NATIVE AMERICAN LANDS

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AGENDA

- New & Proposed Amendments to Federal Regulations
  - Part 83 (Federal Acknowledgment)
  - Part 169 (Right of Way)
  - Part 170 (Indian Reservation Roads Program)
- WA Indian Land Bill (effective June 2014)
- Fee to Trust Transfers
- HEARTH Act
- Recent/Relevant Case Law
  - Carcieri v. Salazar
  - Confederated Tribes of the Grand Ronde v. Jewell
  - Match-E-Be-Nash-She-Wish, Band of Pottawatomi Indians v. Patchak

29 FEDERALLY RECOGNIZED TRIBES IN WA STATE (567 NATIONALLY)

PART 83 – FEDERAL ACKNOWLEDGEMENT (FINAL RULE ISSUED)

PART 83 – FEDERAL ACKNOWLEDGEMENT

- Many Indian tribes are recognized by the federal government through historical executive or congressional action.
- Tribes who do not benefit from this form of recognition have the option of submitting a petition for federal acknowledgment to the Department of the Interior through the regulatory process outlined in Part 83, Title 25 Code of Federal Regulations.
- To date, only 17 tribes have been recognized using Part 83 (many more have petitioned).

PART 83 – FEDERAL ACKNOWLEDGMENT

- Through this method, the applicant attempts to substantiate that they have met all the criteria necessary to support federal recognition as an Indian tribe.
- This recognition is important to many tribes because:
  - It allows them to form a tribal government that is acknowledged by the federal government as its own sovereign nation.
  - It allows the tribe to request that their tribal lands be held in trust by the federal government.
  - It allows the tribe to benefit from federal programs that provide support to the tribe in several areas including, but not limited to, housing, healthcare and education.

PART 83 – FEDERAL ACKNOWLEDGEMENT

- On June 29, 2015 the Department of the Interior released their final rule reforming this regulatory process.

History

- The Department began working on the revisions in 2009.
  - Since that time they have solicited a substantial amount of feedback on their proposed amendments from several sources, including Indian tribes.

- The goal of the reform was to create a process that is more transparent, consistent and efficient than the regulations that have been in place for the last 40 years.

PART 83 – FEDERAL ACKNOWLEDGEMENT

- The final rule carries forward the standard of proof and seven mandatory criteria that exist in the previous version of the rule.
- It also modifies the evaluation period to 1900 – present (previously "first sustained contact with non-Indians").
- Promotes expedited decisions.
- The final rule makes access to petitions for federal acknowledgment available to the public (previously they were not).
  - If the proposed finding is negative, the tribe has the option of requesting a hearing before an administrative law judge to hear testimony. The administrative law judge will issue a recommended decision after the hearing and the Assistant Secretary issues the final decision.

PART 83 – FEDERAL ACKNOWLEDGEMENT

- Does not allow for re-petitioning
  - Given the number of pending petitions as well as those that have not submitted complete petitions, the final rule does not allow re-petitioning.
  - Any petitioner that was previously denied Federal acknowledgment under this process may not re-petition.
  - This includes any petitioners that have reorganized or been renamed or that are wholly or primarily portions of groups that have been denied under these or previous acknowledgment regulations.
- A complete copy of the rule as well as an outline of all of the new amendments can be found on the Department's website at www.bia.gov.

PART 83 – FEDERAL ACKNOWLEDGMENT

- In July of 2015 the Department issued two decisions after concluding their review of applications submitted by the Duwamish Tribal Organization (a Washington state tribe) and the Pamunkey Indian Tribe (a Virginia state tribe).
- The Department determined that the Duwamish Tribal Organization is ineligible for federal recognition under Part 83.
  - The Duwamish Tribal Organization was denied federal recognition in 2001 (they have been pursuing recognition since 1977).
  - The decision issued in July was a reconsideration of the 2001 decision which was vacated by the Western Washington District Court in 2013 and remanded to the Department of the Interior.
  - Conversely, the Department determined that the Pamunkey Indian Tribe is eligible for federal recognition, stating in their decision that the tribe satisfied all seven criteria for acknowledgement in Part 83.
- Both decisions are available on the Department's website at www.bia.gov under the Office of Federal Acknowledgment tab.

PART 169 – RIGHT OF WAY (PROPOSED RULE ISSUED)

PART 169 – RIGHT OF WAY

- The Department of the Interior has issued a proposed rule intended to modify 25 CFR Part 169 which governs rights-of-way over Indian Lands.
- The Department of the Interior holds approximately 56 million acres of land in trust for Indian tribes and individual Indians.
- The Department is required to approve rights-of-way across Indian lands under federal law.
- The existing regulations governing this approval process were last updated over 30 years ago.

