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September 22, 2015

Regional Director
Great Plains Regional Office
Bureau of Indian Affairs
115 4th Ave. SE, Ste. 400
Aberdeen, SD 57570

Re: *Fee to Trust - Pe' Sla approx. 2,022.66 acres, more or less*

Dear Regional Director:

Please accept and consider this letter as the State of South Dakota's opposition to the acquisition in trust of land referred to as Pe' Sla, which contains approximately 2,022.66 acres and is described as follows:

Township 1 North, Range 2 East, Black Hills Meridian, Pennington County, South Dakota

Section 12, E1/2
Section 13, N1/2NE1/4; and

Township 1 North, Range 3 East, Black Hills Meridian, Pennington County, South Dakota

Section 4, SW1/4SW1/4
Section 5, SW1/4, W1/2SE1/4, and S1/2SE1/4SE1/4
Section 7, Government Lots 1, 2, 3, E 1/2NW1/4, E1/2SW1/4, NE1/4, N1/2SE1/4, SE1/4SE1/4, including Lot A in the SE1/4NW1/4 and also in the SW1/4NE1/4 as platted in Plat Book 3, Page 40
Section 8, ALL
Section 9, W1/2NW1/4, NW1/4SW1/4,

containing 2,022.66 acres, more or less

At the outset, it is important to make clear that the State is confident that by filing this opposition, the Tribes and their members will not be kept from utilizing Pe' Sla as a sacred site. The State's comments below are based on the State's concerns with placing the property into trust status. The State believes that the Tribes can utilize Pe' Sla as a sacred site without the legal and jurisdictional issues that will arise by having the property placed into trust.

The Great Plains Regional Director does not have the authority to be the initial decision-maker on this application.

This application was sent to the Great Plains Regional Director for initial consideration. No doubt the Tribes chose the Great Plains Regional Office because three of the four Tribes are located within that region, as is Pe' Sla. But the Shakopee Mdewakanton Sioux Community is not within the Great Plains region. The Shakopee Mdewakanton Sioux Community is located in Minnesota, which is part of the Midwest Region.

The BIA website states: "Each regional office is headed by a Regional Director who is responsible for all Bureau activities within a defined geographical area except education, law enforcement, and functions of an administrative nature." As the Shakopee Mdewakanton Sioux Community is outside of the defined geographical area of the Great Plains region, it does not appear as though the Great Plains Regional Office has the jurisdiction to accept property into trust for that Tribe.

The IRA is not the proper vehicle for placing this property into trust.

The cover letter of the application to take this property into trust states: "The Rosebud Sioux Tribe, Shakopee Mdewakanton Sioux Community, Crow Creek Sioux Tribe, and Standing Rock Sioux Tribe respectfully request that the Secretary of the Interior take Pe' Sla into trust land status pursuant to 25 U.S.C. Sec 465 and restore the land to reservation status pursuant to 25 U.S.C Sec. 467." Page three of the application packet states that "trust acquisition of the subject parcels is within the intended scope of § 465 of the IRA." But the IRA does not contemplate the Department of Interior taking property into trust for the benefit of multiple tribes. The language of the relevant statutes and regulations makes it clear that the Department is authorized to take property into trust for the benefit of one singular tribe. Therefore, acquiring this property in trust for the benefit of the four Tribes would fall outside the scope of the Indian Reorganization Act, leaving no legal authority for this trust acquisition.

The code section authorizing the Secretary of Interior to take property into trust includes: "Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian[.]" 25 U.S.C. 465. The plain language of this statute uses the phrase "the Indian tribe" – a phrase that leaves no room for a plural interpretation of "tribe."

Furthermore, the definitional section of the IRA includes the following: "The term 'tribe' wherever used in this Act shall be construed to refer to **any Indian tribe,** organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. 479 (emphasis added). The clear inclusion of only a singular tribe in the definition of "tribe" supports the conclusion that the language of the IRA is not meant to include multiple tribes within the definition of tribe.

