

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STAND UP FOR CALIFORNIA!, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR,
et al.,

Defendants.

Civil Case No. 1:17-cv-00058
(RDM)

**PLAINTIFFS' MOTION TO HOLD CASE IN ABEYANCE PENDING BOARD OF
INDIAN APPEALS PROCEEDINGS AND MEMORANDUM IN SUPPORT**

Plaintiffs, Stand up for California!, Patty Johnson, Joe Teixeira, and Lynn Wheat (“Citizens”) respectfully move the Court for an order holding this case in abeyance pending a decision from the Interior Board of Indian Appeals (“Board”) on Citizens’ petition to have title to land removed from trust in *In Re: January 19, 2017 Decision to Accept into Trust 35.92+/- Acres of Land in the City of Elk Grove, California, for the Wilton Rancheria and February 10, 2017 Action to Place Said Land Into Trust Before Final Decision*. Attachment 1, Declaration of Jennifer A. MacLean, filed Feb. 24, 2017 (“MacLean Decl.”), ¶ 10, Ex. J.

A stay is warranted while the Board considers Citizens’ Petition for Preliminary Relief to remove title to approximately 36 acres of land from trust—the Elk Grove Site. Under agency regulations, Defendants lack authority to acquire title to land in trust before administrative appeals have been exhausted. *See* 25 C.F.R. § 151.12(d). When Defendants issued their January 19, 2017 Record of Decision, announcing their intent to acquire title to the Elk Grove Site in trust, the decision was not final for the Department. Defendants’ February 10, 2017 acquisition of the Elk Grove Site, therefore, was ultra vires. In the event that the Board does not order, or determines that it cannot order, Defendants to comply with their regulations by immediately

removing title from trust, Citizens will need to seek relief from this Court. Therefore, in the interests of judicial efficiency and preservation of resources, a stay is appropriate until the Board rules on Citizens' motion.

BACKGROUND

On January 11, 2017, Citizens filed this action and sought a Temporary Restraining Order ("TRO") ordering Defendants not to immediately acquire the Elk Grove Site in trust for the Wilton Rancheria. Plaintiffs' Emergency Motion for temporary Restraining Order and Preliminary Injunction, Dkt. 2. On January 17, 2017, the Court denied Citizens' motion. Minute Order, January 17, 2017.

Citizens and Defendants subsequently agreed not to proceed with preliminary injunction briefing, based on Defendants' statement they did not consider Citizens' prior requests to stay any title transfer a formal request under 5 U.S.C. § 705. *See* Dkt. 6. On January 17, 2017, Citizens filed a formal 5 U.S.C. § 705 request, asking Defendants to stay the effect of a fee-to-trust decision for the Wilton Rancheria. *See* Dkt. 6, Ex. 1. Citizens informed this Court on January 17, 2017, that—in the event Defendants issued a trust decision—Citizens would “review any final decisions and confer with Defendants at that time as to the necessity of and timing for seeking emergency and/or preliminary injunctive relief.” Dkt. 6 at 2.

On the evening of January 19, 2017, Mr. Larry Roberts issued a Record of Decision (“ROD”) to acquire the Elk Grove Site in trust. MacLean Decl. ¶ 2, Ex. A. Mr. Roberts signed the ROD as the Principal Deputy Assistant Secretary—Indian Affairs. *Id.* at 90. Under agency regulations, “[a] decision made by the Secretary, or the Assistant Secretary—Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.” 25

C.F.R. § 151.12(c). Decisions made by other Bureau of Indian Affairs officials are not. *Id.* § 151.12(d).

Non-final trust decisions are subject to administrative appeal. 25 C.F.R. § 151.12(d). Agency regulations do not permit Defendants to acquire land in trust before the 30-day appeal period has expired. *See id.* §§ 151.12(d)(2)(iv), 2.7(b). If an interested party appeals a trust decision, Defendants cannot acquire land in trust until all administrative appeals are exhausted. *See id.* § 151.12(d)(2)(iv).

Citizens contacted Defendants through counsel on January 19, 2017 to request a copy of the ROD and to confirm status of the title to the land. MacLean Decl. ¶ 3, Ex. B. On January 20, 2017, Defendants confirmed that they had not yet acquired title to the Elk Grove Site. *Id.* The following Monday, Defendants informed Citizens that they would not take title to the land before resolving Citizens' request under 5 U.S.C. § 705, but that they did not know when that request would be resolved. *Id.* ¶ 4, Ex. C. Accordingly, on January 26, 2017, Citizens asked to meet with Defendants to discuss concerns regarding the "unprecedented nature" of the ROD and whether they could negotiate a reasonable timeline for resolving Citizens' challenge. *Id.* ¶ 5, Ex. D.

