Mary Bishop

From DOI to Sen Lisa re trust land

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 15 2014

RC 064

The Honorable Jon Tester
Chairman
Senate Committee on Indian Affairs
Washington, DC 20510

Dear Chairman Tester:

Enclosed are responses prepared by the Assistant Secretary- Indian Affairs in response to questions received following the May 7, 2014, hearing before your Committee regarding S. 1603, S. 1818, S. 2040, S. 2041 and S. 2188.

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional
and Legislative Affairs

Enclosure
cc: The Honorable John Barrasso
Vice Chairman

Sub. Mary Bishop

Q+A DOI Glen Hill 2014

Questions for the Record for The Honorable Kevin Washburn
Submitted by Senator Lisa Murkowski
U.S. Senate Committee on Indian Affairs
Legislative Hearing on
S. 1603, S. 1818, S. 2040, S. 2041 and S. 2188
May 7, 2014

Trust Lands

1 Instead of providing land for tribes the Alaska Native Land Claims Settlement Act (ANSCA) provided over 44 million acres of land for native owned regional and village corporations, incorporated under state law. How will the rule exclude ANCSA lands from being taken into trust? What is the Secretary's opinion regarding whether this land would be considered Indian country? What authorities would the Secretary anticipate the tribe acquiring over this land?

Response: Under the proposed rule, land in Alaska would be acquired into trust only if the requirements of Section 5 of the Indian Reorganization Act and 25 C.F.R. Part 151 are met. The proposed rule does not prohibit the Department from taking ANCSA lands into trust.

The Department's position is that any land obtained in trust by the United States on behalf of a federally recognized Indian tribe is considered "Indian country" as defined in 18 U.S.C. § 1151. Accordingly, any Alaska tribe with trust land would be able to exercise its authority over such land consistent with the manner in which Indian tribes exercise authority over trust lands in the lower 48 states. We note that pursuant to Public Laws 83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country there.

see next page (easier to read)

2 Much of the land in Alaska that is currently owned by tribes and individual Alaska Natives consists of relatively small, isolated parcels and properties within existing villages. How does the Secretary anticipate administering these isolated parcels and islands within existing villages if this land were to be taken into trust? Would the Secretary consider this land to be Indian Country? What authorities would the Secretary anticipate tribes or individual Alaska Natives acquiring over this land as a result of the conversion to trust status?

Response: If the proposed rule is adopted, the Department would exercise its discretionary authority to acquire parcels of land into trust within existing villages only in accordance with the procedures enumerated in 25 C.F.R. Part 151. Petitioners must demonstrate that they fulfill all of the criteria set forth in the regulations. For instance,

see "Extreme Rubber stamping"

the Department would consider the petitioners' need for the land and the purposes for which the land will be used. The Department would likewise consider any jurisdictional problems and potential conflicts of land use, as well as whether the Bureau of Indian Affairs is equipped to discharge any additional responsibilities resulting from the trust acquisition. As stated above, the Department's position is that any land obtained in trust by the United States on behalf of a federally recognized Indian tribe is considered Indian country as defined in 18 U.S.C. § 1151. Accordingly, any Alaska tribe with trust land would be able to exercise its authority over such land consistent with the manner in which Indian tribes exercise authority over trust lands in the lower 48 states. We note that pursuant to Public Laws 83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country there.

"off Reservation"

3. In *State of Alaska v. United States*, Case NO. 4:13-cv-00008-RRB, a federal district court recently held that the state lacks the legal ability to confirm, interpret and enforce state-owned rights-of-way arising pursuant to RS2477 over Native allotments. This same decision also held that the state lacks the legal ability to condemn rights-of-way over lands allotted to Natives. How would newly-created trust land affect already existing as well as potentially needed state easements and rights-of-way?

complicating

Response: The Department's practice has been to acquire land into trust for Indian tribes subject to existing easements and rights of way. If the proposed rule is adopted, the Department would continue this practice for trust lands acquired in Alaska. Newly created easements and rights-of-way would be subject to the Department's regulations governing rights-of-way over Indian lands located at 25 C.F.R. Part 169.

2.

4. Section 17(b) of ANSCA provides for public easements across ANSCA village and regional corporation land at points along waterways and other public uses, such as recreation, hunting, transportation, utilities, and docks. Would these 17(b) easements apply across trust land in Alaska?

2.

Response: As explained above, the Department's practice has been to acquire land into trust for Indian tribes subject to existing easements and rights of way. If the proposed rule is adopted, the Department would continue this practice for trust lands acquired in Alaska.

5. If land were taken into trust in Alaska, would the Bureau of Indian Education be required to provide, or interested in providing K-12 education on these lands, or do you anticipate that the local municipal government would still run the schools with funding from the State and US Department of Education?