The regulations implementing this section make clear that a group of Tribes is not considered a "tribe" for which property can be taken into trust. 25 C.F.R. 151.2 defines tribe as "any Indian tribe, band nation, pueblo, community, rancheria, colony, or other group of Indians, . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs[.]" A list of those tribes that are eligible for services from the Bureau of Indian Affairs is published annually. *See* 80 Fed. Reg. 1942-48. The list of federally recognized tribes does not include an entity formed by the four Tribes that own Pe' Sla.

The Fee-to-Trust Handbook also suggests that property should only be taken into trust for one tribe. In its Introduction, the BIA's "Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)" states that the standard procedures provided with the Fee-to-Trust Handbook include the "eligibility for an individual or **tribe** to request the Secretary to take title in trust." Release #13-90, Version III (rev 4), Issued: 06/16/14, p. 3. The Handbook further instructs that in order to determine which "operating procedure" applies to an application, the BIA must determine whether "the applicant [is] **a tribe** or eligible individual Indian[.]" p. 5.

Other regulations also support the conclusion that the IRA does not provide a mechanism for a group of tribes to place property into trust. 25 C.F.R. Part 83 is entitled "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." Section 83.2 of this part provides the purpose for the regulations:

> The regulations in this part implement Federal statutes for the benefit of Indian tribes by establishing procedures and criteria for the Department to use to determine whether a petitioner is an

> Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians. A positive determination will result in Federal recognition status and the petitioner's addition to the Department's list of federally recognized Indian tribes. Federal recognition: (a) Is a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify as Indian tribes and possess a government-to-government relationship with the United States; (b) Means the tribe is entitled to the immunities and privileges available to other federally recognized Indian Tribes; (c) Means the tribe has the responsibilities, powers, limitations, and obligations of other federally recognized Indian tribes; and (d) Subjects the Indian tribe to the same authority of Congress and the United States as other federally recognized Indian tribes.

25 C.F.R. 83.2.

Section 83.4 provides who cannot be recognized under Part 83. "The Department will not acknowledge: (a) An association, organization, corporation, or entity formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community." According to the application packet, "The Tribes plan to formalize their shared ownership and joint management of Pe' Sla in a Charter of the Oceti Sakowin Ta Tispaye Pe' Sla Wowakan, which translates to 'Seven Council Fires Pe' Sla Sacred Sites Society.'" The Tribes plan to formalize their management of the property through formation of this entity sometime in the near future. Clearly then, this entity is "an association, organization, corporation, or entity of any character formed in recent times[.]" As such, the entity is not eligible for the "protection, services, and benefits of the Federal Government." Pe' Sla should not be taken into trust for the benefit of the four Tribes, operating as an entity "formed in recent times."

The prohibition on recently formed entities being able to take property into trust comports with the goals of the Indian Reorganization Act. The legal authority for this fee to trust acquisition is Section 5 of the Indian Reorganization Act, now codified at 25 U.S.C. 465. This section allows for the Secretary of the Interior to acquire property into trust "for the purpose of providing land for Indians." "The main goal of Section 5 is to reverse the precipitous decline in the economic, cultural, governmental and social well-being of Indians caused by the disastrous late nineteenth century federal policy which facilitated the breakup of reservations through 'allotment' and eventual disposal (sale) of reservation lands." *ACQUISITION OF TITLE TO LANDS IN TRUST BY THE SECRETARY OF THE INTERIOR*, October 2002. The policy behind the IRA then, is to provide land for those Indian tribes who were affected by the allotment

policy. Entities "formed in recent years" would not be included in those groups affected by the late nineteenth century allotment policy because they would not have existed during the allotment period. This includes the entity to be formed by the four Tribes requesting that Pe' Sla be taken into trust.

