Indian Affairs - Office of Public Affairs

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WASHINGTON, DC – In advance of the 5th White House Tribal Nations Conference, Assistant Secretary-Indian Affairs Kevin K. Washburn today announced a final rule that demonstrates the Obama Administration's continuing commitment to restoring tribal homelands and furthering economic development on Indian reservations. The final 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.

This rule finalizes a proposed rule that was published on May 29, 2013, and was the subject of a Tribal consultation held earlier this summer in Reno, Nevada. In response to requests from commenters, the Department extended the 60-day public comment period, which ended September 3, 2013. In total, the Department received more than 65 comment submissions.

"This rule provides 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 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 certainty and peace of mind to begin development without fear that the decision will be later overturned."

For the Bureau of Indian Affairs trust acquisition decisions, which are generally for non-gaming purposes and constitute the overwhelming majority of land-into-trust decisions, the final rule ensures 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.

For decisions made by the Assistant Secretary, the rule clarifies that the Assistant Secretary's decision is final 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 seeking to block such action 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 final rule also effectively repeals a requirement for a 30-day waiting period which was first created in 1996. 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 law 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, which established 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.
