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SAUK-SUIATLE INDIAN TRIBES COMMENTS TO POTENTIAL REVISIONS TO THE TRUST
ACQUISITION REGULATIONS AT 25 C.F.R. PART 151
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TO CONSULTATION@BIA.GOV

The Sauk-Suiattle Indian Tribe, submits the following comments in response to the Department of the Interior's (Department) December 6, 2017 Dear Tribal Leader Letter (DTLL) proposing a broader discussion on the direction of updates to Part 151.

In general, we oppose any changes that would:

- increase burdens on applicants, including the increase of time it takes to process an application;
- authorize increased deference to state and local governments during the application process;
- invite challenges to a final determination;
- diminish the Secretary's authority or responsibility to take land into trust for Indians; or
- otherwise frustrate the land into trust process.

That being said, we appreciate the Department's willingness to withdraw its Consultation Draft included in its now-withdrawn October 4, 2017 Dear Tribal Leader Letter. We also appreciate the Department's broadened consultation on the off-reservation fee to trust process. However, we want to express our strong opposition to proposed revisions to 25 C.F.R. Part 151 (Part 151) and ask that the Department

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formally withdraw its efforts in this area, given the overwhelming opposition from tribes during consultations. As Secretary Zinke often states, tribal sovereignty ought to mean something. Accordingly, the Department's action on this issue must respect the sovereign tribal nations' opposition to this proposed regulatory review process.

We also note strong concern with Departmental statements at consultations that the rulemaking is warranted to make final land into trust decisions more defensible in litigation. There is no litigation justification for changes to Part 151. The Supreme Court and courts of appeal have unanimously and consistently upheld both the Department's authority to take land into trust for tribes and the particular decisions under the factors set forth in Part 151. In fact, the Department of Justice has repeatedly defended Interior's land into trust process, citing to the universal approval by the courts of both the statute and regulations. The consistent and clear weight of the case law demonstrates that there is no litigation justification for changes to Part 151. See *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005); *Confederated Tribes of Grand Ronde Community v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc) rev'd on other grounds sub nom. *Carcieri v. Salazar*, 555 U.S. 379, (2009); *Upstate Citizens for Equality v. U.S.*, (2nd Cir. 2016); *South Dakota v. Interior*, (8th Cir. 2007) *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, (9th Cir. 2018); *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999).

If the Department pushes forward notwithstanding the overwhelming opposition expressed by tribes nationwide, we strongly suggest that this regulatory review be suspended until the new AS-IA has had an opportunity to meet with tribes. This is particularly important since any efforts to revise such an important tool for tribal governments should be developed with full participation by the Senate confirmed AS-IA, and only after much discussion and feedback from tribes.

BACKGROUND ON THE DEPARTMENT'S LAND ACQUISITION AUTHORITY

During the "Allotment Era" initiated by passage of the Dawes Act in 1887 and continuing until the policy was discontinued in 1934, the federal government took away over 90 million acres of tribal lands guaranteed to tribes by treaties and federal law. This was over two thirds of tribal lands and, since the most productive lands were taken first, over 80% of their value. The remaining tribal lands are most often discontinuous, fractionated, and difficult to use for productive purposes such as grazing or agriculture. The effects of the Allotment Era were devastating to tribal communities, economically and socially, and the effects of allotment continue to this day.

The Allotment Era was but one such period. Similarly unjustified tribal land grabs occurred regionally throughout the late 1800's and into the Termination period in the 1950's and 1960's. Every tribe has a different history, but the theme is the same for all tribes. The United States has taken the lion's share of precious tribal land without justification.

In 1934, Congress ended the Allotment Era by passing the Indian Reorganization Act (IRA). The IRA is comprehensive legislation intended to rebuild tribal governments, tribal economies, and the tribal land base. Section 5 of the IRA provides the authority for the Secretary to acquire land in trust for the benefit of the tribes and individual Indians. One of the chief legislative sponsors of the IRA, Congressman Howard of Nebraska, in 1934 explained this federal law as follows:

The land was theirs under titles guaranteed by treaties and law; and when the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became responsible for the damage that has resulted from its faithless guardianship.

Since 1934, the BIA has maintained a very conservative policy for putting land in trust. Only 8 million acres have been returned to the tribes, most of this was unwanted submarginal lands held by the federal government. Moreover, land is removed from trust every day in Indian Country, with allotments going onto the state tax rolls. In many years, the amount of land going out of trust exceeds the amount going into trust.