United States Supreme Court precedent also prevents the Secretary from accepting property into trust for this newly-formed entity. "We hold that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). An entity not yet created by the four tribes involved in this application could not have been under federal jurisdiction in 1934. Therefore, the Secretary is not authorized to take Pe' Sla into trust for the benefit of this entity.

Of course, an argument could be made that the four distinct tribes who own Pe' Sla existed during the allotment period. Among those tribes listed as federally recognized tribes are each of the four Tribes on whose behalf this application has been made. It could be argued that the IRA can be interpreted to allow for the trust acquisition, for the benefit of each individual tribe, on the basis of their percentage of ownership. But the scope of the trust responsibility created in the federal government by placing this property into trust cautions against such an interpretation. The United States Supreme Court has determined that when a statute authorizing taking property into trust for the benefit of Indians imposes no "fiduciary management duties," *United States v. Mitchell*, 463 U.S. 206, 218 (1983), a "bare trust" is established for the benefit of the tribal members. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 470 (2003).

Similar to the allotment act, the IRA contains no trust language that imposes fiduciary management duties on the United States.

> It follows, we think, that the "trust" established by section 5 of the Act imposes only a duty on the United States to hold the acquired Indian lands so as to prevent continued alienation. *Cf. Mitchell*, 445 U.S. at 543-544, 100 S.Ct. at 1354-1355 (the trust imposed by section 5 of the General Allotment Act, 25 U.S.C. s 348, was intended to prevent alienation of Indian lands and imposes no fiduciary duty to manage timber). Section 5 does not itself "unambiguously impose" a fiduciary duty on the United States to promote all assets or enterprises acquired by the Indians pursuant to the Indian Reorganization Act.

Hydaburg Co-op. Ass'n v. United States, 667 F.2d 64, 68 (Ct. Cl. 1981). Therefore, the United States would have no fiduciary obligation over the

management and control of Pe' Sla. Instead, the control of the property would be left to the newly-created entity established by the tribes. *See United States v. Mitchell*, 445 U.S. 535, 543 (1980). The newly-formed entity would be the entity for which the property is held in trust. Federal regulations and Supreme Court precedent prohibit the United States from accepting property into trust for the benefit of such an entity.

That the Tribes seek to have the property placed into trust for the benefit of the newly-formed entity (rather than the individual Tribes) is further illuminated by the second element of their request. In their application letter, the Tribes request that the Secretary take the property into trust pursuant to 25 U.S.C. 465 and "restore the land to reservation status pursuant to 25 U.S.C. sec. 467." Section 467 provides:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. 467. Pursuant to this section, the Department would either be creating a new reservation, or adding Pe' Sla to an existing reservation.

It cannot be the case that the Tribes have requested the Secretary to add Pe' Sla to one of the existing reservations set aside for the Tribes that have made this application. If that were the case, the one individual Tribe to whose existing reservation Pe' Sla would be added, would have the right of exclusive use of Pe' Sla. *See id.* That use would be determined by "enrollment or tribal membership." *Id.* The agreement between the four Tribes shows that this is obviously not the case. The property is to be utilized by members of each of the Tribes for religious and other purposes. Therefore, the Tribes must be requesting that the Secretary proclaim Pe' Sla a new reservation, presumably for the newly-formed entity consisting of the four Tribes.

The definition of Indian reservation presupposes the existence of a tribe for whom the reservation has been set aside. "Unless another definition is required by the act of Congress authorizing a particular trust acquisition, Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction[.]" 25 C.F.R. 151.2(f). Given the nature of the Tribes' instant application, the inclusion of the request to have Pe' Sla be considered a new reservation makes it clear that the Tribes' request presupposes a Tribe that has governmental jurisdiction over Pe' Sla. The application and the draft agreement attached to it make clear that

the "tribe" meant to have governmental authority over Pe' Sla is the newly created entity formed by the four existing Tribes that have made application. As noted above, federal regulation and Supreme Court precedent do not allow for the taking into trust of property owned by such newly created entities.