On February 2, 2017, Citizens received a Notice of Availability of the ROD from Analytical Environmental Services, the environmental contractor that prepared the environmental impact statement for Defendants. MacLean Decl. ¶ 6, Ex. E. The Notice stated that the Principal Deputy Assistant Secretary made a final agency determination to acquire the Elk Grove Site in trust for the Wilton Rancheria. *Id.* Because Analytical Environmental Services'

notice does not comply with 25 C.F.R. Part 151 or 25 C.F.R. Part 2, the 30-day period to appeal the ROD has yet to be triggered.¹ MacLean Decl. ¶ 5, Ex. D.

On February 6, 2017, Citizens contacted Defendants through counsel regarding Citizens' January 26, 2017 request for a meeting. MacLean Decl. ¶ 7, Ex. F. Counsel for Defendants responded, "I believe that they are still considering it but I will ask them if they can tell me something definite." *Id.*

On the evening of February 10, 2017, Defendants denied Citizens' 5 U.S.C. § 705 request, declined their meeting request, and acquired the Elk Grove Site in trust. MacLean Decl. ¶ 8, Exs. G and H. Because Defendants acquired title at the same time they denied both of Citizens' requests, Citizens could neither appeal the denial of the 5 U.S.C. § 705 request, nor seek emergency relief from the Court pursuant to that same statute.

Citizens subsequently contacted Defendants on February 15, 2017, regarding the inconsistency between their trust acquisition of the Elk Grove Site and agency regulations governing non-final agency action. MacLean Decl. ¶ 9, Ex. I. Citizens did not receive a response to that email.

On February 21, 2017, Citizens filed a Notice of Appeal, a Petition for Preliminary Relief, and a Statement of Reasons with the Interior Board Indian Appeals. *See* MacLean Decl. ¶

¹ Defendants did not publish notice of its decision in the Federal Register or in a newspaper of local circulation. *See* 25 C.F.R. §§ 151.12(c)(2)(ii), (d)(2)(iii). Agency regulations require Defendants to "[p]romptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to [25 C.F.R. Part 2]" when an agency official other than the Secretary or Assistant Secretary issue a decision. *Id.* §§ 151.12(c), (d)(2)(ii). The written notice of the decision "shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal." *Id.* § 2.7(c). The time to file a notice of appeal does not begin to run until interested parties are provided notice in accordance with 25 C.F.R. § 2.7(c). *Id.* § 2.7(b).

10, Ex. J. Citizens' appeal challenges the substance of the January 19, 2017 ROD, but for purposes immediately relevant to this Motion, Citizens sought an order from the Board directing Defendants to remove the Elk Grove Site from trust. *See id.* Citizens has asked the Board to consider that Petition on an expedited basis. *Id.*

DISCUSSION

Defendants' violation of unambiguous agency regulations places Citizens in a jurisdictional limbo. A decision by the Principal Deputy Assistant Secretary is not final for the Department. 25 C.F.R. §§ 151.12(d). Interested parties are supposed to have 30 days to file a notice of appeal—from the date they are provided legally sufficient notice—during which time Defendants cannot acquire title to land in trust. *Id.* §§ 151.12(d)(2)(ii), (iv). If an interested party appeals a decision, Defendants cannot acquire title until administrative remedies are exhausted. *Id.*

Here, the Principal Deputy Assistant Secretary issued what is plainly and by regulation a non-final trust decision. Yet Defendants publicly represented that the decision *is* final for the Department. Defendants have not complied with notice requirements, for either final or non-final agency decisions. *See* 25 C.F.R. § 151.12(c), (d). And when they denied Citizens' meeting request *and* their 5 U.S.C. § 704 request at the same time they took the Elk Grove Site in trust, they prevented Citizens from addressing *any* of these issues, either before the Department or this Court. From start to finish, Defendants violated the regulations they promulgated to restrict the arbitrary exercise of power by their officials.

