TRUST THE PROCESS: INTERIOR PROMISES FINAL RULE WILL STREAMLINE TRIBAL TRUST LAND ACQUISITIONS

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The administrative process by which tribal nations obtain trust status for land to conduct off-reservation gaming or other activities has been criticized by some as cumbersome, lengthy, and overly burdensome.[1] With recently implemented amendments to 25 Code of Federal Regulations (CFR) part 151, the Biden Administration seeks to make this process more favorable to Tribes and to economic development through gaming.

Background

In 1934, Congress gave the US Department of the Interior (the Department) the power to take land into trust for individual Native persons or Tribes through the Indian Reorganization Act (IRA).[2] The purpose of this Act was to allow Tribes to reclaim lands that may have been removed from tribal ownership to be used to "strengthen self-determination and sovereignty."[3] The land-into-trust or fee-to-trust process allows the Department to hold land that the Tribe owns for the Tribe's benefit. The benefits of trust status include sovereign immunity within the bounds of the land; freedom from state and local jurisdiction; exemption from taxation of the land; new market tax credits; Indian employment tax credits; tax-exempt financing; discounted leasing rates; federal contracting preferences; foreign trade zone customers duty deferral, elimination or reduction; state/county land use exemptions; and accelerated depreciation for business property on the land.[4] Trust land is particularly important for Tribes looking to conduct gaming activity: A Tribe can only conduct Class III (Las Vegas-style) gaming activities on non-reservation lands acquired after 1988 which are taken into trust.[5]

In order to be eligible for trust land, a Tribe must be federally recognized and have been "under Federal jurisdiction" in 1934.[6] Regulations codified at 25 CFR part 151 govern this land-into-trust process. Generally, they require a detailed application demonstrating eligibility for trust land through historic evidence, consultation with state and local officials with regulatory jurisdiction over the land to be acquired, and compliance with the National Environmental Policy Act (NEPA).[7]

On December 5, 2022, the Department's Office of the Assistant Secretary for Indian Affairs published proposed amendments to the regulations governing the land into trust process after consideration

of comments from the tribal community. These proposed revisions were first announced at the 2022 White House Tribal Nations Summit, held on November 30 and December 1, 2022. Secretary Bryan Newland stated that the goal of the amendment is to make this process "easier" for Tribes that have faced barriers with the preexisting system, such as costs, delays, or the complexity of the decision-making process.[8] The proposed rules built upon the Secretary of the Interior's approach, which contrasts with that of the prior administration, to streamline the land-into-trust process by returning approval authority to the Bureau of Indian Affairs (BIA) regional directors and to provide clarity on the compacting process.[9]

During the rulemaking comment period, the Department met with Tribal representatives during "two listening sessions and four formal consultation sessions" and reviewed comments from Indian Tribes and the public.[10] Tribes were largely supportive of the amendments, but some raised concerns about presumptive acquisitions outside of a Tribe's historic lands and wanted an equal opportunity to comment on acquisitions alongside government stakeholders.[11] State and local government commenters opposed the rule on the grounds of lack of administrative authority and federalism and were concerned about the presumptions afforded to applicants, as well as the reduced role of public stakeholders in the process and decreased notice requirements.[12]

On December 6, 2023, a year after publishing the proposed amendments to the regulations, the Department issued its final rule.[13] The updated land-into-trust rule went into effect on January 11, 2024.[14] While most of the differences between the proposed version and the final rule were stylistic or clarifying, the provisions regarding evaluation of requests for land received a substantive update to ensure meaningful notice to state and local governments and opportunity for comment.

In its December press release, the Department announced that the final fee-to-trust rule furthered President Biden's goal of "mak[ing] it easier for Tribes to place land into trust" and made the process "simpler, more efficient, and less expensive."[15] After so many years spent in limbo for some Tribes under the existing process, will this prove true in practice? Only time will tell.

