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Sent via e-mail to consultation@BIA.gov

Attn: Fee-To-Trust Consultation
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary - Indian Affairs
1849 C Street NW, Mail Stop 4660-MIB
Washington, DC 20240

RE: Forest County Potawatomi Community Response to Request for Consultation on Potential Part 151 Revisions

Dear Sir or Madam:

The following comments are submitted on behalf of the Forest County Potawatomi Community of Wisconsin (the "Community") in response to the request for consultation regarding 25 C.F.R. Part 151 first issued on October 4, 2017 and as later supplemented in the Dear Tribal Leader letter dated December 6, 2017 issued by the U.S. Department of the Interior (the "Department"). Principal Deputy Assistant Secretary John Tahsuda and staff held an initial listening session on October 16, 2017 in Milwaukee, Wisconsin. After concluding the listening session, the Department issued a Dear Tribal Leader letter dated December 6, 2017 requesting consultation on possible directions for updating 25 C.F.R. Part 151 which establishes the standards and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes (the "fee-to-trust process").

Background of Forest County Potawatomi Community

The Community has considerable experience and interest in the fee-to-trust process under the Indian Reorganization Act. 25 U.S.C. § 465. As the Department is well aware, the Community has actively participated in the development of federal policy and practice regarding the acquisition of land for gaming purposes for the past twenty years. What may be less well known to officials of the Department is the importance to the Community of the fee-to-trust process for non-gaming purposes.

The Potawatomi Nation was a party to over 40 treaties with the United States. The last treaty (Chicago Treaty of 1833) was particularly damaging to the Community. Under the terms of the treaty, the Potawatomi were to be relocated to Kansas, hundreds of miles from their

homeland around the Great Lakes. While some Potawatomi were relocated to Kansas, many refused. Instead, many Potawatomi families traveled hundreds of miles north to northern Wisconsin. These northern Wisconsin lands were not suitable for growing crops, and the winters were very harsh – long and cold. The Potawatomi basically squatted on these undesirable heavily wooded lands, presumably away from the fray of western expansion, for eighty years or so.

In 1913, with the help of Reverend Eric Morstad and Senator Lafollette, Congress appropriated funds from the Chicago Treaty of 1833 to purchase lands for the Wisconsin Potawatomi. However, the Act of 1913 also included a stipulation that the lands could not be larger than a section and that no sections could adjoin. As a result, 11,786 acres of scattered lands were purchased from logging companies who had already stripped those lands of valuable timber.

One hundred years later, the Community's land base remains scattered, with many parcels landlocked. Over the past thirty years or so, the Community has acquired additional lands to help consolidate the scattered parcels, to provide access to roads, to protect cultural and historic sites, or for business purposes.

The Community understands the importance of protecting the Indian Reorganization Act which allows the Secretary to acquire lands in trust to build a consolidated tribal homeland out of scattered trust parcels. The United States also acquired two parcels in Milwaukee in trust for the Community. This land is in the heart of the Community's former treaty lands – one parcel was acquired for gaming and one parcel for government and economic development purposes. Finally, the Community has participated as a nearby tribe in an application by another tribe for a Secretarial Determination for gaming. These comments are informed by the Community's experience in all of these trust land transactions.

Forest County Potawatomi Community Testimony on October 16, 2017

Chairman Harold "Gus" Frank, Forest County Potawatomi Community, testified as Chairman at the October 16, 2017 listening session regarding the October 4, 2017 draft revisions to the fee-to-trust regulations at 25 C.F.R. Part 151. This listening session was held in Milwaukee, within the former Indian lands of the Potawatomi. Chairman Frank described the substantive off-reservation gaming policy followed by the Community for nearly 20 years. He also explained the inherent risk of adopting an aggressive application of the Indian Reorganization Act's authority to acquire land in trust by seeking to include tribal economic development projects that were not tied to a tribe's history on the land and located at a long distance from a tribal homeland. The Community, as expressed by Chairman Frank, urged the Department to use its authority under the Indian Reorganization Act judiciously. For that reason, the Community urged that Part 151 be revised to require an applicant to demonstrate a direct aboriginal or historical connection to the land, or for those tribes whose reservations are themselves outside of their historical area, require that land acquired in trust be in close proximity to the tribe's current homeland. The Community also urged amendments to Part 151 that would give meaningful consideration to the impacts of a

proposed economic development, including gaming, on nearby tribes. We have attached and incorporate the testimony of Chairman Frank in these comments.

