
Rulemaking To Update Land-Into-Trust Process For Tribes And Individual Indians

DECEMBER 13, 2022

On December 5, 2022, the Interior Department's Bureau of Indian Affairs (BIA) published [proposed revisions](#) to 25 C.F.R. Part 151—the regulations governing the United States' discretionary acquisition of land in trust for the benefit of tribal governments or individual Indians. (The revisions affect *discretionary* trust acquisitions only; they do not affect mandatory acquisitions, which typically are governed by statute or court order.) Tribal leaders and other interested parties—including tribal organizations, gaming interests, and surrounding communities—should familiarize themselves with the changing regulatory framework, and are [invited](#) to help shape that framework by submitting public comments to the BIA on or before March 1, 2023, or by participating in consultation sessions open to tribal leadership and representatives of federally recognized tribes or Alaska Native Corporations.

According to its [notice](#) in the Federal Register, the BIA is seeking “to make the land into trust process more efficient, simpler, and less expensive,” in keeping with President Biden's [pledge](#) to “make it easier for Tribes to place land into trust.” The existing regulations do not express any policy in favor of trust acquisition. In contrast, the proposed new regulations would affirm that “[i]t is the [Interior] Secretary's policy to acquire land in trust ... for

individual Indians and tribes.” The proposed regulations also list a number of policy reasons that could support a given acquisition, including that the acquisition would create a tribal land base, protect tribal homelands, preserve cultural resources, facilitate Indian housing, or promote economic development.

The balance of the BIA’s proposed revisions would make both procedural and substantive changes to the existing Part 151 regulations. For instance, the BIA proposes to speed up its decision-making process by requiring the agency to notify applicants when their acquisition package is complete and then to issue a final decision within 120 days. Other revisions seek to remove certain obstacles that have hampered applicants in the past. For example, many applicants have had to continually update their environmental site assessments in order to keep those assessments valid during the pendency of their application. The proposed revisions anticipate only one such assessment at the beginning of the process, and allow for a single update, if necessary, after an application’s approval.

The BIA has also proposed revisions to place a substantive thumb on the scale in favor of trust acquisition. The existing regulations contemplate three categories of land-into-trust applications: those involving land (1) within an Indian reservation, (2) contiguous to the boundaries of a reservation, or (3) outside a reservation. For applications in each of those categories, the BIA proposes to place increased weight on expected benefits to tribal welfare and eliminate existing requirements to consider an applicant’s need for the proposed acquisition, the impact on state and local government tax rolls, and any jurisdictional problems or land-use conflicts that could arise. For applications in the first two categories, the proposed revisions would also create a presumption in favor of approval. For applications in the third category, the BIA has proposed replacing what it describes as an existing

“bungee cord” approach (under which applications are viewed less favorably the farther the subject land is from the tribe’s reservation) with a presumption that acquisition would lead to community benefits without regard to the location of the land.

In addition, the proposed revisions would introduce a new, fourth category of acquisition—labeled “initial Indian acquisitions”—to facilitate the acquisition of trust lands for tribes that do not currently have any land in trust. Applications in this fourth category would enjoy similar presumptions to those afforded applications in the other three.

Finally, the notice states that the BIA seeks to reduce regulatory uncertainty by formally incorporating into its regulations the factors identified by the U.S. Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009), as relevant to determining whether a tribe was under federal jurisdiction in 1934 and thus is eligible under the Indian Reorganization Act of 1934 to have land taken into trust. Drawing on case law and existing agency analysis, the proposed regulations set forth discrete categories of “conclusive,” “presumptive,” and “probative” evidence of a tribe’s statutory eligibility for trust lands.

Parties that may have a land-into-trust application pending when the new regulations ultimately take effect should pay special attention to the BIA’s proposed revisions, as the revisions would (if adopted) allow such parties to choose between continuing to proceed under the current regulations or proceeding instead under the new rules. And whether or not any land-into-trust application is pending, parties seeking to understand, litigate, or comply with the revised regulations may wish to engage counsel with experience navigating the administrative process, preparing comments on proposed regulations, and litigating and advising on tribal land-acquisition issues. Attorneys in WilmerHale’s [Native American Law](#) Practice have

extensive experience in these areas—including experience litigating the Carcieri factors for determining trust eligibility—and are well-equipped to assist tribal governments and other interested parties with these issues.

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