The trouble is that agency regulations do not clearly address what to do when agency officials ignore basic regulatory requirements in this manner. The Board clearly has authority to review a non-final agency decision, but its authority may be less certain when the action that

non-final decision authorizes has already been implemented. In denying Citizens' 5 U.S.C. § 705 request, Defendants cited examples where they have taken land out of trust. *See* MacLean Decl. ¶ 8, Ex. G at 5, n.5. In at least one case, Defendants appear to have relied on 43 C.F.R. § 4.5(a)(2) to support removal of title from trust.² And Section 4.5 grants the Secretary "[t]he authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision." 43 C.F.R. § 4.5(a)(2). But Defendants also cite, as contrary authority, *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987). In that case, the court acknowledged the inherent authority of agencies to reconsider their decisions, but found that "the Secretary exceeded his authority in reconsidering and in revoking the trust status of plaintiff's land" because the administrative appeal at issue was untimely and because of various equitable considerations. *Id.* at 1192-95.

Agency regulations afford the Board the power to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." 43 C.F.R. § 4.318. Thus, if the Secretary has the authority to remove land from trust under 43 C.F.R. § 4.5(a)(2), presumably the Board does as well. Nonetheless, Citizens is unaware of any instance in which the Board has ordered the removal of land from trust. The Board may be uncertain, as well. On February 24,

² MacLean Decl. ¶ 8, Ex. G at 5, n.5 (*citing* Declaration of Pilar Thomas in Support of Brief in Support of the United States' Amended Motion to Dismiss or in the Alternative for Summary Judgment, at 40, *State of South Dakota v. United States Dep't of the Interior*, ECF No. 13-1, Case No. 10-cv-03006-RAL (D.S.D. July 8, 2010)). Defendants also cite a Federal Register notice explaining that the remand of the trust acquisition decision at issue in *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996), "operates to take the land out of trust." 62 Fed. Reg. 26,551, 26,552 (May 14, 1997). The Federal Register notice, however, is ambiguous—at best—as to the legal basis for that conclusion.

2017, the Board issued an order for briefing on jurisdiction to resolve this question. MacLean Decl. ¶ 13, Ex. M.

This jurisdictional uncertainty, which the Board will soon resolve, supports Citizens' request that the Court stay these proceedings while the Board reviews Citizens' Petition. This Court has "broad discretion to stay all proceedings in an action pending the resolution of independent proceedings elsewhere." *IBT/HERE Employee Representatives' Council v. Gate Gourmet Div. Americas*, 402 F. Supp. 2d 289, 292 (D.D.C. 2005). The power to stay proceedings flows from the inherent powers of each court to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quotations omitted).

Holding this case in abeyance until the Board rules on Citizens' Petition will conserve scarce judicial resources. Citizens conferred with Defendants regarding this Motion on February 21 and 23, 2017. MacLean Decl. ¶¶ 11, 12, Exs. K, L. Defendants have not yet, however, formulated a position with regard to this situation. *Id.* ¶ 12, Ex. L. Thus, it is possible that Defendants may independently acknowledge legal error and remove the Elk Grove Site from trust. Alternatively, the Board may order the removal of the title from trust, while it considers Citizens' appeal. If either occurs, Citizens will confer with Defendants regarding appropriate action in this proceeding.

However, if Defendants refuse to comply with agency regulations, and the Board denies Citizens' Petition, Citizens may have to seek relief from this Court. In that case, a stay will have served to reduce the time and effort the Court, counsel, and litigants must expend.

A proposed order has been filed for the Court's convenience.

Dated this 24th day of February, 2017

Respectfully submitted,

PERKINS COIE LLP

By: /s/ Jennifer A. MacLean

Jennifer A. MacLean, Bar No. 1013448

JMacLean@perkinscoie.com

700 Thirteenth Street, N.W., Suite 600

Washington, D.C. 20005-3960

Telephone: 202.654.6200

Facsimile: 202.654.6211

Attorneys for Plaintiffs

Stand Up for California!

Patty Johnson

Joe Teixeira

Lynn Wheat

STATEMENT PURSUANT TO LOCAL RULE 7(m)

Pursuant to Local Rule 7(m), I hereby certify on the 21st and 23rd day of February 2017, that counsel for Citizens has contacted opposing counsel regarding this Motion, but Defendants have not determined their position as of the filing of this motion. Counsel for Plaintiffs has provided opposing counsel with all pleadings and papers filed in this action to date.

/s/ Jennifer A. MacLean

Jennifer A. MacLean
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2017, the foregoing Motion to Hold Case in Abeyance Pending Board of Indian Appeals Proceedings and Memorandum in Support and Statement Pursuant to Local Rule 7(m) was filed with the Clerk of Court using the CM/ECF system. I further certify that service will be accomplished by the CM/ECF system on all participants in this case that are registered CM/ECF users.

s/ Jennifer A. MacLean

Jennifer A. MacLean