The April 6, 2017 Memorandum Regarding Delegated Authority For Off-Reservation Fee-to-Trust Decisions Should be Clarified

On April 6, 2017, Acting Assistant Secretary-Indian Affairs delegated authority for acquisitions of off-reservation land into trust under 25 C.F.R. § 151.11 to the Acting Assistant Secretary – Indian Affairs. In addition, the delegated authority for off-reservation land into trust for gaming would thereafter lie with the Acting Deputy Secretary for the Department of Interior. While this directive did not literally impose a moratorium on off-reservation fee-to-trust applications, based on the experience of the Community and reports from other tribes, it appears that the field offices of the Bureau of Indian Affairs have implemented a defacto moratorium on off-reservation fee-to-trust applications. The Community urges the Department to immediately announce in writing that fee-to-trust applications should be processed under normal order. We also urge the Acting Assistant Secretary and the Deputy Secretary to act on any "decision ready" off-reservation fee-to-trust applications. Finally, we request that the Department consider returning decision making authority over non-gaming applications to the regional offices.

The Department Should Provide Sufficient Staff and Resources to Process Fee-to-Trust Applications

The Community has found that the timely processing of fee-to-trust applications is primarily dependent on the availability of staff and resources at the agency, regional and national office levels. The most important factor in the reasonable treatment of fee-to-trust applications is the availability of staff and resources. Therefore, whatever action the Department decides to take with respect to 25 C.F.R. Part 151 or the Fee-to-Trust Handbook, we urge the Department to insure that sufficient personnel and other resources at the agency, regional and national levels are devoted to the processing of fee-to-trust applications. More than any other policy action, this will help ensure reasoned and fair decisions within a reasonable period of time.

Proposal to Reinstate 30 Day Waiting Period, 25 C.F.R. § 151.12(b)

The Community submitted comments in opposition to the proposal to remove the 30 day waiting period in 25 C.F.R. § 151.12(b), which allowed an interested party to initiate judicial review before land is put in trust after a Notice of Final Agency Determination is published. The Community urges the Department to reinstate the 30-day waiting period. The 30-day waiting period was originally adopted in order to enhance the likelihood that the Supreme Court of the United States would uphold the constitutionality of the Indian Reorganization Act. The 30 day waiting period was removed in 2013 largely based on the belief that the U.S. Supreme Court decision in *Patchak* eliminated the need for the 30 day waiting period. Luckily, no adverse impacts have yet occurred, at least as far as the Community is aware, from the elimination of the 30 day

waiting period. However, the risk remains that the lack of an opportunity for judicial review caused by the absence of a waiting period will undermine the Indian Reorganization Act. In addition, there are sound practical reasons why all parties interested in a fair fee-to-trust application process should support a 30 day waiting period. A primary argument against the 30 day waiting period is that it encourages legal challenges. This is not a meaningful argument. Any party that is sufficiently motivated to file a lawsuit to challenge a fee-to-trust application with a 30 day waiting period will likely file even without a 30 day waiting period. The difference is that without a waiting period, there may not be a good reason for the party opposing the fee-to-trust application to file a complaint in a timely fashion. It is in all parties' interest, including the United States, an applicant tribe, and an opposing party, to obtain a judicial resolution of any challenges in a timely fashion. Timely pre-acquisition litigation also avoids the need for the courts and the United States to develop legal standards for cases where it will be necessary for the United States to take land out of trust. The prospect of federal courts ordering the Secretary of the Interior to take land out of trust will add harmful uncertainty to the status of Indian trust lands. Finally, the opponents of the 30 day waiting period have not provided examples where the waiting period encouraged litigation that would not otherwise have been filed even without a waiting period. The waiting period ensured the fair treatment of legal disputes and should be reinstated.

A Two-Step Process for Off-Reservation Gaming Applications Should be Codified

The proposed "two phase" process for off-reservation gaming applications included in the October 2017 Consultation Draft Part 151 Amendment was widely criticized by Indian tribes. The Community believes the proposal, with important clarifying details, would be a much improved process adding clarity and efficiency to the off-reservation gaming acquisition process. At times in the past, the BIA has, in fact, considered the Part 151 Application for off-reservation gaming acquisitions first before investing the resources needed to consider an application under 25 C.F.R. Part 292 and the Indian Gaming Regulatory Act. Establishing a practice of considering the Part 151 Application first would add clarity for all parties interested in such applications. The question in considering the Part 151 application would be, "Should this application be rejected under 25 C.F.R. Part 151?" In general that question can be answered without full National Environmental Policy Act compliance. A step one Part 151 application would end with a final agency action if the application is rejected. If, on the other hand, the Part 151 application is not rejected, the application would move to step two for consideration under 25 C.F.R. Part 292, as well as compliance with NEPA. In that instance, there would be no final agency action at the conclusion of step one, and final agency action would wait for completion of the entire application process. Adopting a Part 151 step one process would add substantial efficiency and save applicants from pursuing projects that will not be approved. Some off-reservation gaming applicants have argued that 25 U.S.C. § 2719, which governs gaming on lands acquired after 1988, does not allow for the exercise of substantial Secretarial discretion. The Secretary's discretion is, of course, very broad under 25 C.F.R. Part 151. It makes good sense to determine if the Secretary will reject a proposal at the earliest reasonable time. The initial decision in the two step process is not whether to grant or deny an application under 25 C.F.R. Part 151, but rather whether to reject the application, or

