Prairie Band Potawatomi Nation
Government Center

June 30, 2018

Tara Sweeney
Assistant Secretary-Indian Affairs
Department of the Interior
1849 C Street, NW, MS-4141
Washington, D.C. 20240
Attn: Ms. Elizabeth Appel
Via email: consultation@bia.gov

Re: Comments for the Land-Into-Trust Consultation

Dear Assistant Secretary Tara Sweeney:

I am writing on behalf of the Prairie Band Potawatomi Nation (the "Nation" or "Tribe") to submit comments in response to the Department of the Interior's (DOI's) December 6, 2017, Dear Tribal Leader Letter ("December 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").

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 because tribes are allowed the ability to decide how to use their lands: for economic development purposes or governmental and community purposes, such as housing, health care facilities, schools, or other community development and 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 Prairie Band Potawatomi Nation is a federally recognized Indian tribe comprised of approximately 4,617 citizens. Our Nation's principal reservation is in Kansas, consisting of about 77,440 acres and home to about 790 tribal citizens. We also have a 1280 acre reservation

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

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in Illinois. Our Nation is governed by an elected Tribal Council and we have 29 government departments with programs that serve our tribal citizens and in many cases non-members. Our Nation's programs are funded through a variety of sources, including federal contracts and grants, state grants and tribal revenues, which are responsible for approximately seventy percent (70%) of our governmental budget.

The Nation entered into a series of treaties with the United States of America. 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. Our Nation is a major employer in Jackson County, Kansas. We employ tribal members as well as nontribal members living in the area. Our tribal businesses generate economic development on the reservation and throughout Jackson County and northeast Kansas. We can, however, do more in terms of providing for our members and being an economic generator for ourselves and our neighbors. The ability to acquire land-into-trust is a significant tool toward meeting this objective. Further advances will require more land being placed in trust. With this backdrop, I set forth our comments in response to the DOI's December 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 opposed the DOI's proposed revisions to the land-into-trust regulations and the process DOI used to develop them. Giving heed to initial tribal opposition, DOI revised its consultation process as announced in its December 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. However, to ensure a truly renewed Part 151 consultation process, the DOI should formally withdraw the October Letter. 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. We ask that DOI fully withdraw the October Letter to achieve an authentic policy discussion.

B. Comments on DOI's December Letter

In its December Letter, the DOI asked a series of questions to prompt tribal comments. 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 in 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 different statutes. The DOI uses the Part 151 process to administer tribal requests for the Secretary to place land into trust on behalf of a particular tribe under the 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.

It is very concerning to us 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 strength and recovery. These are 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 from some of the most impoverished, remote, and underserved populations in the country. The placement of land into 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 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:
>
> > "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.

Representative Howard explained that:

> "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:

> 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.[2] No statutory authority or court opinion has changed the long-standing objective of the IRA.

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

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[2] *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).

underserved populations in the United States. Tribes' ability to place land into trust has been a critical tool for us to govern and use our lands for the benefit of our members, which often results in benefits for our neighbors as well.

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 her 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, as directed by these statutes, should be to promote tribal self-determination, self-governance and self-sufficiency. The DOI should also be working to accomplish the fulfillment of its treaty obligations and trust responsibility to tribes. In fulfilling these various obligations, DOI should work 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 more efficient.

All aspects of the land-into-trust process could be 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. 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 make the final decision and a timeframe for making the final decision on an application. 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 DOI's bias against gaming applications is concerning.

The DOI is biased against land-into-trust applications for gaming purposes, especially those involving "off-reservation" land. This is evidenced by the DOI's October Letter and its Draft Revisions to Part 151, which would make it more burdensome for tribes to acquire trust lands for gaming purposes. The bias is also evident in the questions DOI poses in its December Letter. Such bias is very concerning to us.

The notion that "economic development" applications should be separated from "non-economic development" applications is directly in contrast with the purpose of the IRA. "The intent and purpose of the Reorganization Act is '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 should be rectified. The DOI should not engage in the politics and rhetoric around gaming applications. Rather, DOI should simply process these applications uniformly and efficiently in compliance with the statutory requirements of the IRA or other authorizing statutes

as intended by Congress. If 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.

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. 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. Further, the text 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." 25 U.S.C. §2719(c). 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. 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 DOI. 78 Cong.Rec. 11125. Today, tribes are more capable than ever to make those types of informed decisions and, thus, the DOI should defer to tribal expertise and process trust applications efficiently without concern over purpose.

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

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. We, as a Nation, have always strived to be good neighbors to our neighbor governments. It is simply good governance for neighboring governments 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. These agreements are often done outside of the trust land application process and sometimes they are reached during the NEPA review portion of the land-into-trust process to mitigate traffic or other concerns.[3] Importantly, 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 having to acquiesce to the demands of the other jurisdiction or not grow its land base, which could be used for a variety of purposes both economic and non-economic. Such a requirement could essentially give state and local

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

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.

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 once those 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 procedural revisions that would make the process more efficient should apply to pending applications, but higher substantive standards should not.

We oppose any revisions to the Part 151 process unless such revisions make the process easier for tribes to take land into trust and work toward fulfilling the purposes of the IRA. If DOI makes any revisions to the land-into-trust process, such revisions should be to make the process more streamlined and efficient for tribes. If the DOI ultimately implements any such revisions then pending applications should benefit from such changes. However, if the DOI ultimately implements revisions that make the process more burdensome for tribal applicants, such as those set forth in the October Letter, which we strongly oppose, then those revisions should not apply to pending applications. Applying such revisions to pending applications would amount to changing the rules and pushing the goalposts further away for tribes already in the process. This would be unfair to those tribes who have diligently followed current law when submitting their applications. It would also result in unnecessary significant costs to those tribes who would need to revise their applications and start anew in the process. This would directly contradict DOI's stated goal as set forth in its October Letter.

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, resulting in the deprivation 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 to place a parcel of land into trust, then the Department should respect that tribe's decision and process the application with all due deliberation – no matter where the parcel is located.

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 that 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. As you consider your next step on this important issue, we strongly urge you to 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.

Sincerely,

Liana Onnen

Liana Onnen
Chairwoman