As a result, the federal government has a trust duty to protect tribal lands which were never taken without tribal consent. Where land was taken, the federal government has an affirmative duty to restore tribal lands.

Given this sacred obligation, and the intentions of Congress, it is disappointing that many reservations have been restored so little.

CONTEMPORARY IMPLEMENTATION OF THE FEE TO TRUST REGULATIONS

Most land to trust transactions are not controversial. While some controversies exist, the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is necessary for consolidation of allotted lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health clinics, and land for Indian schools or other governance needs.

The land acquisition regulations at Part 151 provide a role for state and local government participation. The U.S. Solicitor General explained that the current regulations already address these very concerns. The regulations provide opportunities for all concerned parties to be heard and place an enormous burden on tribes to justify the trust land acquisition. Particularly in the off-reservation context, the regulations require a tribe to provide documentation on a wide range of matters. Although only a small percentage of acquisitions are litigated, some counties regularly challenge tribal land acquisition. This litigation increases costs and delays for tribal applicants.

The regulations provide fairness for all parties. The Congressional purpose of the IRA is to restore tribal lands. The Secretary does not do this in a vacuum, but already takes into account costs and impacts to local governments and communities. The requirements for off-reservation acquisitions are much tougher than the on-reservation standards. As the distance between the tribe's reservation and the land to be acquired increases, the Secretary gives greater scrutiny to the tribe's justification of anticipated benefits, and greater weight to state and local concerns on regulatory jurisdiction and property taxes.

The Secretary of the Interior retains the authority to reject any trust land acquisition that would harm a local government or local community. Land acquisition decisions require balancing of the benefits and costs unique to a particular location. Because of this, the regulations list general factors that the Secretary must weigh, and leave the Secretary ample discretion to reject any transaction where there are significant harmful effects.

States and tribes engage in productive, mutually agreeable approaches to land use planning. State and local governments have an opportunity to engage in constructive dialogue with tribes, taking into account the tribes' history of land loss and the most sensible and mutually agreeable options for restoring tribal lands. In most cases, a very small "tax loss" is a minimal tradeoff for the development of schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe.

10 QUESTIONS & ANSWERS

The most recent DTLL includes 10 questions for tribal comment. The questions are broad and intended to solicit suggestions and thoughts from across Indian Country on the Department's fee-to-trust process, in particular the Department's off-reservation acquisition process. We now address each of those 10 questions.

1. WHAT SHOULD THE OBJECTIVE OF THE LAND INTO TRUST PROGRAM BE? WHAT SHOULD THE DEPARTMENT BE WORKING TO ACCOMPLISH?

The Department's current land acquisition policy contemplates broad flexibility for acquiring land. 25 C.F.R. Part 151.3, Land Acquisition Policy, states land in trust applications must be approved by the Secretary and made pursuant to an authorizing act of Congress (often the act cited for acquisitions is the IRA). Further, subsection (a) of that Part addresses land acquired in trust for a tribe, and subsection (b) addresses land acquired in trust for an individual Indian.

With respect to land acquired for a tribe, the regulations list three categories of acquisitions:

- 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.

25 C.F.R. § 151.3.

In other words, off-reservation acquisitions must be made pursuant to lawful statutory authority, and where either: the tribe owns an interest in the land; or the Secretary determines the land acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." Id. at (a)(2)-(3). We support this approach. It makes sense that when a tribe acquires an interest in land the Department should move swiftly when requested to acquire that interest in trust on behalf of the tribe.

Internally, the Department should work to prioritize fee to trust applications through this Administration's policies toward Indian tribes. The Department should begin by setting a goal of restoring more than 500,000 acres during this Administration. This would include providing the necessary resources and tools to the Regions, working directly with tribal applicants, and providing proper training in trust land title review to the Solicitor's Office where needed. Often times, when tribes discuss trust acquisitions, they find that different BIA Regions and Solicitors Offices will have inconsistent approaches to the regulations and NEPA requirements for instance. The Department should

strive for more uniformity, through increased staffing and training, and should also look to the Regions that process trust acquisitions most efficiently to help develop guidance and training.

2. HOW EFFECTIVELY DOES THE DEPARTMENT ADDRESS ON-RESERVATION LAND-INTO-TRUST APPLICATIONS?

The Department's on-reservation trust acquisition process is sufficient. We appreciate the consideration of contiguous lands as on-reservation acquisitions and encourage the Department to continue treating contiguous lands in that manner.