The Revised Land-into-Trust Process

Notable changes introduced in the final rule for the land-into-trust process include a 120-day maximum period of application review (compared to the existing average of 985 days with no maximum[16]), a new "initial Indian acquisition" method designed to make it easier for Tribes to receive their first trust land, "presumptions" of approval of a trust land applications for on-reservation acquisitions, acquisitions contiguous to a reservation, and initial acquisitions, reduced review criteria for applicants, and codification of a definition of "under Federal jurisdiction" for determination of trust land eligibility.[17] Pending applications will continue under the prior procedure by default, but applicants can elect to apply the new process except for the 120-day rule.[18] The final rule also clarifies that its procedures do not apply to grants of trust land by Congress or a court.[19]

The land-into-trust amendments create a new "presumption" of approval of a trust land application for on-reservation acquisitions, acquisitions contiguous to a reservation, and initial acquisitions, which will simplify and streamline the process for Tribes looking to acquire land already set aside by the federal government for their Tribe or for those looking to acquire trust land for the first time, even if off-reservation.[20] This presumption is intended to affirm that the land is for the welfare and use of the Tribe, as well as to address the historical impact of removal of reservation land by the US government. In making all trust land determinations under the amended scheme, the Department will give "great weight" to important purposes for tribal welfare (e.g., protecting tribal homelands).[21]

Despite opposition from state and local governments, the Department abandoned the "bungee cord" approach for land that is not contiguous to or part of a reservation. That is, there will no longer be heightened scrutiny the greater the distance

between the proposed trust land and the location of the Tribe's reservation. The Secretary of the Interior will instead consider the location of the land broadly in determining whether to take the land into trust. For land that is an initial acquisition, the location of the land is not considered at all unless it is necessary given state and local government comments (e.g., regarding potential conflicts of land use). The rule assumes that the Tribe will benefit from the acquisition and that the Secretary will consider the location of the land and potential conflicts of land use when reviewing the state and local comments in their holistic review of the application. This is significant because it removes a prior constraint on grants of trust land located farther from the Tribe's lands and may lead to an increase in trust land acquisitions across state lines.

Under the proposed rule, the Department sought to reduce the involvement of state and local governments in the land-into-trust process, including by not inviting state and local government comment for on-reservation acquisitions. Predictably, government stakeholders pushed back on this during the comment period. In the final rule, for land within the boundaries of or contiguous to a reservation and for initial acquisitions, the Department will notify state and local governments with regulatory jurisdiction over the proposed trust land. It will then provide a period of 30 calendar days in which state and local governments can provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments.[22] The applicant gets to see the comments and reply if the state or local government responds during that time or request that the Secretary proceed with a decision.[23] When reviewing these comments, the Secretary will apply a presumption "that the Tribal community will benefit from the acquisition."[24]

For land which is outside of and noncontiguous to a reservation, the notice process will be similar to the above; however, the relevant state and local government will be asked to do more than rebut a presumption (i.e., "provide written comments on the acquisition's potential impact on regulatory jurisdiction, real property taxes, and special assessments").[25] The Secretary's review of these comments and initial reservation comments includes "the location of the land and potential conflicts of land use."[26]

At the insistence of many Tribal commenters, the Department added a 30-day deadline within which the BIA must notify applicants of a complete acquisition package so that the new 120-day maximum review period can begin to run.[27] Under the existing regulations, there was no prescribed length of time for a decision, so this new expediency is significant, particularly for Tribes that have waited years, and sometimes decades, to have their land taken into trust.[28]

The rule also clarifies the respective roles and obligations of the Department and Tribe in collaborating to complete the land-into-trust application.[29]