Response: Due to Congress's moratorium on both BIE funding elementary and secondary schools in Alaska, and the addition of new BIE-funded schools in general, State authorized public entities would continue to run schools located on trust lands with funding from the State and U.S. Department of Education. Since BIE transferred its BIE-funded schools to the State, Congress has continued to include language in the Consolidated Appropriations Acts prohibiting BIE from using any of its funding, except for the amounts provided for assistance to public schools under the Johnson O'Malley Act, to support the operation of any elementary or secondary school in the State of Alaska.

Economic Development

1. The proposed rule states that placing land into trust "advances economic development." However, several Alaska Native Corporations (ANCs) formed under Alaska Native Claims Settlement Act (ANSCA) have expressed concerns with the development of their subsurface estate being significantly slowed if the Alaska Native tribe owning the surface estate successfully petitions the Department of the Interior to take its lands into trust. How will the proposed rule generally "advance" economic development, with the many examples of prolonged generational poverty in the lower 48 reservation system of federal land ownership?

ANCSA village corp land → Tribe

Response: The proposed rule would allow tribes to protect tribal homelands so that they are not subject to loss through sale or default. Trust land, which is free from state and local taxation, often provides greater economic development opportunities than fee land. A trust land base also allows tribes to utilize economic development tools like those available under the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act and program funds that are tied to tribal lands such as energy development grants administered by our Office of Indian Energy and Economic Development. In short, tribes may be able to access more federal grant programs..

can't be used as collateral -

2. How will ANC subsurface estate development specifically be impacted by the proposed rule?

Response: The Department's practice has been to process land-into-trust applications from Indian tribes involving split estates under the regulations at 25 C.F.R. Part 151. In certain instances, the Department has acquired in trust only the surface estate on behalf of a tribe. If the proposed rule is adopted, the Department would continue this practice for applications for land into trust in Alaska. ANC subsurface estate development therefore

would not be impacted by the proposed rule. We note that the mineral estate is generally dominant and that subsurface owners would retain a right of reasonable access to minerals below any surface estate acquired into trust.

3. How will the Department resolve the surface and subsurface ownership issues if a tribe owns the surface and an ANC owns the subsurface rights and these parties are in disagreement as to development rights?

Response: As explained above, the Department's practice has been to process land-into-trust applications from Indian tribes involving split estates under the regulations at 25 C.F.R. Part 151. With respect to trust acquisitions of surface estates in Alaska, any disputes between surface and subsurface owners will likely be resolved in the same manner as they are now. Parties will still be encouraged to enter into surface use agreements in order to avoid such disputes. As noted above, the mineral estate is generally dominant and that subsurface owners would have a right of reasonable access to minerals below any surface estate acquired into trust.

find examples! what taxation of mineral by surface owners?

4. How does the Department intend to resolve a situation if a village corporation transferred lands to a tribe, and ANCSA lands are excluded from being taken into trust? Will the original ownership follow the transfer?

Response: As stated above, the proposed rule does not exclude ANCSA lands from being taken in trust. However, if ANCSA lands were excluded from trust acquisition, the tribe would retain title in fee to any land it received in the scenario presented by this question. OK

5. If land is taken into trust on behalf of Alaska tribes does the Secretary plan to provide budget support for tribal development in Alaska, including capacity building, public infrastructure, and justice systems?

Response: Before taking land into trust, the Department considers whether the Bureau of Indian Affairs is equipped to discharge any additional responsibilities resulting from a proposed trust acquisition. If the proposed rule is implemented, the Department will seek to support tribal development in Alaska without decreasing resources available to other tribes.

6. How will regional tribal organizations that currently administer BIA and IHS services be impacted, if a tribe were to take their lands into trust?

Response: With trust lands, tribes may work with tribal organizations to provide governmental services, such as health care, education, housing, jobs, economic

development opportunities, and law enforcement services to their citizens. Tribes and regional tribal organizations would continue to work to provide services to tribal citizens effectively.

Supreme Court's *Venetie* Ruling

The proposed rule also states that placing tribal lands into trust will provide a "physical space" where tribal governments can exercise their inherent self-governance powers, because presumably tribal trust land qualifies as "Indian country." However, the U.S. Supreme Court in *Alaska v. Native Village of Venetie Tribal Gov't* ruled that, with the exception of the Metlakatla Indian Community of the Annette Island Reserve, ANSCA abolished "Indian country" in Alaska.

1. How does the proposed rule affect the *Venetie* Court's ruling on Indian country in Alaska?

Response: In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the U.S. Supreme Court found that ANCSA lands conveyed in fee to an Alaska Native village from two Alaska Native corporations were not "Indian Country." The Department believes that the proposed rule, if adopted, does not conflict with or otherwise impact the Supreme Court's decision in *Venetie*. It is the Department's position that once any land is acquired in trust by the United States on behalf of a federally recognized Indian tribe, the land is considered Indian country.

