Oglala Sioux Tribe

PINE RIDGE INDIAN RESERVATION

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President Troy "Scott" Weston

July 2, 2018

Hon. Ryan Zinke, Secretary
Attn: Tara Sweeney, Assistant Secretary
U.S. Department of the Interior
1849 C St., N.W.
Washington, DC 20240
Via email: consultation@bia.gov

Re: Comments on Land-Into-Trust Regulations (25 C.F.R. Part 151)

Dear Secretary Zinke and Assistant Secretary Sweeney:

The Oglala Sioux Tribe is a Federally recognized Indian tribe, one of the constituent tribes of the Great Sioux Nation, and a signatory to the 1851 Treaty between the United States and the Sioux Nation and the 1868 Treaty between the United States and the Great Sioux Nation.

The Oglala Sioux Tribe submits these comments on the BIA outreach meetings on acquisition of Indian trust land by the Secretary of the Interior: ***No regulatory amendments are required at the present time.***

The Secretary should restore authority to the BIA Regions to acquire land into trust on behalf of Indian tribes and individual Indians. The Secretary should mandate that the BIA Regional Directors prioritize and expedite the acquisition of Indian trust lands for Indian tribes and individuals to enhance restorative justice, promote Indian self-determination, support self-government, encourage economic development, and foster cultural survival and community wellness.

BACKGROUND: 1851 AND 1868 TREATIES

Under the 1851 and 1868 Treaties, the Great Sioux Nation reserved 21 million acres of western South Dakota from the low water mark on the east bank of the Missouri River as our "permanent home" and 44 million acres of land in Nebraska, Colorado, Wyoming, Montana and North Dakota as unceded Indian territory from among our original Lakota, Nakota, and Dakota territory.

Under the Sioux Nation Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation (Sioux) as our "permanent home," and that no treaty for the

cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three-fourths (3/4) of the adult male Sioux population.

In 1876, in violation of the 1851 and 1868 Treaties, the United States sent the U.S. Army under the command of General George Crook and the U.S Cavalry under the command of Lt. Col. George Armstrong Custer to attack our Lakota-Nakota-and-Dakota people at the Little Big Horn. The Federal Government's object was to steal the Black Hills. In 1877, in the "Sell or Starve" Act, Congress seized 7 million acres in the Black Hills from the Great Sioux Nation. In *United States v. Sioux Nation*, 448 U.S. 371 (1980), concerning the "sell or starve" tactics the United States used to steal the Black Hills, the Supreme Court recognized: "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history."

In 1889, to facilitate North and South Dakota Statehood, the United States took an additional 11 million acres of land and transferred our "permanent home" to the railroads and cattle barons, dividing the Great Sioux Reservation into six small reservations: Pine Ridge, Rosebud, Crow Creek, Lower Brule, Cheyenne River and Standing Rock.

From 1889 through 1934, the Sioux Nation tribes lost an additional 6 million acres under the Allotment Policy. During this period, Indian nations suffered under unconstitutional religious, cultural and linguistic prohibitions that amounted to an official cultural genocide policy. As a result, the Oglala Sioux and our sister Sioux Tribes suffer from poverty, economic suffering, and untimely death and disease.

Any BIA Land into Trust regulations should recognize Sioux Nation lands throughout the original 1868 Great Sioux Reservation boundaries as "within" the Reservation for purposes of trust land acquisitions.

THE INDIAN REORGANIZATION ACT OF 1934

In the 1928 Merriam Report, the United States recognized that too much land had been stolen from Indian nations and tribes, and in 1934, President Franklin Roosevelt promoted the Indian Reorganization Act (IRA) to restore Indian lands to promote tribal self-government, Indian economic development, and self-sufficiency. This brought the Allotment Act to an end.

THE GOAL OF THE INDIAN SELF DETERMINATION, ECONOMIC DEVELOPMENT AND RESTORATION OF INDIAN NATION HOMELANDS

Question 1. What should the objective of the land-into-trust program be? What should the Department be working to accomplish?

In accordance with the IRA's purposes, any land-into-trust policies should further the goals of: 1) Promoting Indian Self-Determination and Preserving Indian Sovereignty; 2) Promoting Tribal Self-Government and the Delivery of Tribal Government Services, Including Housing, Education, Community Wellness, and Cultural Preservation; 3) Fostering Tribal Corporations, Business, and Economic Development; and 4) Restoring Indian Nation Homelands.