Update to Interpretation of Land-into-Trust Eligibility Criteria

In addition to process-oriented updates, the Part 151 final rule attempted to clarify the term "under Federal jurisdiction" in the IRA's definition of eligible Indians. The scope of this language can have a significant impact on a Tribe's ability to become eligible for trust land. Prior to the seminal US Supreme Court decision in *Carcieri v. Salazar*[30] in 2009, discussed below, the Department had been ostensibly approving fee-to-trust applications for federally recognized Tribes regardless of whether they had been under federal jurisdiction in 1934.[31] Post-*Carcieri*, the Department issued guidance outlining criteria for determining a Tribe's federal jurisdictional status.[32] The term has also been the subject of particularly contentious litigation in the tribal gaming context.[33]

By way of background, *Carcieri* was the controversial Supreme Court case that reversed long-standing Department land-into-trust eligibility policy and reinstated the requirement that a Tribe must be both federally recognized and under federal jurisdiction in 1934 to be eligible for trust land. Specifically, it held that the Secretary of the Interior could not take land into trust for the Narragansett Tribe because it was not under federal jurisdiction

in 1934, the time of the IRA's enactment.[34] While the central holding in *Carcieri* is temporal (i.e., *when* does a Tribe need to have been under federal jurisdiction?), the majority did recognize that since the Narragansett had always been under state jurisdiction (rather than federal), they did not meet the definition of "Indian" in the IRA and were ineligible to receive trust land.[35] Notably, Justice Breyer issued a concurring opinion that proposed a framework for assessing whether a Tribe was under federal jurisdiction, which suggested that certain historic criteria would provide persuasive evidence of such status.[36] He went on to apply this test to the Narragansett's historical background and opined that they would not qualify.[37]

In the Department's 2014 Opinion M-37029 (the M-Opinion), which was revoked by the Trump presidential administration and reinstated on April 27, 2021, the Department outlined its guidance for what it means to be under federal jurisdiction per the IRA in response to *Carcieri*.[38] Under the M-Opinion, to be considered under federal jurisdiction, a Tribe must: (i) have been subject to an action or series of actions "that generally reflect federal obligations, duties, responsibility for or authority over the Tribe by the Federal Government"; and (ii) had active jurisdictional status in 1934.[39] The M-Opinion discusses specific examples of evidence that would be considered probative of a Tribe's jurisdictional status to varying degrees. This guidance is reminiscent of Justice Breyer›s concurrence in *Carcieri*. Application of the evidentiary guidelines from the M-Opinion has not always been consistent, however, leading to judicial intervention and review further delaying the approval process for Tribes. [40]

The revisions to Section 151.4 include three ways of demonstrating a Tribe's jurisdictional status under the IRA vis-à-vis the federal government:

- *Conclusive evidence*, such as a treaty ratified by the United States and still in effect in 1934 or a vote under Section 18 of the IRA, with the exclusion of "evidence of executive officials disavowing Federal jurisdiction over a Tribe in certain instances" (no further analysis needed);
- *Presumptive evidence*, which includes evidence of "land claim settlements," treaty negotiations with the United States or federal legislation for a specific Tribe acknowledging a government-to-government relationship in or before 1934 (further analysis only as to evidence of existence of Federal jurisdiction in 1934); and
- *Probative evidence*, which is an act or series of acts that when viewed in concert establish Federal responsibility or authority over the Tribe that remained intact in 1934 (e.g., attendance of tribal members at BIA operated schools, the provision of health and social services to a Tribe or tribal members, "efforts by the Federal Government to conduct a vote under section 18 of the IRA to accept or reject the IRA where no vote was held," Federal "approval of contracts between a Tribe and non-Indians," and Federal "enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions)). Once this evidence has been provided, it is the responsibility of the Secretary to determine whether the Tribe has: (i) been subject to federal obligation or authority; and (ii) had an active jurisdictional status in 1934.[41]

The final rule clarifies that the adoption of a new test will not disturb prior determinations that a particular Tribe was under federal jurisdiction per the IRA.[42] Although the categories for the federal jurisdictional analysis are more specific than the M-Opinion guidance, the third category still allows for the type of broad discretion that the Department has been employing for this determination under current practice. This discretion provides fertile ground for challenges to Department land-into-trust decisions under the Administrative Procedure Act (APA). Indeed, state and local governments raised several legal arguments against the final rule, including under the APA, in their public comments.