move the application to the next step. The procedural objections to a two step process are resolved by implementing a two-step process in this fashion.

25 C.F.R Part 151 Should be Amended to Add a List of Valid Grounds for Approving Off-Reservation Fee-to-Trust Applications

The Community recommends that 25 C.F.R. Part 151 be amended by adding a list of valid grounds for approving an off-reservation fee-to-trust application. The current structure of 25 C.F.R. Part 151 implies that on-reservation applications are favored and will likely be approved and, that an off-reservation application will have a more difficult time getting approved. In some circumstances, this distinction between on and off-reservation applications may make sense, but in many circumstances, it does not. Depending on the specific circumstances of a particular tribe, such as a tribe like the Community with only scattered trust land parcels, or a tribe with only a deminimus amount of land in its reservation, a compelling case can be made for the need for off-reservation acquisitions. While the on-reservation versus off-reservation standards are well entrenched, the unjustified prejudice faced by some off-reservation applications could be substantially rectified by adding a list of those situations where the Secretary would likely give an off-reservation application favorable treatment, akin to the treatment of an on-reservation application. The Community proposes that a list of presumed valid grounds for acquiring off-reservation land should be added to 25 C.F.R. § 151.11. The list should include:

1. Lands within close proximity to an existing tribal homeland (lands on or near existing reservations).

2. Lands within an Indian land consolidation area approved by the Secretary. 25 U.S.C. § 2203. Developing an Indian land consolidation area could alleviate the need for a costly case by case showing of need for every parcel within the consolidation area. An Indian land consolidation area also provides notice to surrounding communities and landowners that fee lands within the Indian land consolidation area may be acquired in trust in the future.

3. Lands within a former reservation or treaty land.

4. The former historic Indian lands of a tribe.

5. A land parcel with unique religious, cultural, or historic value to the tribe.

6. Lands necessary to create or consolidate a tribal homeland.

Conclusion

The Community appreciates the interest of the Department in improving the fee-to-trust process and requests that you give serious consideration to these comments.

Very truly yours,

Eric Dahlstrom
Attorney at Law

Testimony of Harold "Gus" Frank

Chairman, Forest County Potawatomi Community

To the United States Department of the Interior, Listening Session Regarding

October 4, 2017 Draft Revisions to the Fee-to-Trust Regulations at 25 C.F.R. Part 151

Milwaukee, Wisconsin

October 16, 2017

Good morning. I am Harold Frank, Chairman of Forest County Potawatomi Community (Potawatomi). Thank you for the opportunity to comment on the proposal to improve the Fee-To-Trust Regulations.

This is a uniquely appropriate time and place for Potawatomi to offer its views on this important matter. The Department of the Interior is conducting this listening session on the former Indian lands of the Potawatomi. When the French arrived here on the shores of Lake Michigan, they found many Potawatomi villages. Seven generations ago, within a stone's throw of today's listening session there was a former Potawatomi village and burial ground. Just across the river our ponies flourished off the land as they grazed in a dry meadow. About a mile from here was a Potawatomi village frequented by players of the moccasin game and heavy gamblers. This, of course, was prior to the passage of the Indian Gaming Regulatory Act (IGRA).

These lands were eventually ceded to the United States by Potawatomi in the Treaty of Chicago.

Years later, under the authority of the Indian Reorganization Act (IRA), the Secretary re-acquired two parcels of former tribal lands in trust for Potawatomi, including the former Concordia College Campus, where we now house tribal governmental offices and our Potawatomi Business Development Corporation. The second parcel is less than two miles from here in Menomonee Valley where we operate the Potawatomi Hotel and Casino. Shuttles are available for anyone interested in visiting our beautiful facilities. For a generation we have developed this land and surrounding area for our tribe and to benefit our friends and neighbors, including the city and county of Milwaukee.

