agreement to deal with impacts, and that as a result DOI does not have to do

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[5] *See* https://www.walkingoncommonground.org/ for many examples of intergovernmental agreements between tribes and state and local governments.

much further delving into those impacts. Thus, it creates a more easily defensible record and position for BIA if the acquisition is challenged in court. The other facet, he says, is that there was an active effort a few years ago by NCAI and Senate Committee on Indian Affairs to amend the land-into-trust process. One of the ideas, according to Mr. Tahsuda, that had support was the idea that if MOUs could be achieved that would facilitate the process, make it happen faster, and lead to less litigation. Even though that legislation was not adopted, the idea seemed like a good one and was included in the proposed regulations. He reiterated that it was never a part of BIA's thought process that this would be a veto. A tribe could also include a comment in its application that the tribe tried to negotiate an MOU and was unable to do so. In his personal experience representing tribes in different parts of the country, tribes had the most success when they were able to achieve these kinds of relationships with local governments, and facilitated longer-term productive relationships in those communities.

But these points belie how this proposed concept would work in reality: the way the regulation is structured, the MOU provision will operate as a bottleneck on land-into-trust acquisitions, and will give significant, inappropriate leverage to state and local governments. Moreover, as was pointed out to AAS Tahsuda at the Portland meeting, while the MOU concept was part of the discussions about land-into-trust legislation, it was not supported by the tribes. Another commenter also pointed out, correctly, that when you already have a positive relationship with the local government entities, such an MOU will evolve naturally out of that relationship, but if the concept is in the regulation then those recalcitrant entities will see it as a veto. If DOI puts such language into the regulation, it will encourage the anti-tribal elements to think that they have a veto (a hostage situation). The commenter stated, and we agree, that it should be left out, and where a tribe has an MOU, it can include that in its application on a voluntary basis.

v. The United States trust responsibility and fiduciary duty flows only to tribes – not to public citizens, state or local governments.

Again, the IRA does not require the DOI to consider public citizens or state and local concerns when evaluating a land-into-trust application. In fact, the IRA was passed to *protect* tribes from those very interests who – much like today – sought to keep land out of tribal ownership. The only possible place to consider citizen, state or local concerns is strictly within the NEPA review process, and there, once the environmental concerns are adequately mitigated, then the citizen, state or local jurisdiction concerns should not interfere with the fiduciary duty of the Secretary to acquire land-into-trust on behalf of the applicant tribe. The United States trust responsibility and fiduciary duty flows only to tribes – not to public citizens, state or local governments.

vi. Any new revisions should not apply to pending applications.

It is a well-established principle of administrative law that regulations promulgated by an agency hold the force of law for that agency. Part 151 was promulgated under the Department's federal rulemaking authority and establishes the regulatory process for exercising its trust

acquisition authority under the IRA. Validly promulgated regulations have the force law and are treated the same as statutes. *Griffin v. Harris*, 571 F.2d 767, 772 (3d Cir. 1978). Further, once adopted, an agency is legally bound by its own regulations. *United States v. Nixon*, 418 U.S. 683, 695–96 (1974). The existing Part 151 regulations were appropriately adopted under the APA and applications submitted under them should be processed quickly and efficiently according to them.

C. Comments to Draft Revisions in October Letter

i. The October Letter Draft Revisions proposed two-tier review and approval process does not respect tribal self-determination and sovereignty.

We are seriously concerned with the addition of a two-tier review and approval process in the October Letter Draft Revisions. Unilateral denial without conducting a complete review of the application will result in additional costs for a tribe – not less. A tribe whose application is denied in the first review will have to expend valuable resources to appeal the decision, and if it succeeds in overturning the initial decision, it will then continue proceeding through the remainder of the process. Many tribes may not have the resources to sustain the application through such delay and cost and then would be deprived of their right to homelands. We know that delay is a common tactic used by well-funded tribal land acquisition opponents and this would only serve to bolster their opposition.

Congress has recognized many times over the right of a tribe to make its own decisions in exercise of its sovereignty. If a tribe determines that placing a parcel of land into trust – no matter where located – then the Department should respect that tribe's decision and process the application with all due deliberation.

ii. Reinstatement of 30-day stay before placing land into trust will increase cost for tribes requiring them to use their "limited resources" – precisely what these revisions purport to avoid.

Finally, the repeal of the so-called "Patchak Patch" is contrary to the stated goal of the revisions – preservation of tribal resources. In 2012, the Supreme Court of the United States held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 567 U.S. 209 (2012) that the law does not bar Administrative Procedure Act challenges to the DOI's determination to take land in trust even after the United States acquires title to the property. Acquiring the land-into-trust immediately allows a tribe to proceed with its development plans without undue delay. It does *not* prejudice a potential challenger from filing a lawsuit challenging the Secretary's decision as that challenge can be brought for 6 years after the decision has been made. Alternatively, restating the 30-day period before placing the land-into-trust *does* prejudice a tribe which may be faced with a lawsuit brought within the 30-day period and an injunction prohibiting it from proceeding with its economic development opportunity while the challenge is litigated.

Conclusion

On behalf of our Tribe, we appreciate the opportunity to comment on this most significant topic. We strongly urge you to carefully consider your federal fiduciary responsibilities and our concerns and Congress's intent when passing legislation to return land to tribal ownership.

We oppose the October Letter and its Draft Revisions to Part 151. The DOI must formally withdraw that letter. Further, the only revisions to Part 151 should be revisions that make the land-into-trust process more streamlined, efficient and quick for tribes. Acquiring land-into-trust for tribes should be made easier for tribes, not harder.