Conclusion

The revisions to the land-to-trust regulations appear designed to make it easier for Tribes to acquire trust land. However, these changes do not address the backlog of pending applications nor do they

neutralize the risk of litigation over trust land acquisitions. While the truncated decision-making period for trust land acquisitions is certainly a positive step for Tribes submitting new applications, APA challenges by citizens or competitors and other legal disputes can still cause significant delays in the ability to use trust land and develop it once acquired.

In an area as contentious and competitive as Tribal land acquisition, particularly in the gaming context, the final rule is likely to give rise to disputes in the courts involving the new terms of the land-into-trust process.

Notes

1 See, e.g., Land, Trust, and Natural Resource Management: Hearing Before the H. Approp. Comm., Subcomm. on Interior, Env't, and Related Agencies, 116th Cong. 1 (2020) (statement of Gov. Reggie Wassana, Cheyenne and Arapaho Tribes); U.S. Dept. of Interior, Bureau of Indian Aff., Indian Affairs proposes new regulations to improve fee-to-trust, gaming compact processes (Dec. 5, 2022), available at https://www.bia.gov/news/indian-affairs-proposes-new-regulations-improve-fee-trust-gaming-compact-processes; Philip Marcelo, WBUR, Massachusetts Tribe Earns Federal Land In Trust Status (Sept. 18, 2015), https://www.wbur.org/news/2015/09/18/mashpee-land-approval; Cayuga Nation of New York, Indian Nation Sues Federal Government for 15-Year Delay on Trust Land Application, Cayuga Nation News (June 16, 2020), https://cayuganation-nsn.gov/news/indian-nation-sues-federal-government-for-15-year-delay-on-trust-land-application.

2 Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5129 (2022).

3 25 C.F.R. § 151.3 (2024).

4 U.S. Dept. of Interior, Bureau of Indian Aff., Benefits of Trust Land Acquisition (Fee to Trust), https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition; U.S. Dept. of Interior, Bureau of Indian Aff., Fee to Trust Land Acquisitions, https://www.bia.gov/bia/ots/fee-to-trust.

5 Tribes that conduct Class III gaming must also comply with the Indian Gaming Regulatory Act.

6 25 U.S.C. § 5129 (2024). Alternatively, tribes may be descendants of members who were federally recognized and under Federal jurisdiction in 1934 or of "one-half or more Indian blood." Id.

7 25 C.F.R. § 151.8 (2024).

8 U.S. Dept. of Interior, Bureau of Indian Aff., Indian Affairs proposes new regulations to improve fee-to-trust, gaming compact processes (Dec. 5, 2022), https://www.bia.gov/news/indian-affairs-proposes-new-regulations-improve-fee-trust-gaming-compact-processes.

9 U.S. Dept. of Interior, Office of the Secretary, Order No. 3400, Delegation of Authority for Non-Gaming Off-Reservation Fee-to-Trust Acquisitions (April 27, 2022); U.S. Dept. of Interior, Bureau of Indian Aff., Indian Affairs to Host Tribal Consultations on Changes to Fee-to-Trust & Gaming Compact Regulations (Mar. 29, 2022), https://www.bia.gov/news/indian-affairs-host-tribal-consultations-changes-fee-trust-gaming-compact-regulations.

10 U.S. Dep't of Interior, Indian Affairs announces new regulations to improve fee-to-trust process (Dec. 6, 2023), https://www.bia.gov/news/indian-affairs-announces-new-regulations-improve-fee-trust-process.

11 88 Fed. Reg. 86230, Part V (2023).

12 Id.

13 88 Fed. Reg. 86222 (2023).

14 25 C.F.R. § 151 (2024).

15 88 Fed. Reg. 86230 n. ii (2023).

16 88 Fed. Reg. 86223 (2023).

