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July 29, 2013

Ms. Elizabeth Appel
Office of Regulatory Affairs and Collaborative Action
Department of Interior
18th & C Streets, NW
Washington, DC 20240

Re: NCAI Comments on Proposed Amendment to 25 CFR 151.12 – Appeals of Land Acquisition Decisions

Dear Ms. Appel:

On behalf of the National Congress of American Indians, I write to express our appreciation to the Department for the proposed procedural amendments to 25 C.F.R. §151.12(b), and to offer a few comments. The rule change is welcome and necessary. This subsection was promulgated in 1996 to ensure the opportunity for judicial review of administrative decisions to acquire land in trust for Indian tribes under Section 5 of the Indian Reorganization Act (IRA). The rule created a 30 day period when potentially aggrieved parties could seek judicial review of a land acquisition decision before the Quiet Title Act (QTA) purportedly barred judicial review. See, 61 FR 18082, April 24, 1996. After the Supreme Court's decision in *Match-E-Be-Nash-She-Wish v. Patchak*, which held that the QTA does not bar judicial review of trust land acquisitions, the rule is no longer needed or desirable.

The rule instead has the unintended effect of making all trust acquisition decisions final agency action and limiting the opportunity for Interior review of its own decision making processes. Administrative review of federal trust land acquisition decisions will ensure that agency expertise is brought to bear on complex Indian law questions, and a requirement of exhaustion of administrative remedies will reduce long periods of litigation uncertainty for future trust land acquisitions. We strongly support the proposed rule change. We offer a few comments here, and also encourage the Department to consider the many excellent tribal comments submitted.

Discussion: On June 18, 2012, the Supreme Court issued its decision in *Match-E-Be-Nash-She-Wish v. Patchak*, where Patchak challenged the Secretary of Interior's decision to place land into trust for an Indian tribe under the authority of the IRA. Although the Department of Interior had operated for many years under the assumption that the QTA and its Indian lands exception prevent

retroactive challenges to land that is already held in trust for Indian tribes, the Supreme Court held that the QTA does not apply to challenges to the federal trust land acquisition process where the aggrieved party is not asserting an ownership interest in the land. In addition, the Supreme Court held that Patchak's challenge is not barred by prudential standing.

The *Patchak* decision raises two distinct problems. The first is that aggrieved parties may now seek retroactive reversals of the Department's prior decisions to place land in trust for Indian tribes. Although there are many valid defenses, some of these challenges may deprive tribes of existing trust lands and affect settled legal and jurisdictional expectations and tribal investments in the property. One unusual consequence of the *Patchak* decision is that while adverse landowners (who are essentially non-existent because of the BIA title review process) are barred from suit under the QTA, non-adverse claimants like Patchak with remote injuries and indirect interests are enabled to seek reversal of settled federal land acquisitions. The Supreme Court found "[t]hat argument is not without force, but it must be addressed to Congress." NCAI urges the Department to support amendments to the QTA to settle the trust status of existing Indian trust lands.

The second problem is prospective and will be addressed through this rulemaking. The *Patchak* decision raises the possibility of years of litigation uncertainty after land has been acquired in trust in future acquisitions, from a broad range of neighbors. 28 U.S.C. § 2401(a) provides a six-year general statute of limitations governing "every civil action" against the United States. Six years or more of litigation uncertainty after a trust acquisition has occurred will make it much more difficult for Indian tribes to move forward with plans and invest in development and infrastructure such as housing or a school or cultural resource protection. Interior's regulations and guidance should be modified to create greater certainty by requiring exhaustion of administrative remedies.

Exhaustion of Administrative Remedies: *Darby v. Cisneros*, 509 U.S. 137 (1993) held that, under the Administrative Procedure Act, 5 U.S.C. §704, a person aggrieved by an agency action is generally barred from judicial review for failure to exhaust administrative remedies when the agency's regulations provide both that (1) the administrative appeal is mandatory, not optional; and (2) that during the administrative appeal the agency action is not operative and is not final agency action that triggers judicial review. USAM 4-2.120

The Bureau of Indian Affair's general appeal regulations create a mandatory requirement of administrative review. Pursuant to the DOI's regulations applicable to the Bureau of Indian Affairs, "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the [DOI], shall be considered final so as to constitute Departmental action subject to judicial review," (absent emergency conditions). 25 C.F.R. § 2.6(a). See, *Jech v. Dept. of Interior*, No. 11-5064, June 19, 2012 (10th Cir)(interpreting the language to require administrative appeal); *Oneida Tribe v. Village of Hobart*, 787 F.Supp.2d 882 (E.D. Wis.

