



NATIONAL CONGRESS OF AMERICAN INDIANS

August 6, 2013

The Honorable Kevin Washburn
Assistant Secretary – Indian Affairs
MS-4141-MIB
1849 C Street, NW
Washington, DC 20240

RE: Addressing the tax status of ‘permanent improvements’ under the American Indian Probate Reform Act in a manner that mirrors the newly amended Part 162 Regulations

Dear Assistant Secretary Washburn—

I write to you on behalf of the National Congress of American Indians, the oldest and largest national organization of American Indian and Alaska Native governments, to ask that the Bureau of Indian Affairs amend its treatment of ‘permanent improvements’ under the Bureau’s probate regulations to align with the treatment of ‘permanent improvements’ under the newly amended Part 162 regulations.

As you know, the BIA issued an interim final rule on February 10, 2011 that states that “As a general rule, the Department considers permanent improvements to be non-trust property, and OHA does not probate them.” Unfortunately, not allowing permanent improvements to be probated by OHA has several negative effects. First, it contributes to the current probate backlog and it also presents an unduly burdensome process for probating the entire estate of the decedent. Also, this treatment of permanent improvements has legal and policy implications beyond the Indian Land Consolidation Act and the American Indian Probate Reform Act, because state and local governments are now attempting to subject these improvements to state jurisdiction and taxation.

Within the past several years, the BIA has worked vigorously to make improvements on how leases are governed in Indian Country. More recently, Congress through passage of the Helping Expedite and Advance Responsible Tribal Homeownership Act, and the BIA through amendments made to the Part 162 surface leasing regulations, demonstrated the intent to both transfer greater authority to Indian tribes over land leases, but also to clarify existing tribal regulatory authority over leased lands, including tribal taxing authority over permanent improvements and the authority to institute tribal preference requirements within business leases. We recommend further clarification as to permanent improvements under ILCA and AIPRA.

We propose a simple solution within the federal rulemaking authority of the BIA. The proposed addition to the regulations would amend 43 CFR Part 30 to

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clarify the tax status of permanent improvements as exempt from state and local taxes, in the same manner as the Part 162(a) regulations do. For example, Part 162(a) states:

Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

25 C.F.R. 162.017(a). The new Part 162 leasing regulations do not address the trust status of permanent improvements, but only clarify the long-held view that such improvements are insulated from state taxation [*See, United States v. Rickert*, 188 U.S. 432, 441-42 (1903); and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158-59 (1973)(holding that the tax immunity outlined in 25 U.S.C. §465 extends to permanent improvements on trust lands as well.)]. A similar approach should be implemented within the probate regulations.

Currently, tribes are disappointed at continued attempts by state and local governments to tax activities and property within the reservation. However, the BIA and the Department of the Interior serve an important role in tribal affairs, and tribes urge the BIA to reexamine its position in regards to permanent improvements – in particular, the unintended effects the BIA's position has had on the tax treatment of permanent improvements under the probate regulations. This work must be done now so its intended results may be applied to the rapidly approaching Buy Back program under the Cobell settlement.

In closing, we thank you for your time and we look forward to working with you to help address this matter. If you have any further questions or concerns, please contact John Dossett, NCAI General Counsel, at jdossett@ncai.org, or Derrick Beetso, NCAI Staff Attorney, at dbeetso@ncai.org or (202) 466-7767.

Sincerely,



Jefferson Keel
NCAI, President



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #PDX-11-111

TITLE: Directing the Department of the Interior to Place a Moratorium on Certain Regulations Restricting Probate of Improvements to Trust Land

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, on December 2, 2008, the President signed Public Law 110-453, which made various changes to the Indian Land Consolidation Act (ILCA) and the American Indian Probate Reform Act (AIPRA), including treatment of permanent improvements when someone dies owning an interest in both trust land and permanent improvements on the trust land; and

WHEREAS, on February 10, 2011, the Bureau of Indian Affairs issued an interim final rule that updated regulations to implement this law; and

WHEREAS, the interim final rule states that as a general rule, the Department of the Interior considers permanent improvements to be non-trust property and that Tribal or State courts, and not the Office of Hearings and Appeals (OHA), are responsible for probating such improvements; and

WHEREAS, not allowing these improvements to be probated by OHA will further contribute to the probate backlog and has negative legal and policy implications beyond AIPRA and ILCA, including subjecting such improvements to state jurisdiction and taxation.

NOW THEREFORE BE IT RESOLVED, that because of these adverse impacts, the Department should immediately place a moratorium on those provisions of the February 10, 2011 interim final rule that address permanent improvements and consult with Tribes, Indian organizations, and Indian landowners on how to address this issue going forward.

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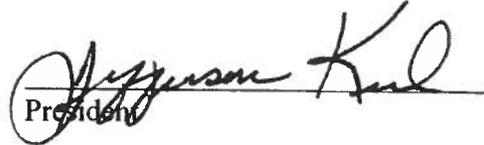
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BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2011 Annual Session of the National Congress of American Indians, held at the Oregon Convention Center in Portland, Oregon on October 30 – November 4, 2011, with a quorum present.


President

ATTEST:


Recording Secretary