



National Congress of American Indians

NCAI News

NCAI Update – August 31, 2001

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ACTION ALERT: NCAI is requesting that all tribes submit comments on the Secretary of Interior’s latest notice of “proposed withdrawal of the final rule” of Land-to-Trust regulations. NCAI supports the passage of the final rule as published on January 16. Notice to withdrawal the rule suggests that the Secretary is responding to state and local interests, with little regard to Tribal concerns. Comments must be at the Department of Interior by September 12. The DOI is keeping track of how many comments—pro and con—they receive on the issue. It is imperative that the Department receives as many comments from Tribes to convey the importance of keeping the final rule. Please address your comments to: Terry Virden, Director, Office of Trust Responsibilities, MS 4513 MIB, 1849 C Street, NW, Washington, DC 20240. Attached are the minutes of the August 21 Land Recovery Task Force meeting at NCAI.

The NCAI Land Recovery Task Force met on August 21, 2001 to discuss the recent decision by the Department of Interior to issue a “Notice of proposed withdrawal of final rule; request for comments,” (66 Fed. Reg. 42474, 8/13/01). The Department’s regulations on trust land acquisition are extremely important to tribal land recovery and management, as well as tribal jurisdiction. NCAI has supported the final rule, published on January 16, 2001, as a reasonable and balanced approach to the issue. The Aug. 13 notice signals the intent of the Department to withdraw the final rule and raises sharp concerns that the Secretary’s views are influenced by state and local government concerns while taking little notice of the concerns raised by tribal governments. Comments on the August 13 notice are due by September 12.

The Aug. 13 notice focuses on four “areas of concern” where the Department is considering specific changes to the final rule. Task Force members observed that the areas of concern and the proposed changes reflect the views of opponents of trust land acquisition, but are described in vague terms that make it difficult to assess what the concerns really are, the merits of those concerns, or how the proposed changes would actually affect the land to trust process. The Task Force concluded that it is extremely important for the Secretary to engage in full and meaningful consultation with tribal leadership in order for tribes to

understand the concerns and be able to respond to them, as well as for the Secretary to understand the full context of tribal land recovery efforts.

The August 13 notice raised four “areas of concern:”

1) Prioritizing land to trust for individual homesites of five acres or less: The notice describes a proposal to expedite and prioritize land to trust applications for housing of five acres or less. The Task Force generally felt that while land for individual housing is a priority, it is no more of a priority than land for health care facilities, schools, forestry, agriculture, economic development, natural resources protection, or cultural purposes. The issue of small individual homesites was never prioritized above other uses by NCAI or most tribes. In addition, the five-acre limitation would make this a very small benefit as most Indian allotments that might be placed back in trust are larger in size. This “concern” was viewed as an effort by the Department to appear even-handed while the rest of the concerns favor the opponents to land to trust.

2) Proposal to require Secretarial approval of land use plans for off-reservation trust land acquisition: This proposal is described in very general terms: “the Department is considering the advisability of requiring that tribes submit land use plans for the parcel to be acquired. The Secretary would approve those land use plans as a part of her review of the application.” Because the final rule already requires that a tribe submit a huge amount of information on the purpose, need and proposed use of the land as a part of the application process, this new vaguely-worded proposal raises concerns that the Secretary is considering trying to place some kind of additional restrictions on use of land acquired in trust. This would be an invasion of a tribe’s ability to manage and control its own land and would run counter to tribal self-determination. In addition, there are clear practical limitations on the ability of the Department to engage in land use management on tribal lands over the long term, making it likely that any land use restrictions would serve as hindrances to future management or development. This policy would seem to run counter to the Administration’s philosophy on economic development and land use restrictions. Overall, this concern on land use is an area which requires a great amount of further discussion with the Secretary.

