Indian Affairs - Office of Public Affairs

Proposal Released for Public Review and Comment for 60 days

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WASHINGTON – Today, Assistant Secretary-Indian Affairs Kevin K. Washburn issued for public comment a proposed rule designed to demonstrate the Administration's commitment to restoring tribal homelands and furthering economic development on Indian reservations. The proposed rule will provide for greater notice of land-into-trust decisions and clarify the mechanisms for judicial review depending on whether the land is taken into trust by the Assistant Secretary for Indian Affairs, or by an official of the Bureau of Indian Affairs. During the public comment window, Indian Affairs will also conduct tribal consultation.

For the Bureau of Indian Affairs trust acquisition decisions, which are generally for non-gaming purposes and constitute the vast majority of land-into-trust decisions, the proposed rule will ensure that parties have adequate notice of the action and clarifies the requirement that exhaustion of administrative remedies within the Department is necessary to seek judicial review.

"The principal purpose of this proposed rule is to provide greater certainty to tribes in their ability to develop lands acquired in trust for purposes such as housing, schools and economic development," said Assistant Secretary Washburn. "For such acquisitions, the proposed rule will create a 'speak now or forever hold your peace moment' in the land-into-trust process. If parties do not appeal the decision within the administrative appeal period, tribes will have the peace of mind to begin development without fear that the decision will be later overturned."

For decisions made by the Assistant Secretary, which generally are for gaming or other complex acquisitions, the proposed rule clarifies that the Assistant Secretary's decision is a final decision and allows the Assistant Secretary to proceed with taking the land-into-trust with no waiting period. Because a simple change in ownership status itself is not an act that causes irreparable harm in many cases, it will place the burden on litigants to come forth and demonstrate such harm if they wish to prevent the trust acquisition from occurring, while not affecting the right to judicial review of the basic decision.

The proposed rule issued today would also effectively repeal a 1996 procedural provision by omitting a 30-day waiting period which, as a result of a 2012 U.S. Supreme Court decision, now is unnecessary.

In 1996, the Department revised its land-into-trust regulations in Part 151 by establishing a 30- day waiting period following publication of a Departmental determination to take land into trust for an Indian tribe. At that time, prevailing federal court decisions held that the Quiet Title Act (QTA), 28 U.S.C. 2409a, precluded judicial review of such determinations after the United States acquired title to the land in trust. The waiting period was intended to ensure that interested parties had the opportunity to seek judicial review under the Administrative Procedure Act (5 U.S.C. 704) before the Secretary acquired title to land in trust. See 61 FR 18082 (Apr. 24, 1996).

The legal landscape changed, however, on June 18, 2012, when the Supreme Court issued its decision in Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). In that decision, the Supreme Court held that the Quiet Title Act does not bar Administrative Procedure Act challenges to the Department's determination to take land in trust even after the United States acquires title to the property, unless the aggrieved party asserts an ownership interest in the land as the basis for the challenge. Following Patchak, the 1996 procedural rule establishing a 30-day waiting period before taking land into trust to allow for Administrative Procedure Act review is no longer needed. Unless judicial review under the Administrative Procedure Act is precluded on some other basis, such as standing, timeliness, or a failure to exhaust administrative remedies, judicial review of the Secretary's decision is available under the Administrative Procedure Act even after the Secretary has acquired title to the property.

The proposed rule will be available in the federal register at https://www.federalregister.gov/public-inspection. Public comments may be submitted to the Department for sixty days following the proposed rule's publication in the Federal Register. Tribal Consultation on the proposed rule will occur on June 24, 2013, in Reno, Nevada.

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