Furthermore, taking this property into trust would be outside the authority delegated to the Secretary. Because, by definition, an Indian reservation is "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction," proclaiming that Pe' Sla is reservation would be to create a new tribe (consisting of the members of the four applying Tribes) by the Secretary. But the Secretary is not authorized to create new Indian Tribes in this manner.

When enacting Section 103 of Public Law 103-454, Congress made the following finding: "The Congress finds that . . . (3) Indian Tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe'; or by a decision of a United States Court." Secretarial proclamation of a new reservation for the benefit of a previously-unrecognized Indian Tribe is not an appropriate means for an Indian Tribe to obtain federal recognition. A federal court has also stated that: "We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed." *United States v. State Tax Comm'n of State of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976). Taking this property into trust and proclaiming it to be reservation would be beyond the authority delegated to the Secretary.

At the end of the day, the foregoing analysis leads to one conclusion – the IRA meant what it said when it said that property could be taken into trust for **an Indian** or **a Tribe.** When, as here, the property is sought to be placed into trust for the benefit of multiple Tribes, the trust acquisition would be beyond the authority of the IRA, and without legal authority. And proclaiming Pe' Sla to be a new reservation would be to recognize a new Indian Tribe, which is also outside the Secretary's delegated authority.

The relevant criteria do not weigh in favor of taking this property into trust.

25 C.F.R. 151.9 requires that a tribe desiring to acquire land in trust set out "other information which would show that the acquisition comes within the terms of this part." In this case, the Tribes must provide information demonstrating that the requirements of 25 C.F.R. 151.10 are met in its application. As set forth below, the pending application does not fulfill the

following requirements of 25 C.F.R. 151.10. The legal authority discussion provided above is relevant to the analysis under subsection 25 C.F.R. 151.10(a).

1. The Tribe failed to assert a need for the land at issue. 151.10(b)

The Tribes have indicated that they wish to preserve Pe' Sla as a sacred site for themselves and their ancestors. The Tribes do not, however, suggest how holding the property in fee simple prohibits any such use of this property. The State is aware of the authority stating that an applicant to take property into trust need not demonstrate the need for additional property to be held in trust – just the need for additional property. But here the distance between the subject property and the nearest reservation of an applying Tribe exacerbates the potential jurisdictional concerns. And the State believes the applying Tribes should articulate their need to have the property placed into trust.

The State's concerns regarding the remaining factors exist in large part due to the distance between Pe' Sla and the applying reservations. None of those concerns exist while the property is held by the Tribes in fee and subject to State law and jurisdiction. At the same time, the Tribes have not come forward with any reason why the religious ceremonies to be performed, as well as the re-introduction of buffalo and other native species, cannot be performed while Pe' Sla is owned by the Tribes in fee simple.

2. Effects on jurisdiction.

25 C.F.R. 151.9 and 151.10(f) require that the application address "jurisdictional problems and potential conflicts of land use which may arise." The State applauds the Tribes' efforts in working with the county to develop agreements addressing many of these jurisdictional issues. The State is concerned, however, that there is at this point apparently no fully executed agreement between the parties addressing management of Pe' Sla as between the Tribes. As stated above, management of Pe' Sla will be left to the Tribes, as the federal government will hold the property in a "bare trust." Therefore, it is essential that the Tribes involved be able to work together to eliminate any potential issues. The lack of an executed agreement (when combined with the other issues addressed elsewhere in this comment letter) indicates to the State that this parcel is not yet ready to be placed into trust. Additionally, serious issues regarding criminal and civil jurisdiction exist, which issues are exacerbated by the distance of Pe' Sla from any of the existing reservations.