PART 169 – RIGHT OF WAY

- The proposed rule would effectuate changes to:
  - The approval process
  - The way compensation and valuation is calculated
  - Compliance and enforcement of the right-of-way
- The proposed rule would also place specific time limitations on the Department when presented with an application pertaining to a right-of-way.
  - Including the imposition of a 60 day time frame to make a determination regarding a right-of-way grant and a 30 day time frame on the Department to make a determination regarding an amendment, assignment or mortgage of an existing right-of-way.
- The proposed rule is available on the Department's website at www.bia.gov.
  - The comment period for the proposed rule expired on November 28, 2014. To date, there has been no announcement by the Department regarding formal implementation of the proposed rule.

PART 170 – INDIAN RESERVATION ROADS PROGRAM (PROPOSED RULE ISSUED)

PART 170 – INDIAN RESERVATION ROADS PROGRAM

- The Department of the Interior has issued a proposed rule intended to modify 25 CFR Part 170 which governs the Tribal Transportation Program (formerly known as the Indian Reservation Roads Program).
- All roads and facilities that are deemed eligible for funding under the Tribal Transportation Program are identified on the National Tribal Transportation Facility Inventory (formerly known as the Indian Reservation Roads Inventory).
- The roads on the Inventory consist of roads that are located on tribal lands or provide access to tribal lands.
  - The Inventory also includes bridges, parking lots, transit centers and other types of transportation related public facilities.
  - If the roadway or facility has been constructed using funds from the Tribal Transportation Program it must be open to the public.

PART 170 – INDIAN RESERVATION ROADS PROGRAM

- The proposed rule outlines a new process for calculating how much funding is available to each tribe and how that funding can be properly attributed to the construction of public roads and facilities.
- Under a new section of the proposed rule the tribe must provide a description of the current use of the land and identify the fee owner of the land on which they intend to construct a road or facility.
- Why is this new section so important? Rampant access issues involving Native American lands across the country.
- If the tribe will be the "owner" of the road or facility, they must provide documentation evidencing the consent of each fee owner to use their property for the road or facility that will appear on the Inventory.
  - The consent document will most likely be a right-of-way easement.

PART 170 – INDIAN RESERVATION ROADS PROGRAM

- "Owner" as contemplated in the proposed rule is not intended to be a reference to the fee owner of the property on which the road or facility will be constructed.
  - The "owner" is defined as the party that has the authority to finance, build, operate or maintain the public road or facility.
  - An "owner" can be a federal or state government, the BIA or a tribe and will be the party benefitting from the easement.
- Tribes are also required to provide a tribal resolution or other official action identifying support for the public facility and its placement on the Inventory. In other words, the tribe must consent in writing to the public use of the transportation facility.
- The proposed rule is available on the Department's website at www.bia.gov. The comment period for the proposed rule expired on March 20, 2015. To date, there has been no announcement by the Department regarding formal implementation of the proposed rule.

WLTA INDIAN LAND BILL

WA INDIAN LAND BILL – EFFECTIVE JUNE 2014

- WLTA was neutral on the bill. (HB 1287)
- Benefitting tribes must be federally recognized.
- Bill exempts from property tax land owned in fee by the tribe that is located inside the reservation, regardless of the use of the land.
- Land outside the reservation that is leased to a third party for economic development is now subject to a leasehold excise tax.
- Land located outside of a reservation but used by a tribe for economic development is now exempt from property tax, but is subject to a payment in lieu of taxes which can be negotiated between the tribe and the county. In order to qualify for this exemption the land had to be owned by the tribe prior to March 1, 2014.

FEE TO TRUST TRANSFERS

FEE TO TRUST TRANSFERS

- The Indian Reorganization Act (IRA) [48 Stat. 984, 25 U.S.C. § 461 *et seq*. (June 18, 1934)] provides the Secretary with the discretion to acquire trust title to land or interests in land.
- The Secretary bases the decision to make a trust acquisition on the evaluation of the criteria set forth in Title 25 Code of Federal Regulations (CFR) Part 151 and any applicable policy.
- With the exception of certain mandatory acquisitions, the decision to acquire title requires Secretarial approval.

FEE TO TRUST TRANSFERS

Mandatory vs. Discretionary Acquisition

- *Mandatory Trust Acquisition*: A trust acquisition directed by Congress or a judicial order that requires the Secretary to accept title to land into trust, or hold title to certain lands in trust by the United States for an individual Indian or tribe. The Secretary does not have the discretion to accept or deny the request to accept title of land into trust.
- *Discretionary Trust Acquisition:* A trust acquisition authorized by Congress that does not require the Secretary to acquire title to any interest in land to be held in trust by the United States on behalf of an individual Indian or tribe. The Secretary has discretion to accept or deny the request for any such acquisition.

FEE TO TRUST TRANSFERS

Why would a tribe apply to have property taken into trust by the Federal Government?