17 See id.

18 25 C.F.R. § 151.17(a) (2024).

19 Id.

20 See 25 C.F.R. § 151.9-12 (2024). In addition, no policy reasons are required for the acquisition where the tribe already owns an interest in the land. Id.

21 See id.

22 25 C.F.R. § 151.9-10, 12 (2024).

23 Id.

24 Id.

25 25 C.F.R. § 151.11 (2024).

26 Id.

27 25 C.F.R. § 151.8 (2024).

28 For example, in 2020, the Cayuga Nation sued the Department in federal court while awaiting a decision on an application submitted in 2005. Cayuga Nation of New York, Indian Nation Sues Federal Government for 15-Year Delay on Trust Land Application, Cayuga Nation News (June 16, 2020), https://cayuganation-nsn.gov/news/indian-nation-sues-federal-government-for-15-year-delay-on-trust-land-application.

29 25 C.F.R. § 151.8 (2024).

30 555 U.S. 379 (2009).

31 See U.S. Dep't of Interior, Office of the Solicitor, M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (the M-Opinion) at 18 (Mar. 12, 2014), available at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf (per Carcieri, the Department must "point to some indication that in 1934 the tribe in question was under federal jurisdiction" beyond general plenary authority); see, e.g., Carcieri, 555 U.S. at 382, 395 (procedural history was that Department had granted the Narragansett Tribe land in trust even though it was undisputed that the Tribe was not under federal jurisdiction in 1934).

32 M-Opinion, supra note 31.

33 See, e.g., Mashpee Tribe v. Bernhardt, 466 F. Supp. 3d 199, 235-36 (D.D.C. 2020), appeal dismissed, No. 20-5237, 2021 WL 1049822 (D.C. Cir. Feb. 19, 2021) (holding that Secretary of Interior improperly applied M-Opinion test in decision after remand denying Mashpee Tribe land into trust by viewing evidence of Mashpee students attending BIA schools and receiving federal services there, three different census reports, and federal reports and surveys in isolation rather than "in concert"); Littlefield v. U.S. Dep't of the Interior, 85 F.4th 635, 646–53 (1st Cir. 2023), cert. denied sub nom. Littlefield v. Dep't of Interior, No. 23-839, 2024 WL 1348872 (S. Ct. Apr. 1, 2024).

34 Carcieri, 555 U.S. at 382 (discussing with approval the Secretary's application of the M-Opinion test for "under Federal jurisdiction" to the Mashpee Wampanoag Tribe in a 2021 Record of Decision granting land into trust).

35 Id. at 384.

36 Id. at 395, 399 (Breyer, J., concurring).

37 Id. at 397-99 (Breyer, J., concurring).

38 M-Opinion, supra note 31.

39 Id. at 19.

40 See, e.g., Mashpee Tribe v. Bernhardt, 466 F. Supp. 3d 199, 235-36 (D.D.C. 2020), appeal dismissed, No. 20-5237, 2021 WL 1049822 (D.C. Cir. Feb. 19, 2021) (holding that Secretary of Interior improperly applied M-Opinion test in decision after remand denying Mashpee Tribe land into trust by viewing evidence of Mashpee students attending BIA schools and receiving federal services there, three different census reports, and federal reports and surveys in isolation rather than "in concert"); Citizens for a Better Way v. U.S. Dep't of Interior, No. 2:12-CV-3021-TLN-AC, 2015 WL 5648925, at *22 (E.D. Cal. Sept. 24, 2015), aff'd sub nom. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke, 889 F.3d 584 (9th Cir. 2018) (upholding Secretary of Interior's determination that the Estom Yumeka Maidu Tribe of the Enterprise Rancheria were under Federal jurisdiction, which applied the M-Opinion test, based in part on evidence of Section 18 election).

41 25 C.F.R. § 151.4 (2023).

42 Tribes with pending applications will be able to opt in to proceed under the new regulations but will not receive the benefit of the 120-day timeline. See id.