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21st Century Proposed BIA Indian Land Regs In a 19th Century State of Mind

By R. Joseph Sexton

In his famous 19th century treatise, “Democracy in America,” Alexis de Tocqueville noted that whereas the Spaniards “pursued the Indians with bloodhounds” and “sacked” the continent “with no more temper or compassion than a city taken by storm . . .” ultimately, “[t]he Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they even succeed in wholly depriving it of its rights” By contrast, de Tocqueville notes, “the Americans of the United States have accomplished this twofold purpose with singular felicity; tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.”

Apparently not much has changed in the past 150 years.

The Bureau of Indian Affairs’ (“BIA”) public comment period for proposed regulations governing “Indian lands” closes on November 28, 2014.¹ These proposed regulations concern “rights-of-way” over Indian lands; or, the rights of non-owners—like farmers, railroads, utility companies, and outside government agencies, among others—to access and use Indian lands.

To those who may not be familiar with federal policy over Indian lands, Tribal Governments and American Indian individuals can do very little with their lands without the approval of the BIA’s suffocating bureaucracy. Ironically, these are the same lands that were often promised to Tribes and their people by the federal government for their “exclusive use and benefit” in perpetuity. For anyone who has a basic knowledge of this area of law, the regulatory revisions may seem to be an effort to streamline the mind-numbing bureaucratic processes Tribes and individual Indians must navigate to make even the most basic decisions regarding their lands.

But to those who have seen the absolute ineffective and often times arbitrary nature of the BIA’s bureaucracy when it comes to governing Indian lands, these regulatory revisions do nothing more than perpetuate a resilient legacy of harm to Indian Country through laws, regulations, and executive actions emanating from Washington D.C.

Indeed, it is not hyperbole to contend that these regulations—combined with the ineffective regulatory regime that presently has a stranglehold on Tribes and individual

¹ Rights-of-way on Indian Land, 79 Fed. Reg. 34455 (June 17, 2014)(to be codified at 25 C.F.R. pt. 169); found online at: www.bia.gov/cs/groups/xraca/documents/text/idc1-026971.pdf

Indians' right to make use of their lands—will result in a continued diminishment of Tribal sovereignty and individual Indian landowner rights, which will, in turn, continue the slow but steady federal government's suffocation of Indian Country.

Specifically, the principal problems of these proposed rules include the following broad problems.

- Unnecessarily ambiguous provisions in **the proposed regulations open the door to state and local ordinances, taxes, and state courts**—the judges of which are often times openly hostile to Tribal sovereignty and woefully ignorant of Indian law in general—governing Indian lands. Such an open door undermines Tribal sovereignty. The regulations should make Tribal sovereignty paramount if self-determination is, in fact, a central element of modern federal Indian policy.
- **The proposed rules include significantly greater power for the BIA** to make decisions on behalf of Tribes and, especially, individual Indians, and to take actions impacting their lands without providing actual notice to the Tribal owners of those lands. This is disturbing to say the least. In essence, several of the revisions to these rules work to relieve the landowners of their right to have a say in what happens to their lands if it is too inconvenient for the BIA to track the landowners down and get their input. New regulations should empower the landowners, not disenfranchise them.
- **The proposed rules give increased authority for temporary holders of interests in Indian lands** (e.g., a life tenant) to encumber Indian land with a right-of-way that may be permanent and impossible to undo (e.g., a road that could have destructive effects on the land and environment). So, a tenant who has an interest in a parcel of Indian land that the landowners may never have agreed to may make decisions that permanently damage those lands, leaving the Indian landowners to deal with the effects of those temporary interest holders. What other trustee aside from the federal government would be permitted to treat her ward's realty with such disregard?
- **The proposed regulations contain an express presumption that the BIA must grant rights-of-way, renew rights-of-way, permit changes to rights-of-way, and allow for mortgaging of rights-of-way**, all of which burden the title to Indian lands, unless the BIA finds certain limited reasons to reject such efforts to encumber Indian lands. This is a presumption against the protection of the rights of the individual Indian and Tribal landowners. Again, it seems that a trustee's presumption should err on the side of protecting their wards' interests. In this case, the BIA proposes rules that do exactly the opposite.

The BIA's attempt to fast-track this significant regulatory overhaul may be the biggest problem here. Although there have been extensions of the agency's unilaterally imposed deadlines to submit comments on these proposed rule changes, the BIA first published the proposed rules this summer, and had minimal consultation with those who will be

impacted most profoundly: Tribes and individual Indian landowners. A couple of extensions of a deadline to submit comments is not enough. The BIA should have taken, and should still take, its time with these rules by making a much better effort to consult with those who will be impacted by these proposed rules.

In any event, it is alarming to still see the lack of regard for the rights of American Indian people interwoven through these proposed regulations. It is more troubling to consider the potential havoc these new rules may wreak on Indian Country. Hopefully these proposed regulations do not become law in such a way that allows the United States to, yet again, tranquilly and legally deprive the first Americans of their land rights.

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