- Tax benefits.
- Many federal programs and services are available only on reservations or trust lands.
- Trust acquisitions also allow tribes to grant certain rights-of-way and enter into leases necessary for tribes to negotiate the use and sale of the natural resources.

FEE TO TRUST TRANSFERS

- The procedure for transferring property into trust outlined in the *BIA Fee to Trust Handbook, Version III (rev 4), Issued: 06/16/14*.
- Handbook is available on the BIA website.
- Acquisitions can be challenged by an administrative appeal with the Interior Board of Indian Appeals (IBIA) prior to approval or under the APA (Administrative Procedures Act) after approval.
  - Challenges under the APA can occur for up to six years following the acquisition.

HEARTH ACT

- Acronym for “Helping Expedite and Advance Responsible Tribal Homeownership”.
- Signed into law by President Obama on 7/30/2012.
- Amends the Indian Long-Term Leasing Act of 1955.
- As of Oct. 2015 there are 22 tribes with leasing regulations approved by the Department under the HEARTH Act.
- Under the HEARTH Act, federally recognized tribes can develop and implement their own regulations governing leasing on Indian lands.

HEARTH ACT

- The HEARTH Act amends the Long-Term Leasing Act 25 U.S.C. 415 to allow any tribe, for the purposes authorized under 415(a) to lease tribal land without approval of the Secretary, if the lease is executed under Tribal Regulations approved by the Secretary.
- The tribal government drafts, approves and submits its leasing regulations to the BIA for approval.
- Once they are approved, leases executed by the tribe under the approved regulations will not require additional BIA review or approval by the Secretary of the Interior.

HEARTH ACT

- Tribes have the option to enact leasing regulations for specific areas (i.e. business leasing) and leave remaining areas (i.e. residential or agricultural leasing) subject to BIA review and Secretarial approval.
- Cowlitz Indian Tribe (Business Leasing Regs).
  - Approved January 22, 2015

CARCIERI v. SALAZAR, 555 U.S. 379 (2009)

CARCIERI V SALAZAR

- US Supreme Court case decided in 2009 which holds that the Secretary of the Interior's authority under the Indian Reorganization Act to take land into trust for Indians is limited to Indian tribes that were under federal jurisdiction when the IRA was enacted.
- This decision has been controversial because it does not clearly define the term "under federal jurisdiction".
- A tribe may have been federally recognized in 1934 based on a treaty or some other format, but the question of whether or not the tribe was "under federal jurisdiction" may still remain.

CARCIERI V SALAZAR

- Upon receipt of a Fee to Trust application the BIA must make a determination as to whether or not the tribe was under federal jurisdiction in 1934.
  - This is a required part of their review process.
- The BIA may consult with the Office of the Solicitor to prepare a Carcieri Opinion to rely upon when there is some question.
  - This can be a long and complicated analysis.

FEE TO TRUST HANDBOOK

Step 10: Preparing Analysis and Notice of Decision (NOD)

1. All gaming acquisition NOD's shall be prepared pursuant to the procedures outlined in the Gaming Handbook and submitted to OIG for publication in the Federal Register.

2. If a significant amount of time lapses between the date of the NOA and the NOD, reissue the NOA to allow for updates to the comments, applicant's responses to comments, and application documents (e.g., title evidence and ESA).

3. Consult with the Office of the Solicitor to prepare an analysis of whether the tribal applicant was under Federal jurisdiction in 1934 for inclusion in the decision, if applicable.[1] BIA should consult with the Solicitor's Office as early in the process as possible (i.e., as soon as BIA has determined an application is complete) so that the Solicitor's Office has sufficient time to prepare a *Carcieri* opinion. For tribes for whom the Solicitor's Office has already prepared an analysis of whether the tribal applicant was under Federal jurisdiction in 1934, BIA may rely on that analysis.

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[1] An opinion whether a tribal applicant was under Federal jurisdiction in 1934 (a "*Carcieri* opinion") is only required for applications submitted pursuant to 25 U.S.C. 465 and that rely on the first definition of "Indian."

CARCIERI V SALAZAR

- The Carcieri decision has prompted other litigation over the validity of the fee-to-trust transfers that already occurred. Most recently *Big Lagoon Rancheria v. California*.
- Multiple "Carcieri Fix" bills have been introduced in an effort to overturn the Carcieri decision.
- Senator Jon Tester from Montana, the Vice-Chairman of the Senate of the Committee on Indian Affairs introduced a bill on April 1st.
- Senator John Barrasso from Wyoming, the Chairman of the Senate Committee on Indian Affairs introduced a bill July 29th.
  - Tester has pulled his bill in favor of Barrasso's
- Key points of Barrasso's bill:
  - Streamlines portions of the land into trust process
  - Restores the Interior Secretary's authority to take land into trust for all federally recognized tribes
  - Reaffirms the status of Indian lands already taken into trust