Ancestral and traditional homelands should be treated as on-reservation acquisitions. The 14 acre reservation of the Sauk-Suiattle Indian Tribe only exists because we purchased it. All of our acquisitions are necessarily off-reservation acquisitions which are within are ancestral homeland. Acquisitions for the Sauk-Suiattle Indian Tribe should be treated as on-reservation so long as they are within our ancestral homeland.

The review under the National Environmental Policy Act (NEPA) is perhaps one of the most costly and time-consuming facets of on-reservation acquisitions and the Department should explore ways to streamline this process, including categorical exclusions if possible. Based on the Department's long history of processing trust acquisitions, the Department should categorically exclude all on-reservation applications from NEPA. Also, where the Tribe is already approving its own leases under the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act, or otherwise under Title II of the Indian Trust Asset Reform Act (ITARA), it should be able to use its Department-approved environmental review process in lieu of federal environmental review for on-reservation trust applications as well.

Further, there should be an automatic presumption favoring acquisition of on-reservation lands, rather than a tribe needing to prove a need and purpose for the land as with respect to off-reservation acquisitions. This would rightfully favor tribal civil regulatory jurisdiction and help streamline on-reservation acquisitions.

3. UNDER WHAT CIRCUMSTANCES SHOULD THE DEPARTMENT APPROVE OR DISAPPROVE AN OFF-RESERVATION TRUST APPLICATION?

When this tribe purchases lands in its ancestral territory the application should be fast tracked for approval. This is consistent with the current regulations, as discussed above, which state that land should be acquired in trust where: (a) there is statutory authority to do so; and (b) if off-reservation, where either the tribe owns an interest in the land; or the Secretary determines the land acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3 (a)(2)-(3).

In addition, the presentation of a well-supported economic development plan that details how revenue generated from that plan will help supplement dwindling federal resources, the Department should act expeditiously to approve such acquisitions even if the distance of the acquisition is far from the tribe's reservation or homelands. This approach is already codified in the regulations but warrants mention here.

Further, it goes without saying that where the Tribe and the state and local governments collectively support the acquisition, it should be fast tracked for approval.

4. WHAT CRITERIA SHOULD THE DEPARTMENT CONSIDER WHEN APPROVING OR DISAPPROVING AN OFF-RESERVATION TRUST APPLICATION?

The Department should continue to use the same criteria for consistency purposes. The existing regulations have been in place for some time now, they work, and the Regions and tribes have grown comfortable with their processes and requirements.

In short, tribes do not need additional changes to an already complicated system unless those changes are truly going to advance trust acquisitions quickly and more efficiently. If the Department insists on pushing forward despite universal tribal opposition, we offer the following suggestions for the Department to consider through updates to the BIA's Fee to Trust Handbook and not through regulatory changes.

a. The Department Should Take into Consideration Historical Circumstances of Applicant Tribes

The Department should consider the historical circumstances of the applicant tribe. The Department should be well aware of these histories and circumstances when processing trust applications. We have had to look to non-contiguous lands, planning to establish businesses in proximity of our current reservation, which are entirely within our homeland, but subject to "off-reservation" acquisition burdens.

b. The Department Should Continue to Consider the Unique Issues Facing Land Locked Tribes with Little or No Options for On-Reservation or Contiguous Land Acquisitions, and Tribes with No Formal Reservation

The Sauk-Suiattle Indian Tribe has had to purchase every parcel that it now holds. The tribe had to purchase the fourteen acres wherein much of our tribal programs and housing are physically located. Every new acquisition is treated as off-reservation. As a result, we have scattered trust lands and we work with two different counties where their trust lands are located. Tribes without reservations because of historical circumstances should not be penalized in the fee-to-trust process. Indeed, a primary purpose of the IRA was to ameliorate the harms of prior policies by restoring homelands to landless tribes.

c. The Department Should Continue to Consider Tribal Economic Development & Geographical Challenges

The Tribe is limited with respect to where to build and in regards to climate change. In that regard, the Tribe looks for land that is not situated in a flood plain, or other similar danger zone, and that necessitates the purchase of off-reservation land. Tribal housing and vital government programs are at this point located in a floodplain.