2011). Although these general regulations require administrative appeal of all BIA and other Interior decisions, this requirement is undermined for land to trust acquisitions because of 25 CFR 151.12(b). For this reason, the proposed amendment to require exhaustion is necessary and strongly supported by tribal governments.

We note that 99% or more of trust land acquisitions are non-controversial and are never challenged. Mandatory administrative appeal requiring exhaustion of remedies will bring greater certainty to those decisions. For those acquisitions that are appealed, mandatory administrative appeal will allow the Department of Interior to apply its expertise to any legal challenges, and will require any aggrieved parties to make their intentions known within 30 days, before the tribe starts making decisions and investments on the use of the property, and preventing parties from sleeping on their rights for six or more years.

Comments:

1) Litigation Delay in Interior Appeals and Amending 25 CFR Part 2: In discussion of this proposal to date, the chief concern among tribal leaders has been that the requirement of administrative appeal could cause additional delay beyond the judicial review process. Tribal attorneys have cited to some cases from the Interior Board of Indian Appeals that take several years for resolution – and then are appealed to federal district court. NCAI supports the provision of additional resources and staff to the IBIA to reduce lengthy appeal times.

In addition, after this rulemaking is completed, NCAI urges the Department to consider updating the 25 CFR Part 2 Appeal regulations, which have not been amended since promulgation in 1989, before *Darby v. Cisneros*. The BIA appeal regulations were intended to work in tandem with the general Interior Appeal process found at 43 C.F.R. Part 4. While those general Interior appeal regulations have been updated since 1989, the BIA Appeal regulations have not.

When revising Part 2, the Department should consider explicitly requiring adverse parties to file a petition for stay. Many appeals are repetitive, have been rejected again and again, and are filed for purposes of delay. The procedure outlined in 43 C.F.R. §4.21 requires appeals to include a petition for stay and to make a showing of likelihood of success on the merits, or the appeal can be rapidly dismissed within 45 days. The BIA Part 2 regulations should be updated to include a petition for stay requirement like that found in 43 CFR §4.21.

In addition, a petition for stay requirement in Part 2 would provide standards for the Department to replace the outdated "voluntary stay" policy, where the Department has previously withheld final action in all land to trust acquisitions until all legal remedies are exhausted. Instead, only appeals with merit would be accompanied by a stay.

2) Amendments to BIA Fee-to-Trust Handbook and BIA Manual: Corresponding changes will be needed to the Fee to Trust Handbook and the BIA Manual. In particular, the notices should be modified to remove the statement that the decision is final agency action. This could be also be done in a manner that will simplify the process. Step 11 on Public Notice could be merged with Step 10 on the Notice of Decision, and the sample notice letters would be modified.

3) Interested Party: The term "interested party" is defined under Part 2 to mean parties with standing. We don't believe that Interior intends to imply that any person who has an objection to a land to trust decision is considered an interested party with standing. We would suggest that within 25 CFR 151.12, that term should be changed to simply "party" or "person."

4) Single 30 Day Period: Some tribes have raised concerns that in practice there are frequently two thirty waiting day periods. The first occurs under 151.12(a) when the BIA performs a preliminary title report, and then again under 151.12(b). NCAI encourages that the rule be made clear, and that the BIA Land Acquisition Handbook be modified, to require that only one 30 day notice period is to be provided, and that title examination should be performed once and should not be a cause of unnecessary delay.

5) Preserving other Defenses – As noted above, a major concern with the *Patchak* decision is that land acquired in the past can be challenged without the benefit of the QTA defense. In the preamble to the final rule, we encourage the Department to avoid any language that generally accepts the conclusion that longstanding decisions on land to trust can be summarily reversed. There may be many other defenses, including the statute of limitations, the federal trust responsibility, as well as other defenses related to federal ownership of a right of alienation under the Non-Intercourse Act, 25 USC 177.

Conclusion: The amendment of 25 C.F.R. §151.12(b) and the requirement of exhaustion of administrative remedies offers an opportunity to solve some of the problems caused by the *Patchak* decision. The requirement of an administrative appeal will permit the great majority of land acquisitions to proceed with greater certainty after the expiration of the administrative appeal date. For those acquisitions that are appealed, it will require any aggrieved parties to come forward within 30 days, and will provide tribes with knowledge of the challenges they face before they proceed to make planning, cultural, or capital investments in the property. On behalf of NCAI, we strongly support the amendment to 25 C.F.R. §151.12(b).

Sincerely,

Jefferson Keel