CONFEDERATED TRIBES OF THE GRAND RONDE v. JEWELL, 75 F.SUPP.3D 387 (D.D.C. 2014)

CONFEDERATED TRIBES OF THE GRAND RONDE V. JEWELL

- Case involving the Cowlitz Indian Tribe.
- In 1863 Abraham Lincoln signed a proclamation opening the tribe's lands in southwest Washington to non-Indian settlement.
- Without a reservation, the tribe spent most of the 20th century without land or formal tribal government.
- The U.S. Secretary of the Interior approved the tribe's application for federal recognition in 2002.
- Immediately afterwards the tribe submitted a request that the secretary acquire in trust a 152-acre parcel to be the tribe's reservation and to serve as the site for, among other things, a casino-resort complex.
- The Cowlitz tribe's request was challenged by an Oregon tribe with its own casino, as well as by local governments and private citizens in Clark County.

FEDERALLY RECOGNIZED VS. UNDER FEDERAL JURISDICTION

- The secretary's authority to acquire the land in trust depended upon the provision in the Indian Reorganization Act of 1934 that refers to "any recognized Indian tribe now under Federal Jurisdiction." The challengers argued that "recognized," as used in the IRA, meant as of the 1934 enactment. Federal recognition of the Cowlitz tribe, coming only in 2002, was thus 68 years too late.
- The secretary had reasoned that since the IRA had no time limit on recognition, it was sufficient for a tribe to be federally recognized at the time the secretary acquired the land in trust. The secretary found that the Cowlitz tribe met the "under Federal Jurisdiction" requirement based upon evidence that before 1934 the federal government had been engaged with the tribe and tribal members and a corresponding lack of evidence that the tribe's status had been terminated before 1934.

FEDERALLY RECOGNIZED VS. UNDER FEDERAL JURISDICTION

- In *Carcieri v Salazar*, the Supreme Court held that the meaning of "now" in that phrase meant that the tribe had to be under federal jurisdiction at the time of passage of the IRA in 1934. Plaintiffs in the Grande Ronde case urged the District Court to interpret the phrase as requiring ***both*** federal jurisdiction and federal recognition at the time of passage of the Act.
- The District Judge recognized, in its *Carcieri* Opinion, the majority of the Supreme Court left open the issue of whether or not "now" related in the same way to the time of recognition, with Justice Breyer, in his concurrence, opining that recognition and jurisdiction are separate concepts and that the IRA imposed no time limit on recognition.
- After deciding these and other issues in favor of the Cowlitz Indian Tribe, the court confirmed the secretary's decisions to accept the land into trust for the tribe and to allow gaming.

MATCH-E-BE-NASH-SHE-WISH, BAND OF POTTAWATOMI INDIANS v. PATCHAK, 132 S. CT. 2199 (2012)

PATCHAK

- The Match-E-Be-Nash-She-Wish Tribe applied for the Secretary to take land into Trust so they could use it for a gaming facility.
- David Patchak filed suit under the APA asserting that such an acquisition would result in economic, environmental and aesthetic harm to him and his nearby property and requested declaratory relief reversing the acquisition.

PATCHAK

- The court held that in Patchak's suit under the APA he established "prudential standing" for his case by asserting an interest that is "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated.
  - Such suits under APA can be brought any time within the APA's 6 year statute of limitations, even after the Secretary has acquired title to the property.

- Consequently, the department determined that there was no longer a need for a 30 day waiting period to seek judicial review of the fee-to-trust acquisition under the APA.

- BIA amended the Fee to Trust regulations (25 CFR Part 151) effective December 13, 2013.

25 CFR PART 151 - AMENDMENTS

- Decisions to acquire land in trust are delegated either to the Assistant Secretary of Indian Affairs or to a BIA official, with the majority being delegated to BIA officials. In addition to elimination of the 30 day waiting period, other key changes are as follows:

  1. Interested parties (as defined in BIA regulations) must make themselves known to the BIA in writing in order to receive written notice of the BIA's official decision.

  2. When a BIA official approves a trust acquisition application, the official must now publish notice of that decision (and right to administrative appeal) in a newspaper of general circulation servicing the affected area to reach unknown interested parties. The time frame for unknown interested parties to file an administrative appeal begins to run upon the date of this publication.

  3. When the official decision is issued by a BIA official, interested parties must exhaust all administrative remedies set forth in 25 C.F.R. Part 2 within 30 days before they can seek judicial review under the APA. If interested parties who have received notice of the BIA's official decision fail to file an administrative appeal within 30 days they are precluded from seeking judicial review under the APA.

  4. There are no administrative remedies to exhaust when decisions are made directly by the Assistant Secretary of Indian Affairs. These decisions are deemed final for the Department.

- The new rule established by the BIA in response to the Patchak decision is unofficially referred to as the "Patchak Patch".

QUESTIONS?