



THE STATE
of ALASKA

GOVERNOR SEAN PARNELL

Department of Natural Resources

CITIZENS' ADVISORY COMMISSION ON
FEDERAL AREAS
Stan Leaphart, Executive Director

3900 Airport Way
Fairbanks, Alaska 99709
Main: 907.374.3737
Fax: 907.451.2751

July 31, 2014

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW.
Washington, DC 20240.

Re: 1076-AF23 – Proposed Rule – Land Acquisitions in the State of Alaska (Docket ID:
BIA-2014-0002)

Dear Ms. Appel:

The Citizens' Advisory Commission on Federal Areas (CACFA) has reviewed the proposed revision to the regulations at 25 CFR Part 151 (79 *Federal Register* 24648) . The proposed revision would remove a provision in the Department of the Interior – Bureau of Indian Affairs land-into-trust regulations that currently excludes, with one exception, land acquisitions in trust in the State of Alaska. We offer the following comments for consideration.

Taking land into trust is not the best option for Alaska's communities.

The Commission does not support the proposed rulemaking. We believe that taking land into trust will undermine the Alaska Native Claims Settlement Act (ANCSA) and the significant economic, social and cultural benefits that statute has provided to Alaska Natives.

The Background and Explanation section (79 FR 24649) of the proposed rule states that "*Placing land into trust secures tribal homelands, which in turn advances economic development, promotes the health and welfare of tribal communities, and helps to protect tribal culture and traditional ways of life.*" We submit there are more effective ways to improve life in rural Alaska and foster tribal self-determination.

The State of Alaska is collaborating with tribes and Alaska Native communities to address the public safety challenges throughout rural Alaska. The State is currently negotiating agreements with tribes to offer tribal civil courts process and remedies for certain state law misdemeanors, including alcohol and domestic violence related offenses. Over the last four years, Governor Parnell has secured \$44 million in new funding as part of the Choose Respect Initiative. This initiative is helping to stop domestic violence, sexual assault and child sexual abuse in our state. The additional funding for this initiative also provides support for Village Public Safety Officers, State Troopers and prevention programs.

The State is strengthening the rural court system. State prosecutors and defense attorneys currently participate in a circle sentencing project. This project brings state court proceedings to rural villages and allows community members to participate in sentencing criminal defendants.

This commission supports the State's efforts and believes very strongly that those efforts represent better solutions for promoting economic development and the health and welfare of our rural communities.

The current rulemaking should be suspended.

The Commission appreciates the BIA extending the original June 30, 2014 comment deadline for this rulemaking. The additional time for the public and affected stakeholders to develop a better understanding of the issues associated with the proposal was beneficial. We note that the Alaska Federation of Natives (AFN) has requested that the current July 31, 2014 comment deadline be extended until October 1, 2014. AFN has stated its intention to help schedule roundtable discussions with Alaska's congressional delegation, the State of Alaska, Alaska Native Stakeholders and key tribal attorneys during August to discuss this issue. This Commission is also meeting next week (August 8 & 9, 2014) and will be discussing the proposed land into trust regulations.

While we support AFN's request for another extension of the comment deadline, we believe that the public interest would best be served by suspension of the current rulemaking pending a final court decision in *Akiachak Native Community v. Sally Jewell*. This Commission is aware that the U.S. District Court for the District of Columbia (Court) has denied the State of Alaska's request to enjoin the Secretary of the Interior from promulgating this regulation. Nevertheless, we believe that by pursuing this revision before a decision can be made by the appeals court, the Department will only increase the public's confusion and uncertainty about this issue.

DOI/BIA have not met the procedural requirements of E.O. 13132 – Federalism.

Section III, Subsection F – Federalism (E.O. 13132) of the Supplementary Information accompanying this proposed rule states:

“Under the criteria in E.O. 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States,

or on the distribution of power and responsibilities among the various levels of government.”

This Commission realizes that many of these types of determinations that are required when an agency engages in rulemaking activity have become *pro forma*. This appears to be the case in this rulemaking. A rulemaking authorizing the Secretary to take lands into trust in Alaska, thereby creating Indian country¹ where tribes would have legal and jurisdictional powers and authorities they do not currently have in Alaska would clearly have a direct effect “*on the distribution of power and responsibilities among the various levels of government.*”

Should lands taken into trust qualify as Indian country in Alaska, the resulting change in the level and nature of tribal authority could be significant. While Alaskan tribes currently have jurisdiction over tribal members, and in certain situation over non-members, this proposed rulemaking would provide for territorial jurisdiction by tribes. This territorial jurisdiction could undercut state management of fish and wildlife, alcohol, tobacco, gaming, environmental protection, forest practices and zoning. There is also a high potential that in some areas of Alaska the taxing authorities and other jurisdictions of boroughs and municipalities will be affected by this rulemaking.

We note that the Court, in its order of June 26, 2014 on the State of Alaska’s motion to stay this rulemaking pending appeal, appears to agree with our assessment of the nature of the potential effects that could result from changes to current regulations:

*“Though the Court disagrees with Alaska’s position and finds there to be a low likelihood of success on the merits, it recognizes that **the case presented difficult and substantial legal questions regarding the balance between federal and state regulation of Indian land**, and that its decision was at times, a close one.”*

(Memorandum Opinion and Order, pg. 6, emphasis added)

The Commission strongly recommends that the DOI and the BIA revisit the requirements of E.O. 13132 and comply with the procedures outlined in that E.O. for full consultation with the State of Alaska as well as with borough and municipal governments.² There is no indication that the required consultation has occurred.

¹ The DOI/BIA addressed the issue of Indian country in the 1999 proposed revisions to the regulations at 25 CFR Part 151: “*Of course, if land were taken in trust by the Secretary, such trust land then would qualify as Indian country and an Alaskan tribe would have all the powers that pertain within Indian country.*” 64 *Federal Register* 17578.

² Sections 4(d)&(e) of E.O. 13132 require:

(d) When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.

(e) When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.

This rulemaking fails to meet requirements of NEPA.

Council on Environmental Quality (CEQ) guidelines require federal agencies to consider both direct and indirect effects of their actions, including rulemaking. The effects that must be considered and analyzed include: *“ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”* (40 CFR §1508.8(b)).

We find nothing in either the supplementary information or the docket information for this rulemaking that indicates DOI/BIA has prepared an environmental assessment or an environmental impact statement. If the agency has made a determination that compliance with NEPA is not required for this rulemaking, this determination should be provided. However, given the potential impacts to state and local regulatory and taxing authorities and the state’s management authority over fish and wildlife resources, should lands be taken into in Alaska, we believe that some level of NEPA compliance is called for.

In conclusion, this Commission believes that an appropriate balance currently exists with respect to Native lands and sovereignty issues in Alaska. ANCSA, with its corporate structure, built around a significant land base, was passed with the overwhelming support of Alaska’s Native citizens. It has been a notable success and corporation shareholders and tribal members have benefitted both financial and culturally. The proposed land into trust regulations will serve to undermine ANCSA and jeopardize that success.

The Commission meets in Anchorage on August 8 & 9 and has scheduled a briefing and discussion on this issue. Based on that, additional comments may be forthcoming. We appreciate the opportunity to comment on this proposed rulemaking. Please contact our office if there are questions or if we need to clarify our comments.

Sincerely,



Stan Leaphart
Executive Director

Cc: Governor Sean Parnell
Senator Lisa Murkowski
Senator Mark Begich
Congressman Don Young