Potawatomi has long urged the BIA to adopt substantive standards that it will follow in approving or rejecting off-reservation gaming applications. In fact, the Potawatomi have had their own off-reservation gaming policy in place since 1999. This off-reservation gaming policy provides substantive criteria and allows the Tribe to support gaming proposals that are consistent with the criteria, and oppose proposals that are not consistent with the criteria. The Potawatomi off-reservation gaming policy states that the Tribe will support a new off-reservation casino expansion if the proposal can demonstrate that:

1. *The new off-reservation Indian casino is not simply a front for non-Indian promoters.*

2. *The new off-reservation casino will result in an overall improvement in the tribal communities of Wisconsin (not one tribe benefiting at the cost of another).*

3. *The new off-reservation casino will be located on former tribal lands or lands within a new reservation created for that tribe.*

Potawatomi appreciates that the Secretary's authority to re-acquire former Indian lands under the IRA is precious. Congress passed the IRA to give the Secretary the power to re-acquire former tribal lands lost during the allotment era and to create new reservations for landless Indians. This is now referred to as "building a tribal homeland". Many foes of Indian tribes would like to repeal or severely restrict the authority of the Secretary under the Indian Reorganization Act.

If the Secretary uses this authority for purposes not clearly supported by the historical practice of the Secretary, the Secretary will put at risk his duty of restoring former tribal lands and building viable homelands. For this reason, we urge the Secretary in the development of its rules, policies, and practices to use his authority under the IRA judiciously so as not to put at risk this important statutory authority.

Some tribes will make a case that the IRA should be used aggressively as a tool for commercial development. Those tribes argue that the tribe's history on the land and the distance of the land from its current homeland does not matter. We urge the Secretary to reject such arguments. Those business ventures should be encouraged and supported, but not with Section 5 of the IRA.

Potawatomi urges the Assistant Secretary to include in its revisions to Part 151 substantive standards, including a requirement that the applicant demonstrate a direct aboriginal or historical connection to the land, or for Tribes whose reservations are outside of their historical area, require that the land be in close proximity to the Tribe's current homeland.

In addition, Part 151 should protect the rights of nearby, impacted tribes. Impacted tribes should be included as interested parties who are allowed to formally participate in the application process. Consultation with impacted parties should include Indian tribes and non-Indian local communities. Our experience demonstrates that the Department of Interior has a very bad track record of consulting with the surrounding community. Indian gaming facilities affect a wider area than just the local government with jurisdiction over the proposed casino site. They can directly affect the government obligations and revenue of tribes and other governments in the area. All impacted parties should have an opportunity to consult.

Additionally, it is important that the Assistant Secretary adopt specific procedures to ensure an open, on the record, process for handling applications. Part 151 should provide party status for all affected parties and require that every party provide other parties copies of all submissions and communication with the BIA. The written submissions should be maintained on a public docket available on the Internet. Our experience has been that BIA grants the applicant ex-parte status with special access to the decision maker while at the same time making it very difficult for other tribes, state, and local governments to participate in the decision making. Applicant tribes may believe that this ex-parte practice works to their advantage. However, in the long run, the credibility of the process and the integrity of the decision making will be enhanced if it is transparent and open to all affected parties.

Potawatomi supports the 2-step process approach suggested in the draft revisions. We have learned first-hand that requiring all parties to fund a full-scale application can be very time

consuming and expensive. The 2-step process may require additional procedural clarification, but in concept, it will benefit tribes and save valuable resources.

Finally, Potawatomi strongly supports the reinstatement of the 30-day waiting period between a land-in-trust decision by the Assistant Secretary and the actual acquisition. Potawatomi submitted comments in opposition to that change when it was proposed because it seemed likely to create procedural problems, unfairly prejudice tribes and other entities wishing to challenge a fee-to-trust decision, and ultimately would undermine the integrity of the trust status of land. The rule change adopted in 2013 devalues trust status by forcing the government to claim that the Secretary can put land in trust and take it out of trust, arbitrarily. We believe that trust land status should be viewed by the United States with a high level of seriousness. The reinstatement of the waiting period, in our opinion, enhances the permanency of trust status.

We appreciate the work that the Assistant Secretary and his staff have invested in the detailed proposals, analysis, and explanations for the draft amendments to Part 151. Potawatomi will assist in this effort in any way that the Department of Interior feels would be useful. In addition to this prepared testimony, we intend to submit more detailed comments which expand further on these topics. Thank you again for the opportunity to comment on this important issue.