Section 5 of the IRA should be read to support the Act's broad, remedial, restorative, intergovernmental purposes. The Act, as amended, has the following purposes:

- To ***prevent the loss of Indian lands*** by ending the Allotment Act policy of distributing tribal lands and selling surplus lands;

- to ***secure Indian land tenure*** by extending Indian trust land protections into the future, including exemptions from state taxation;

- to ***restore federal lands*** taken from Indian tribes to tribal and individual Indian ownership;

- to ***restore Indian lands, mineral rights and waters*** through purchase, relinquishment, gift, exchange, and assignment in trust with preemption of state and local taxation;

- to ***promote economic development*** through forestry management, range management, and protection of the soil;

- to ***proclaim new Indian reservations*** and add to existing Indian reservations;

- to ***promote Indian business development*** corporations, and to provide financing for Indian economic development;

- to ***promote Indian education***, including vocational and trade schools;

- to ***promote Indian health care***; and

- to ***preserve Indian sovereignty***, facilitate tribal government reorganization, protect "vested rights" of Indian tribes, and promote tribal self-government.

Frederick Hoxie, a renowned Historian and Expert, explains the goals and impact of the IRA as follows:

> First, the IRA was intended to end allotment—the government program of individualizing and privatizing American Indian lands. As a national policy, allotment had been initiated in 1887 by the Dawes Severalty Act and had facilitated the transfer of tens of millions of acres of Indian land from Native to non-Native ownership. While the consequences of this devastating loss continue to plague Indian people in the United States down to the present day, the IRA ended federal support for the continued erosion of American Indian community resources.
>
> Second, the IRA made possible the organization of tribal governments and tribal corporations. These provisions of the law created a mechanism by which Native people could establish federally-recognized entities that could govern, develop—and speak for—their communities. From 1934 onward, tribal governments would be a constant, visible factor in policymaking.
>
> Third, by ending the allotment policy and providing for the future development, and even expansion, of reservation communities, Congress endorsed the idea that individuals could be both U.S. and tribal citizens. For the first time in the nation's history, the federal government codified in a general statute the idea that tribal citizenship was compatible with national

> citizenship and that Indianness would have a continuing place in American life. This action brought forward a new generation of Native American leaders.
> Over the past eight decades the implementation of the IRA has generally supported these three goals: the individualization of indigenous community resources has been halted, tribal institutions have flourished, and Indian people have asserted themselves as citizens of, and advocates for, their tribes without jeopardizing their status as citizens of this nation….

F. Hoxie*, The Goals of the Indian Reorganization Act,* Hearing Before the Senate Committee on Indian Affairs, THE INDIAN REORGANIZATION ACT—75 YEARS LATER: RENEWING OUR COMMITMENT TO RESTORE TRIBAL HOMELANDS AND PROMOTE SELF-DETERMINATION (June 23, 2011).

Thus, the objective of the land into trust program should be to carry out the goals of the IRA, and the Department should take steps to achieve these goals, and should not make the recovery of Indian lands in trust more difficult.

Question 2. How effectively does the Department address on-reservation Indian trust land applications?

The Department is slow to act on all land into trust applications, including on-reservation applications. For example, the Department requires Indian tribes to have maps and legal documents for Indian lands, when the Bureau of Indian Affairs is tasked by law with maintaining the legal title to Indian lands. The BIA should provide the technical services to Indian tribes concerning title, maps, etc. of the land to be acquired in trust for Indian tribes and Indians.

The Department of the Interior should deem on-reservation Indian trust land acquisitions to be categorically excluded from the environmental reviews, unless positive evidence of significant environmental damage is present. After all, the land was originally our Indian homelands and is being restored to its Indian homeland status through the land into trust process.

3. Under what circumstances should the Department approve or disapprove an off-reservation trust application?

When an Indian tribe seeks to reacquire land in trust from its original, treaty, historic homeland or reservation area, even if the United States diminished the area over a period of time, the acquisition should be treated as an on-reservation acquisition. Hence, the Oglala Sioux Tribe should be acknowledged to be acquiring land on-reservation throughout its "respective territory" under the 1851 Treaty and its "permanent home" and "unceded Indian territory" under the 1868 Treaty.