The Department's earlier approach to this effort (See DTLL from 10.4.2017) seems based in an assumption that current on-reservation lands are enough for tribes, and that the need for off-reservation lands are limited. Off-reservation land acquisitions are a bona fide necessity for the Sauk-Suiattle Indian Tribe. The Department has a trust responsibility to assist our tribe and others in meeting our governance needs, which includes addressing current on and off reservation land needs.

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 purposes (for example Tribal government buildings, or Tribal healthcare, or Tribal housing)?
- b. Whether the application is for gaming purposes as distinguished from other (non-gaming) economic development?
- c. Whether the application involves no change in use?

No. The criteria for off-reservation applications should not be changed. With respect to 3 (a), (b), and (c) we submit that these questions are largely NEPA questions. The NEPA analysis must analyze the proposed use and determine whether there are any significant effects to the human environment which would affect Interior's decision to acquire the land in trust status. That being said, the NEPA analysis for (a) and (b) are sometimes time-consuming and inject uncertainty that discourages investment in Indian country.. However, depending on the land use at the time of the request for trust status, (c) could often qualify for categorical exclusions thereby reducing the costs associated with NEPA compliance and significantly speeding up the acquisition process.

However, if Interior is considering changes to this framework, it should strike the current language at 25 C.F.R. § 151.11(b) and replace it with explicit language that states that "as the intended economic benefits of the acquisition to the Tribe increase, the Secretary will give lesser weight to concerns raised pursuant to paragraph (d) of this section." This would be consistent with Interior's trust relationship to Indian tribes, BIA's policy of promoting greater economic sufficiency for Tribes, and the congressional intent of the Indian Reorganization Act. Further, as Tribes are growing their citizenry, the federal budget supporting Indian Affairs has remained relatively stagnant. For this reason, Interior should strongly support any efforts to bolster tribal economies, including championing trust acquisitions, both on-reservation and off-reservation, that help tribal economies.

Also, in consideration of Interior's trust responsibility to Tribes, and the BIA's policy toward promoting self-determination and strong tribal economies, Interior should never deter from its policy of promoting stronger economies of tribes under any circumstances. By stating that as the distance of an acquisition from a Tribe's homeland increases, its economic justification for the project will face more scrutiny and second-guessing, Interior creates a framework where tribal economic development projects become arguably less relevant as the distance increases from their homelands. Sometimes, for instance, a tribe may receive lands through gift or donation, which are situated further from the tribe's reservation than usual off-reservation acquisitions, but still present great economic opportunities for the tribe. In these instances, the tribe's proposed land use should not be any less relevant if it helps to supplement dwindling federal resources in any way.

6. WHAT ARE THE ADVANTAGES/DISADVANTAGES OF OPERATING ON LAND THAT IS IN TRUST VERSUS LAND THAT IS OWNED IN FEE?

This question is not helpful to the Department's understanding of this issue. It seems to conflate a tribal lands issue that is outside the scope of the Part 151 process. For this reason, we do not address this question.

7. SHOULD PENDING APPLICATIONS BE SUBJECT TO NEW REVISIONS IF/WHEN THEY ARE FINALIZED?

No, but we should be given the option to proceed under any new revisions if we wish. We have already placed significant effort, time, money and other contributions into existing applications submitted under the current regulations and thus should not be expected to begin anew under future revisions.

8. HOW SHOULD THE DEPARTMENT RECOGNIZE AND BALANCE THE CONCERNS OF STATE AND LOCAL JURISDICTIONS? WHAT WEIGHT SHOULD THE DEPARTMENT GIVE TO PUBLIC COMMENTS?

First, we note that the IRA does not require that the Secretary balance the concerns of state and local jurisdictions. However, with respect to this question, we feel the current regulations adequately address the concerns of state and local jurisdictions, and the concerns of the public as well. It would be a serious mistake to afford increased input to state and local jurisdictions and the public with respect to tribal trust acquisitions.

Current regulations already require Interior to actively engage with state and local governments to solicit comments on a trust acquisition's potential impact on their respective regulatory jurisdiction; real property taxes and special assessments. 25 C.F.R. § 151.11(d). This process is sufficient to address pertinent concerns by state and local governments, and also to adequately address the interests of the citizens which they represent. In addition, any necessary environmental review under NEPA is subject to public comment and such comments are subject to meaningful consideration by Interior.

Further, tribes expressed concern that state and local governments, if afforded increased input in the process, would not act in good faith. In most instances, tribes have purchased valid legal title to the land from a willing seller and should not be hamstrung from asserting full regulatory authority over the land if the applicant tribe deems it in its best interest to do so.