3) Standards – The Jan. 16 final rule contains defined standards for when land will be taken into trust, whereas the current regulations do not. This was one of the major objectives behind the development of the final rule, and the NCAI Land Recovery Task Force has strongly supported establishing standards that are firmly grounded in the Indian Reorganization Act and its purposes of reestablishing the tribal land base and reversing the

negative consequences of tribal land loss. Because these standards are the heart of the regulations, it is of great concern that the Department indicated a desire to revisit the standards in their Aug. 13 notice. The notice provides some degree of detail about what the Department is considering. Of particular concern is the suggestion that for off-reservation acquisitions, the tribe would be required to show that “no demonstrable harm to the local community is realized.” It does not seem that the Department has carefully considered this proposal. A tribe generally does not have the information available to meet this standard, rather it is the local community that is in a position to determine whether there is any harm to its own interests. In addition, a standard of “no demonstrable harm” would put the tribe in a position of trying to prove a negative and may be impossible to meet given that most trust acquisitions involve some small loss of property tax revenues to the local government. It seems more likely that the Department intends to apply the standard of whether there is “significant harm to the local community” and that this is a burden of proof that should be borne by the local community which is opposed to the acquisition. Once again, this is the area that will require a great deal of further discussion with the Department.

4) Availability of Applications for Review – Here the Department identified a concern of states and local governments that they might not have enough time to obtain copies of an application package from the BIA and respond to it within the time frames of the Jan. 16 final rule (30 days on-rez, 60 days off-rez). The notice suggests extending each of those deadlines by an additional 30 days. The Task Force has supported the concept that states and local governments should have an adequate procedure for providing comments on pending land to trust applications and overall found this to be the least worrisome of the proposals. At the same time, the Task Force has also very strongly objected to the unreasonably long delays that occur under the current process, and wants to make sure that the process becomes as time-efficient as possible. The notice also asks for comments on how the Internet or use of technology could make the review of applications easier and more efficient. It was noted that if the BIA and/or the tribes can make the applications readily available via the Internet, then the longer time frames for review would not be unnecessary.

5) Other Areas of Concern – The Aug. 13 notice mentions only the four areas of concern, and asks for comments on whether final rule should be withdrawn. The notice leaves open the possibility that there are other areas of concern that are prompting the Department to consider the withdrawal of the rule. From reviewing the comments submitted by state governments, other concerns may include the Tribal Land Acquisition Area (TLAA), requiring consultation or negotiations with states and local governments, and the delegation of authority to regional offices for application approval. In addition, there are a number of issues that have been raised by tribes, such as contiguous lands, Alaska lands, the definition of reservation, and the retroactive effect on pending applications. Finally, it was discussed

that the Secretary apparently does not feel that she has adequate data from the BIA about the volume and purposes of trust acquisition applications. At this point, it is unclear what process the Department might use to redraft the regulations and what issues would be considered in that process. Once again, the Task Force felt that it was vitally important for the Department to consult with tribes on these questions.

Action Items: The Task Force identified a number of follow-up action items.

a) NCAI President Susan Masten has sent a letter to Secretary Gale Norton requesting a meeting with the Task Force co-chairs to discuss this issue. A number of follow-up efforts are being made to encourage the Secretary to schedule this meeting. Similar requests will be forwarded to other key officials in the Department, including Assistant Secretary Neal McCaleb. NCAI is also contacting the Senate Committee on Indian Affairs to enlist their aid in ensuring a meaningful dialogue between the Department and tribal leadership on this issue.

b) It will be very important that these meetings are well-organized and productive. The goals will be to educate about the background of tribal land acquisition efforts using map-based presentations and specific examples. The Task Force is requesting assistance in gathering reservation maps that show the negative effects of allotment and other federal land and management policies. In addition, if Task Force members would like to make specific suggestions about points to be made in the discussion with the Department, these would be most welcome.

c) The deadline for comments is September 12, 2001. Staff will draft comments that maintain the same position of support for the Jan. 16 final rule as a balanced approach to the land to trust issue that has already considered and addressed all of the concerns raised by tribes and states in the extensive rulemaking process. The comments will also advocate very strongly for a full and meaningful consultation process on any changes to the final rule. In addition, the comments will address the areas of concern raised in the August 13th notice. Finally, the previous NCAI comments will be attached in order to demonstrate the prior concerns that have been raised by the tribes.

d) Staff will develop a shorter version of sample comments for the consideration of tribes as they develop their own comments. These sample comments will be sent with a notice to all tribes by September 5th.

e) Staff will develop a short background paper or fact sheet on land to trust for general educational use.

f) Staff will follow up on the issue of data collection for land to trust acquisitions to determine whether further actions might be needed by tribes, the BIA, Congress, or the GAO to gather adequate information on trust land acquisitions.

g) After the decision on whether to withdraw the regulations, the Task Force may wish to follow up with state organizations like the National Governors Association and the National Association of Attorneys General to have more dialogue about land to trust issues.

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