Moreover, the Department should acknowledge that Section 5's land into trust process is intended to further the broad remedial, restorative purposes of the IRA and reacquire Indian lands off-reservation when the acquisition of such land into trust would serve to:

- ***Preserve Indian Sovereignty and Promote Indian Self-Determination;***
- ***Foster Indian Business Development and Encourage Indian Economic Development;***
- ***Enhance Tribal Self-Government;***

- ***Promote Agriculture, Forestry, Animal Husbandry, Restoration of the Soil;***
- ***Promote the Delivery of Tribal Government Services, Including Housing, Education, Health Care, Police and Fire Protection, Water, Sewer and Sanitation Services, Child and Elder Care, Cultural and Linguistic Preservation, and Community Wellness;***
- ***Enhance Tribal Government and Community Institutions; and***
- ***Provide for Indian Nation Infrastructure.***

Further, the Act does not provide different standards for on-reservation and off-reservation Indian trust land acquisitions, but rather puts these categories in the same sentence in a single section. Accordingly, the Department of the Interior should not further burden the process for land outside reservations and instead should prioritize the process for all land in trust acquisitions. When Indian trust land acquisitions further the broad purposes of the IRA, the Secretary of the Interior should restore the land to Indian country status.

4. What criteria should the Department consider when approving or disapproving an off-reservation trust application?

The Department should consider whether the Indian tribe's goals in reacquiring the land into Indian trust status furthers the Indian tribe's sovereignty, self-determination, self-government, business development, economic development, provision of tribal government services, or restoration of Indian homelands.

The Department should recognize that the recovery of sacred sites and sites of historical significance or occupation are very important to the sustainability of Indian nations, and should give special priority to such acquisitions whether on or off-reservation.

Further, the Department should develop categorical exclusions for land into trust applications to help streamline the NEPA process. Proposing additional categorical exclusions falls within the Department's current initiative to reduce regulatory barriers, streamline process and reduce costs to Indian nations and tribes when going through the land acquisition process.

5. Should different criteria and/or procedures be used in processing off-reservation applications based on:

a. Whether the application is for economic development as distinguished from non-economic development (for example Tribal government buildings, or Tribal health care, or Tribal housing)?

No. Business, Corporate, and Economic Development are all purposes and activities promoted by the IRA, so the Department should not denigrate tribal economic development by making it more difficult.

Moreover, Section 2719(c) of the Indian Gaming Regulatory Act states, "[n]othing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust." Injecting gaming concerns into the land into trust process would be contrary to this clear statutory provision, and interfere with the remedial goals of the IRA in general in order to address

a very few off-reservation gaming applications that are dealt with under separate statutory authority.

b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?

No. Indian gaming land into trust applications should meet the statutory criteria for use of after-acquired lands for Indian gaming (where applicable) under the Indian Gaming Regulatory Act, 25 U.S.C. sec. 2710. If those requisites are met, there is no reason to treat the land into trust acquisition differently from other economic development acquisitions.

c. Whether the application involves no change in use?

Yes. Expedited consideration should be given to land into trust acquisitions that involve no change in use, and a goal of 60 day review and 90 day acquisition of such lands into trust should be set.

6. What are the advantages/disadvantages of operating on land that is in trust versus land that is owned in fee?

Indian tribes should make the determination to seek to have land acquired in trust. Indian trust land is Indian in character, restored to its original Indian country status as "permanent home" for an Indian tribe and that is important for the future of Indian nations and tribes. The restoration of Indian trust lands is restorative for Indian tribes, in terms of liberty, self-government, economic development, cultural survival, and community well-being because Indian country status helps Indian tribes maintain sustainable, healthy communities.

Indian trust land is an essential part of the territorial component of Indian sovereignty that is protected by Indian treaties and self-governed by Indian nations and tribes in furtherance of our original, inherent sovereignty.

7. Should pending applications be subject to new revisions if/when they are finalized?

No. The Secretary of the Interior should not change the rules for pending applications because it violates due process and investment backed expectations concerning Indian land and property.

8. How should the Department recognize and balance the concerns of state and local jurisdictions? What weight should the Department give to public comments?

Concerning on-reservation acquisitions, the views of state and local governments are entitled to little weight. The United States of America always acknowledged the prior rights of Indian tribes to our own self-government and respective territories. *See* 1778 Treaty with the Delaware Nation, guaranteeing Delaware Territory. Moreover, in Territory Organic Acts, Indian rights were expressly preserved:

> "The utmost good faith shall always be observed towards the Indians. In their liberty and property, they shall never be invaded….