Regarding criminal jurisdiction, the State has been provided an agreement entered into between the Tribes and Pennington County regarding joint law enforcement. But the Pennington County Sheriff has not signed that

agreement. A South Dakota Attorney General's opinion from 1989 opines that "a joint powers law enforcement agreement must include the county sheriff to be effective and enforceable because the county sheriff is the only person who may implement the joint powers agreement." Ms. Karen A. Johnson, 1989 S.D. Op. Atty. Gen. 113 (1989). The State is concerned that without the signature of the Pennington County Sheriff, the Law Enforcement Agreement is unenforceable. Because the enforceability of the law enforcement agreement is in question, so is criminal jurisdiction once Pe' Sla is accepted into trust. Without the issue of criminal jurisdiction firmly in hand, the State is left with no choice but to request that this fee to trust application be denied until such time as this issue, as well as the other issues addressed by the State, are resolved.

The State also has serious concerns regarding civil jurisdiction on Pe' Sla should the property be taken into trust. For example, the State is concerned about a legal remedy for the victims of torts that may occur on the property. The Tribes have provided correspondence indicating that the Shakopee Mdewakanton Sioux Community maintains a comprehensive insurance policy that applies to Pe' Sla. The letter also indicates that the Shakopee Tribe has an ordinance in place waiving sovereign immunity, to the extent a claim is payable from the proceeds of an insurance policy. But the State has not seen the entire policy, and a waiver of sovereign immunity is not clear from the information reviewed by the State. And, as discussed in detail above, there are four Tribes seeking to have this property placed into trust. The State has been informed that the Rosebud Sioux Tribe maintains an insurance policy that covers Pe' Sla, but the State has not seen this policy and the manner in which sovereign immunity is addressed in the policy. The State has received nothing indicating that Standing Rock Sioux Tribe, or Crow Creek Sioux Tribe have in place an insurance policy covering Pe' Sla; or that these Tribes have waived sovereign immunity in any fashion regarding a potential tort that may occur on Pe' Sla. As with criminal jurisdiction, without the issue of civil jurisdiction adequately addressed, the State is left to oppose this fee to trust application.

3. The ability of the BIA to discharge additional duties resulting from taking this land into trust must be considered.

25 C.F.R. 151.10(g) requires the Secretary to consider whether the BIA is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." The State does not believe the BIA is equipped to handle the additional responsibilities that will stem from acquiring this property into trust. The distance between the Rosebud Agency and Pe' Sla appears to prevent timely response to any call for assistance. And the distance between the property and the Rosebud reservation will further stretch already

thin Bureau resources on the reservation. The Tribes' application does not indicate how this acquisition will trigger any additional Bureau resources.

Additionally, as discussed above, the Great Plains Regional Director does not appear to have authority over the Shakopee Mdewakanton Sioux Community. It is unclear what role the Midwest Regional Office would play in discharging any additional duties resulting from taking this property into trust.

4. Distance from the boundaries of an applying Tribes' reservation.

When application is made for acquisition of off-reservation property into trust, the Secretary is to consider additional requirements. One such requirement is found at 25 C.F.R. 151.11(b). This sub-section provides in relevant part:

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition.

In the present context, the "acquisition" mentioned in this regulation must mean the acquisition of the property into trust. The Tribes own this property in fee simple, having already acquired it through purchase. Therefore, in order to avoid rendering this language superfluous, the "acquisition" must mean the acquisition of the property into trust. But as addressed above, the Tribes have provided no "justification of anticipated benefits from the acquisition" into trust. Nowhere in their application packet do the Tribes indicate that any of the uses they intend for Pe' Sla cannot be fulfilled while the property is in fee status.

According to the Tribes' application, the Rosebud reservation is the closest reservation to Pe' Sla, 170 miles away. This distance requires the Secretary to give great scrutiny to the justification for taking this property into trust. In light of the scrutiny to be provided to the Tribes' justification for acquiring Pe' Sla into trust, when compared to the issues raised by the State in this letter, it is clear that Pe' Sla should not be placed into trust at this time.

Conclusion

Based on the above, the State respectfully requests that the Tribes' application to acquire Pe' Sla into trust be denied.

Respectfully submitted,

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MN/mn

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