Stand Up For California!
"Citizens making a difference"

www.standupca.org

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Elizabeth Appel,
Office of Regulatory Affairs and Collaborative Action,
U.S. Department of the Interior
1849 C Street, NW.
Washington D.C. 20240
consultation@bia.gov

RE: Bureau of Indian Affairs: Land Acquisitions - Appeals of Land Acquisition Decisions
Proposed Rule – 1076-AF15

Dear Ms. Appel,

Stand Up For California! is a non-profit benefit corporation that acts as a statewide community watchdog focusing on gambling issues affecting the State of California. Trust lands acquired by California's 110 tribes after 1988 are often used for gaming or ancillary projects for gaming. California in an attempt to address the many impacts of after acquired lands in fee to trust land conversions has included land use components in its tribal state gaming compacts. Additionally, the newer gaming compacts are sight specific and require mitigation agreements for off reservation impacts created by on reservation developments. However, this does not address the social, financial and legal impacts of non-gaming fee to trust acquisitions and their associated developments that create off reservation impacts.

DISCUSSION

Ostensibly the proposed rule seeks to clarify section 151.12. Nevertheless, it is apparent the rule is an end run around the U. S. Supreme Court decision in *Match-E-Be-Nash-She Wish Band of Pottawatomi Indians v. Patchak* 132 S. Ct. 2199 (2012). The proposed rule adds administrative obstacles for potential litigants contrary to the U.S. Supreme Court ruling. The rule raises U. S. Constitutional issues and private property rights by authorizing the "taking" of land into trust without judicial review of the Secretary's decision. The action of taking the land into trust prior to a judicial review compromises litigants' ability to achieve due process and a fair and impartial hearing. This proposed rule requires serious review.

Inadequate Notification and Comment Period

We have reviewed the proposed rule and have provided comment. However, we request that the comment period of 60 days be extended to 90 days or preferably, more. Citizens, local and state government as well as private industry currently involved in fee to trust transactions are now only learning of this proposed regulation and wish to comment. We especially ask for judicious consideration to an extension of the comment period so that proper comments can be submitted.

Our organization has been supportive of comprehensive reform of the fee to trust process for a number of years. We thank you for this opportunity to make comment on this proposed rule revising 25 CFR Section 151.12. Unfortunately, we view this proposed rule change as another piece-meal approach to necessary reform of the fee to trust system. This proposed rule demonstrates that the development of the current trust land system has been on a case-by-case basis, establishing weak procedures and ill-defined substantive standards.

The Bureau of Indian Affairs reasoning for this proposed rule is that *Patchak*[1] created a problem that opens the door for costly lawsuits long after tribal projects, like housing, casinos, and healthcare facilities have broken ground. Let's be clear, *Patchak* did not change the law. Rather the U. S. Supreme Court made clear that the Bureau of Indian Affairs has been misapplying the law for years. As a practical matter, it is the Bureau of Indian Affairs that has established a long standing policy to disregard the *legitimate concerns* of affected parties that has created problems. It is the Bureau of Indian Affairs failure to recognize the legitimated concerns of the non-tribal communities that has brought about costly, difficult and protracted legal challenges.

Transferring fee land into trust is a serious responsibility of the Bureau of Indian Affairs. It is a responsibility that requires decision makers to give serious consideration to the social and financial issues affecting not only tribal communities but also to non-tribal communities. Creating new trust lands for casino enterprises in the middle of "established community's" whether the proposed sight is in rural residential area or miles from existing or former Indian lands in urban or metropolitan areas exacerbates impacts on; the environment, infrastructure or lack of infrastructure, regional water supplies, air quality as well as the social-cultural, economic and political systems of states.

Responsible rulemaking requires balancing the authorities and rights of the tribal and non-tribal communities, local, state and federal government. This proposed rule does not meet this standard.

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[1] U. S. Supreme Court decision in *Match-E-Be-Nash-She Wish Band of Pottawatomi Indians v. Patchak* 132 S. Ct. 2199 (2012).

Clarification of 25 CFR 151.12 (c) and (d)

The following two changes achieve clarification.

- 151.12 (c): Decisions made by the Secretary or the Assistant. Secretary Indian Affairs are final agency actions under the Administrative Procedure Act (5 (USC 704). Affected parties may appeal directly to federal court.

- 151.12 (d) When decisions are made by BIA officials to acquire land in trust, interested parties must first exhaust all administrate remedies available (as set forth in 25 C.F.R. Part 2) before they may file an appeal in federal court.

However, this proposed rule goes further and changes the "Appeal process" that follows in each 25 CFR 151.12 (c) and (d). These changes have significant consequences on communities of non-Indians and Indians who have long lived together and are now torn apart by the Secretary's determination to acquire land in trust without the benefits of the 30 day notice of trust acquisition or the mutually beneficial self-stay provision.

Decisions Made by the Secretary or the Assistant Secretary Indian Affairs

The Bureau of Indian Affairs has long failed to recognize the interests of private citizens germane to the decision to convert fee land to trust land. The conversion of land into trust immediately affects where people live and enjoy outdoor recreation. The conversion of land into trust diminishes the local tax base impacting local services. Further, it creates complex multi-jurisdictional conflicts complicating the administration of justice and the ability of lawmakers and law enforcement officers to resolve ordinary disputes.