Northwest Ordinance (1787) and (1789). In the Kansas—Nebraska Act, the Territorial Organic Act required "rigid" and "faithful" observance of treaty rights.

In western states' enabling acts, States were required to disclaim all right, title and interest to Indian lands, and further, many western Statehood Acts acknowledge that the United States may acquire additional lands for federal purposes and that federal and federal Indian trust lands are not taxable by the states. Accordingly, when Indian tribes reacquire traditional lands, state and local governments were on notice that they had no right, title or interest in those lands when the state was admitted to the Union.

Additionally, the IRA authorizes Indian nations and tribes to negotiate with state and local governments as a matter of self-government. The term negotiation indicates that state-tribal agreements should be *voluntary*, the federal government should not try to force such negotiations or establish the parameters because that would make such negotiations more difficult and would violate the federal government's treaty and trust responsibility to protect Indian nations and tribes. As the Supreme Court said in *Montana v. Blackfeet Tribe,* 471 U.S. 759, 764--765 (1985), the structure of the Constitution vests the United States with plenary authority over Indian affairs vis-à-vis the states:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *see Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 414 U. S. 670 (1974) (citing *Worcester v. Georgia,* 6 Pet. 515, 31 U. S. 561 (1832)). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. In *The Kansas Indians,* 5 Wall. 737 (1867), for example, the Court ruled that lands held by Indians in common, as well as those held in severalty, were exempt from state taxation. It explained that "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State]"….

Thus, the objective of the land-into-trust program should be to carry out the goals of the IRA: 1) Promoting Indian Self-Determination and Preserving Indian Sovereignty; 2) Supporting Tribal Self-Government and the Delivery of Tribal Government Services, Including Housing, Education, Community Wellness, and Cultural Preservation; 3) Fostering Tribal Corporations, Business, and Economic Development; and 4) Restoring Indian Nation Homelands.

9. Do Memoranda of Understand (MOUs) and other similar cooperative agreements between tribes and state/local governments help facilitate improved tribal/state/local relationships in off-reservation economic developments? If MOUs help facilitate improved government-to-government relationships, should that be reflected in the off-reservation application process?

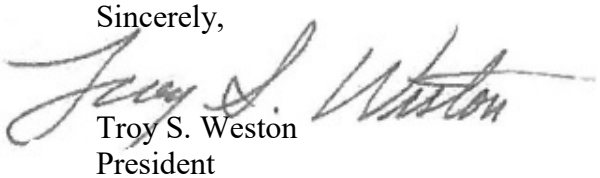
No. Under the Constitution of the United States, our treaties and the federal trust responsibility, Indian nations and tribes enjoy a government-to-government relationship with the United States. The IRA is intended to promote Indian self-determination and self-government. By

suggesting through IRA regulations that Indian nations and tribes should or must have agreements with state and local governments, the United States would abdicate its role as treaty partner with Indian nations and tribes and undercut Indian self-determination and self-government. If the regulations suggest that state and local MOUs are a factor in determining land into trust applications, the regulations will only make it harder for Indian nations and tribes to enter *voluntary* agreements with neighboring state and local governments pursuant to tribal self-government.

Conclusion: No regulatory changes are required at this time to the Department of the Interior's Land into Trust Regulations, 25 CFR Sec. 151. The Secretary of the Interior and Department of the Interior staff should prioritize and expedite Indian trust land acquisitions in order to fulfill the purposes of the IRA: 1) Promoting Indian Self-Determination and Preserving Indian Sovereignty; 2) Promoting Tribal Self-Government and the Delivery of Tribal Government Services, Including Housing, Education, Community Wellness, and Cultural Preservation; and 3) Fostering Tribal Corporations, Business, and Economic Development; and 4) Restoration of Indian Nation Homelands. The Secretary should streamline the implementation of the existing regulatory process by restoring authority to the regions to take land into trust.

Thank you for working to fulfill the Department of the Interior's treaty and trust responsibility as you implement the IRA's Indian land into trust acquisitions process, 25 CFR Sec. 151. The United States should facilitate the restoration of Indian trust lands as envisioned by Congress in the 1934 IRA, which has been repeatedly affirmed by amendment. No new regulatory burdens should be imposed on Indian nations and tribes as we seek to recover our essential homelands.

Sincerely,



Troy S. Weston
President