Insights: Alerts

DOI Actions Underscore Need For Tribal Consultation

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At this point in the Obama administration eight years ago, Secretary Ken Salazar was clear on his commitment to restoring tribal homelands. Embracing his trust and treaty responsibilities, Secretary Salazar left no ambiguity on priorities, stating "[t]aking land into trust is one of the most important functions that this Department takes on behalf of Indian tribes." After eight years of focused effort, more than 600,000 acres were restored to tribes as well as the equivalent of another 2.1 million acres due to the Cobell settlement. These are small but significant steps in restoring the tens of millions of acres taken from tribes under repudiated policies of allotment, assimilation and termination.

At a tribal energy summit earlier this year, Secretary Ryan Zinke posed the question "What are we going to be 100 years from now? Is there an off-ramp?" The questions stirred significant concern among Indian country, with the U.S. Department of the Interior issuing a letter that same week assuring tribal leaders that "the Secretary supports tribal self-determination, self-governance, and sovereignty, and believes that the federal government should meet its trust responsibilities." The department explained that there were "many options for improvement as we work together" and committed to tribal leaders that any changes "will require detailed thought and consultation with Tribes[.]"

Well, times are changing without tribal consultation or a clear articulation of how actions will impact tribes in the short term — much less a 100 years from now. At a recent House hearing and in a subsequent notice, the Interior Department made clear that they are considering an agenda that could limit the restoration of tribal homelands to the detriment of future generations.

Perhaps most concerning is the Interior Department's testimony that it may be revisiting how it applies the Carcieri decision — suggesting that the established standard which has been affirmed by the courts is too favorable to tribes. Carcieri impacts every tribe because the Interior Department undertakes a rigorous analysis of whether a tribe was under federal jurisdiction in 1934 before the secretary decides to place a particular parcel of land into trust.

So what's driving the change? Have tribes complained that the current approach is too favorable? No. Have the courts found the approach unlawful? No. Will a change to that analysis grind the restoration of tribal homelands to a halt? Will every tribe have to invest scarce resources and time to demonstrate that it satisfies a new approach? Will it cause uncertainty and provide fodder for litigation? Without a doubt, a change in how the the Interior Department applies Carcieri will be a full employment act for lawyers.

Other changes were floated at the Congressional hearing, without formal tribal consultation, none of which appear to be good for Indian country. The Interior Department did not propose mandatory acquisitions for on-reservation applications or streamlining a process that under the best of circumstances often takes at least a year to place land into trust. The department did suggest a desire to change the process and limit restoration of homelands outside of reservation boundaries. In a notice issued within a week of the hearing, the department confirmed its intentions.

According to the notice, the department intends to establish additional requirements for tribes to satisfy for off-reservation acquisitions and to remove the Patchak patch that tribes worked to put in place to promote investment and jobs in Indian country. The Patchak patch ended the department's self-imposed waiting game for the acceptance of land in trust to allow for the filing of lawsuits. Patchak effectively found that the waiting game was unnecessary. Why would the department now propose reinstating delay?

The department's actions over the past few weeks underscore the immediate need for formal tribal consultation. Secretary Zinke deserves to be informed by tribal leadership on how these potential changes would impact tribal nations. The Secretary would surely hear that lands the department deems off-reservation are every bit of the cultural, historical and social fabric of tribal nations as those deemed on-reservation. Pe Sla is an obvious example. This sacred site in the Black Hills was placed into trust last year for four tribes. Its restoration is just as important to these tribes as any on-reservation restoration.

Secretary Zinke would also surely hear that after the Supreme Court's decision in Patchak there is no legal need to delay placing land into trust once that decision is made. Every court that has reviewed the current approach has affirmed it. The Patchak patch removed the delay in placing land into trust while also providing a clear process for appeals. Under the current rules, tribes have certainty that if an appeal is not filed within 30 days that the land will remain in trust. Such certainty is critical to investment and economic development. The department's stated intention to reinstate delay in restoring tribal homelands is a stark contrast to other steps Secretary Zinke has taken to speed up approvals — such as his recent secretarial order to streamline the process for federal oil and gas leasing permits.

At the recent Congressional hearing, Chief Kirk Francis of the Penobscot Nation and President of the United Southern and Eastern Tribes (USET), was the lone tribal witness. He rightly described the hearing testimony as "dangerous." Without tribal consultation and notwithstanding USET's unequivocal opposition to "any update to the IRA's Section 5 trust acquisition authority that would change existing standards or criteria, amounting to an attack on the continued vitality of the IRA's trust land acquisition authority," the Interior Department committed to working with the House Natural Resources Committee to amend the Indian Reorganization Act.

Is this Secretary Zinke's 100-year vision? Before looking out 100 years to the future, we should look 100 years to the past. In 1917, Secretary of the Interior Franklin K. Lane announced a new policy for Indian Affairs. It was centered around giving every "competent" Indian "full control of his property and have all his lands and moneys turned over to him, after which he will no longer be a ward of the Government." Secretary Lane touted the benefits as follows:

> This is a new and far-reaching declaration of policy. It means the dawn of a new era in Indian administration. It means that the competent Indian will no longer be treated as a half ward and half citizen. It means reduced appropriations by the Government and more self-respect and independence for the Indian. It means the ultimate absorption of the Indian race into the body politic of the Nation. It means, in short, the beginning of the end of the Indian problem.

In four short years, the Interior Department's "new" policy approved over 17,000 applications and removed more than 2.4 million acres from trust.

Respecting tribal sovereignty and self-determination, over the past eight years the department worked with tribal

leadership to prioritize the restoration of tribal homelands. Much of that restoration has been through the Land Buy Back Program transferring individual interests of the equivalent of 2.1 million acres to tribal trust so that it may never fractionate again. With help from Congress, the department restored more than 600,000 acres of fee land in trust for tribes. In the arc of the moral universe it is a small step, but it nonetheless shows that the arc bends toward justice.

Tribes will continue to be vigilant in prioritizing the restoration of land for future generations. Tribal homelands are a keystone to tribal self-determination and self-governance. The department's recent testimony makes plain that thorough, formal consultation between Secretary Zinke and tribes is needed before the department moves any further down a path of potential changes to its Carcieri analysis, the department's fee to trust regulations or amending the Indian Reorganization Act.