A citizen's only opportunity for legitimate concerns to be considered in the trust land conversion is through an "Appeal process" or "judicial review". The Bureau of Indian Affairs does invite citizens to participate in scoping hearings, accepts our comments *but is under no obligation to read or consider the comments*. ***The proposed changes to 151.12 do not cure this problem.***

If it is truly the goal of the Assistant Secretary to eliminate lawsuits, the Assistant Secretary must amend 25 CFR 151.10 and 25 CFR 151.11 to reflect the standards for review available under the Administrative Procedures Act. ***Serious consideration of comment from all affected parties is a responsible and accountable action and gives integrity to the decision making process.***

This rule is a "Patchak Patch", granting the Secretary a free pass from judicial review of his/her decision-making.

Decisions Made by Bureau of Indian Affairs Officials:

A fee land conversion into trust that does not involve gaming when decided by a Bureau of Indian Affairs Officials allows for a 30 day appeal period. However, if affected parties do not file an appeal within 30 days with the Interior Board of Indian Appeals, the opportunity for a fair hearing in federal court is lost forever. The rule is one-sided. The rule penalizes non-tribal stakeholders who may not be aware of the trust acquisition through no fault of their own. The following issues have occurred in California. This rule creates a serious and significant inequity to affected parties.

- What if an affected party is not aware of a notice of application or notice of trust decision: the person is out of town, on vacation, ill, or temporarily hospitalized

- What if an affected party holds a recorded easement on the land?

- Citizens find one day that access to their private property is blocked due to the acquisition of tribal trust lands, or

- A tribe's on-reservation development that is inconsistent with local zoning or planning has created interference with a shared aquifer significantly reducing or drying the water supply of wells in an area, or

- Utility and water companies with recorded easements to deliver service via high power transmission lines or maintenance of reservoirs supplying water to metropolitan areas are not properly notified and given the opportunity to make legitimate comments which significantly affects the wellbeing of nearby urban and metropolitan populations.

Some of these impacts may not be recognized within the 30 day period. In fact, a number of impacts will not occur until development of the trust lands takes place. Nevertheless, all citizens have a protected interest in not having large swaths of their communities transformed which is precisely what the Bureau of Indian Affairs is doing when if approves the transfer of fee land titles into trust. Doing so without a 30 day notice or a self-stay provision creates a multitude of new issues that beg for additional litigation, not less.

The proposed regulation allows the fee to trust process to be manipulated by decision makers and other interests to eliminate opposition and potential appeals. This proposed rule seriously affects the integrity of the decision makers and the decision making process.

30 Day Appeal Period and Self Stay Policy is Mutually Beneficial

A 30 day appeal period and self-stay is a mutually beneficial policy. This component provides citizens a judicial review of the application. A judicial review is necessary as previously pointed out. ***The Secretary is under no obligation to read or give consideration to comments of citizens or other private parties in the fee to trust process.*** A 30 day appeal period alerts a tribe to potential issues. The appeal process can be a time to resolve anticipated impacts through negotiated agreements, improved alternatives in environmental impact reports or statements that reflect the concerns of private parties and citizens.

The proposed rule seeks to ***stack the deck*** against the legitimate interests of potential litigants. The Secretary by "taking" the land immediately into trust despite an Appeal before the Interior Board of Indian Affairs or before the federal court allows a tribe to move forward with its developments. Cases in which a tribe begins or completes construction before a case can be reviewed by the Court, undermines the ability of a fair and impartial hearing. Therefore, the court may view the tribal interests as now outweighing the once legitimate interests of the litigants seeking the appeal. The proposed rule creates inequitable results. ***This proposed rule does not promote a fair-minded process.***

Constitutional Review

It is questionable if the Assistant Secretary by a stroke of his pen has the executive authority to propose a regulation that is inconsistent with federal statute such as the Administrative Procedures Act and the interpretation of the U. S. Supreme Court in *Patchak.* This rule in essence expands the power of the Secretary by limiting judicial review of his/her determinations.

The Court ruled that *Patchak* challenges can be made from a month to six years. The proposed rule at 151.12 (d) (B) (iii) limits affected parties who are unknown to the 30 day appeal period calculated from the date of notification in a newspaper of general publication. ***What if the affected property owners live in another state or out of the country, temporarily hospitalized, elderly or individuals are simply not up to date on federal Indian policy? This language requires constitutional review.***

Conclusion

Stand Up For California!, recommends that any proposed rule must restore the balance of authorities between tribes, local, state and the federal government. Federal policy makers must reform the entire fee to trust process in order to develop a "*programmatic policy"* that to the greatest extent possible provides for all affected parties the opportunity to participate in an open, fair and objective process. Such a "*programmatic policy"* will eliminate the Bureau of Indian Affairs problems which are manufactured by the taking of land into trust without proper notification of affected parties, reading of comments submitted and consideration of legitimate concerns expressed in the comments by ALL affected parties.

Again, thank you for this opportunity to participate in the rulemaking process. I hope that our organizations comments are found to be helpful and serve in the development of a fair, objective and transparent process.

Sincerely

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