2. If, assuming the proposed rule establishes "Indian country" in Alaska, what will tribal civil and criminal jurisdiction entail for members and non-members in terms of regulation and adjudication?

Response: If the proposed rule is adopted, tribal civil and criminal jurisdiction over any Indian country in Alaska would remain consistent with the way in which tribal jurisdiction is exercised in Indian country throughout the rest of the United States. The Department acknowledges that pursuant to Public Laws 83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country in Alaska.

3. What does the Secretary anticipate will be the impact of trust land on the State's ongoing efforts to address alcohol abuse, domestic violence, sexual assault and alcohol-related crimes, enhance local law enforcement, develop collaborative criminal justice programs, and improve rural education?

Response: The Department has received a number of comments on the proposed rule that the creation of trust land in Alaska will have lasting positive effects on the lives of

Alaska Natives. We note that the Indian Law and Order Commission, formed by Congress to investigate criminal justice systems in Indian Country, expressly highlighted the unacceptable state of public safety for Alaska Natives, especially for Native women who suffer inordinately high rates of domestic abuse, sexual violence and other offenses. *See* Indian Law and Order Commission, "A Roadmap For Making Native America Safer: Report to the President and Congress of the United States," at 33-34 (November 2013). Accordingly, the Commission recommended providing for the creation of Indian country in Alaska and allowing tribally owned fee lands to be placed in trust for Alaska Natives. *See id.* at 51-55. Similarly, the Secretarial Commission on Indian Trust Administration and Reform, established by former Secretary of the Interior Ken Salazar, endorsed these findings and likewise recommended allowing Alaska Native tribes to put tribally owned fee simple land into trust. "Report of the Commission on Indian Trust Administration and Reform," at 65-66 (December 2013). This report included testimony stressing the vulnerability of tribal lands in Alaska owned in fee. *See id.* at 61-65. Most recently, a Washington Post article described the deplorable crime statistics and public safety issues in Alaska Native communities. Sari Horwitz, *In Rural Villages, Little Protection for Alaska Natives,* Washington Post (Aug. 2, 2014), available at: http://www.washingtonpost.com/sf/national/2014/08/02/in-rural-villages-%E2%80%8Alittle-protection%E2%80%8A-for-alaska-natives/. Having land in trust will allow tribes and Alaska Natives to take advantage of programs and services that are already available to tribes in the lower 48. Trust lands in Alaska, in appropriate circumstances, could provide additional authority for Native governments to be stronger partners with the State of Alaska to address these problems. It may also make more federal programs available to be brought to bear on these social problems.

See AG Geraghty response to

also see news articles describing similar conditions in lower 48 reservations.

4. In the situation where tribes with former reservation lands obtained fee title to their lands, instead of participating in the land and money distributions to ANCSA corporations, what is the Secretary's opinion regarding her authority under the proposed rule to take former reservation land into trust? If taken into trust, what is the Secretary's opinion regarding whether this land would be considered Indian Country? What authorities would the Secretary anticipate the tribe acquiring over this land?

= ie Venetie + Tetlin ?

Response: If the proposed rule is adopted, the Department would have the discretion under the Part 151 regulations to take into trust former reservation lands held in fee by Alaska tribes. As stated above, the Department's position is that any land obtained in trust by the United States on behalf of a federally recognized Indian tribe is considered Indian country. Accordingly, any Alaska Native tribe with trust land would be able to exercise its authority over such land consistent with the manner in which Indian tribes exercise authority over trust lands in the Lower 48 states. Also, pursuant to Public Laws

① Venetie + Arctic Village
② Tetlin

83-280 and 85-615, Alaska State courts would generally have jurisdiction over most crimes and some civil matters occurring in Indian country in Alaska.

Land Into Trust Regulation Changes

The proposed rule further states that the Department of the Interior will retain its "full discretion" to evaluate and decide whether to approve any particular trust application under the criteria listed in 25 C.F.R. Part 151. However, the regulations governing on-reservation and off-reservation acquisitions, 25 C.F.R. § 151.10 and .11, will require extensive revision in light of the proposed rule.

what are some anticipated revisions?

on + off reservation

1. How will the Department ensure that the Alaska Native community, including tribes and ANCs, plays an active role in the revision of these regulations?

Response: The Department provided a 90-day public comment period for the proposed rule that ended on July 31, 2014, and has received comments on its proposed rule from the Alaska Native community. The Department also conducted a tribal consultation session in Alaska, where it heard verbally from numerous members of the Alaska Native community. Before issuing any final rule or amending the regulations at 25 C.F.R. Part 151, the Department will carefully consider and respond to all comments. The Department remains committed to engaging with Alaska Native groups, including tribes and ANCs, before taking any actions that could affect them.

Leaphart on federalism

No requirement to "engage" with non-tribal or ANC entities other than state?