9. DO MEMORANDA OF UNDERSTANDING (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?

MOUs are the prerogative of the sovereign entities involved, and to require a showing of an MOU would be paternalistic and potentially creates an effective veto for state and local governments over trust acquisitions. Any mention of MOUs in the Part 151 regulations will be seized upon by those opposed to trust acquisitions and will lead to administrative and court challenges which may not bode well for tribes.

10. WHAT RECOMMENDATIONS WOULD YOU MAKE TO STREAMLINE/IMPROVE THE LAND-INTO-TRUST PROGRAM?

The April 2017 Departmental memorandum removing off-reservation land acquisitions from the BIA Regions and transferring those decisions to Central Office should be rescinded. The local BIA Realty offices know their tribes the best, as well as the surrounding communities. For this reason, it makes the most sense to allow the Region to continue to process such applications. In this manner, Department headquarters can focus its efforts on the small number of acquisitions that are out of the ordinary, or otherwise controversial in nature.

The Department should refrain from making any changes to the current Carcieri M-opinion. While the M-opinion adds an additional layer of review for certain applications, it is a necessary tool in light of the Carcieri opinion and is a good example of how the Department can actively engage with tribes to fulfill the trust responsibility.

The Department should not reinstate the 30-day stay period between when a decision is made to acquire land in trust and when the Department actually acquires the land in trust. As stated repeatedly across Indian Country, this policy frustrates tribal interests by encouraging often frivolous challenges to trust acquisitions that take years to resolve, all the while keeping the land out of trust and subjecting the tribe to state and local taxes throughout the duration of the challenge

The Department should consider adding an additional CATEX to its Land Conveyance and Other Transfers CATEX list, which would address instances where the intended land use is for conservation purposes. In other words, the purpose would be to manage the land to preserve its historic significance, which typically includes conservation of native flora and fauna. The existing CATEX “where no change in land use is planned” may not reach far enough to address instances where tribes need to actively manage land for conservation purposes, and where they previously did not undertake such management. Such use would arguably be a “change in land use” and therefore fall outside the scope of existing CATEXs. For this reason, NCAI supports a new CATEX for land conveyances where the land would be used for conservation purposes. This could include sacred sites protection and cultural preservation as well.

Also, BIA may consider adding a CATEX for instances where the tribe’s development plans have been approved by local zoning jurisdictions as consistent with surrounding land use criteria. If a tribe seeks to develop its land in a similar or like manner as surrounding businesses or landowners, federal environmental review should encourage the tribe’s efforts to work with local regulatory bodies. Further, in such instances, federal environmental review should not work to frustrate tribal development plans. In addition, the BIA may consider adding a CATEX for instances where there would be “minimal change in land use, such that the impacts on the human environment would not be significant or otherwise adverse.” For instance, if a tribe acquires land which had already historically been used as a hiking trail and valued for its scenic beauty—yet poorly managed, and the tribe intends to improve trails and trail markings, increase accessibility and use, and otherwise improve the conditions of the acquisition.

Next, gaming considerations do not belong within the fee to trust regulations. The Indian Gaming Regulatory Act, at Section 2719(c), states “Nothing in this section shall effect or diminish the authority and responsibility of the Secretary to take land into trust.” Any addition of gaming considerations into the fee to trust regulations at Part 151 would amount to a violation of this provision of IGRA.

Also, it was noted in the Listening Session at NCAI’s Annual Conference in Milwaukee, WI that Alaska is home to over 200 tribes, which collectively hold approximately 1 million acres of land in fee status. However, the Department, to date, has failed to consult in or near Alaska on this issue. It is important that the Department engage with Alaska Native tribes to understand their unique needs and help facilitate many future trust acquisitions for tribes north of the lower 48 states.

CONCLUSION

We ask that the Department place this exercise on pause until the new AS-IA has had the opportunity to consult with tribes, and has developed her own initiatives for Indian Affairs. Finally, if the Department pushes forward despite the broad objections from Indian country, we request further consultation before the Department moves forward and we recommend that any suggestions herein or otherwise be developed as internal guidance – perhaps as updates to the already existing BIA Fee to Trust Handbook, instead of through regulatory revisions. We thank you again for your consideration and please feel free to contact me at Benjamin Joseph, Chairman, Sauk-Suiattle Indian Tribe at (360) 436-0131 or chairman@sauk-suiattle.com with any questions or thoughts.