

**Comments of the National Congress of American Indians
on the Notice of Proposed Withdrawal of the Final Rule
on Acquisition of Title to Land in Trust for the Benefit of Tribes and Indians**

September 12, 2001

On January 16, 2001, the Department of Interior issued a final rule regarding acquisition of title to land in trust for Indian tribes and individual Indians. (66 Fed. Reg. 3452). The effective date for this rule has been extended several times. On August 13, 2001, the Department again extended the effective date, and issued a notice of proposed withdrawal of the rule, requesting comments on whether to withdraw the final rule and propose a new rule. (66 Fed. Reg. 42474). The August 13 notice also identified four specific areas where the Department is considering changes to the final rule.

The Department's authority for taking land into trust is found in Section 5 of the Indian Reorganization Act (IRA), and is extremely important in assisting Indian tribes to recover from the impacts of enormous loss of lands caused by federal policies. After engaging in the extensive rulemaking process to this date and finding the final rule to be generally balanced in its approach to taking land into trust, NCAI continues to support the final rule and would encourage the Secretary not to withdraw the rule, but instead to make it effective at the end of the current extension period. Our position is supported by NCAI Resolution #MSH-01-39, "Supporting Trust Land Acquisition Regulations." NCAI's support for the final rule was explained in detail in our June 15, 2000 comments, and we attach those comments.

As the Department reaches a final decision on whether or not to withdraw the rule, we would like to briefly reiterate several key factors in support of the rule. These comments also discuss the specific areas noted in the August 13 notice. Finally, we discuss some concerns related to the rulemaking and consultation process in the event that the Department decides to withdraw the rule. If there is another round of rulemaking, we believe that the process for consulting with tribal governments would be absolutely critical to ensuring the success of the rulemaking procedure and to maintaining the government-to-government relationship between tribes and the Department.

The Final Rule is Balanced and Should Be Made Effective

The final rule was the result of a lengthy rulemaking process where all parties had ample opportunity to provide comments and consult with the Department. It has been over 28 months since the rule was initially proposed - and the issue has been under consideration within the Department for much longer than that. The final rule struck a balance between viewpoints that is reflected in the fact that neither the tribes nor the states received everything that they wanted. Compared to the current rule, the new final rule shifts the balance toward states and local governments by restricting the types of land acquisitions that are considered "on-reservation" and making the requirements much more difficult for "off-reservation" acquisitions. The final rule also requires that applications address every conceivable impact of a trust land acquisition - zoning, law enforcement, utilities, sanitation, fire and emergency services, and many more. The final rule also gives states and local governments a much greater opportunity to be involved in the process, and provides standards that weigh against taking land

into trust where there would be significant harm to the local community. All of these changes were sought by state and local governments and were granted in the publication of the final rule.

NCAI supports the final rule because it carries out the purpose of the IRA by providing a mechanism for taking land into trust both on-reservation and off-reservation, consistent with the principle of the IRA that tribes must have lands that can be used effectively to improve the conditions of their people. The rule also provides clear standards for when land will be taken into trust. The land to trust process has lacked clear standards, and all parties benefit from knowing how the Secretary's discretion is likely to be exercised. The rule also encourages consideration of factors that are appropriate for tribal land acquisition, such as the tribe's need for land for self-determination, economic development, Indian housing, land consolidation or natural resources protection. Finally, the final rule provides time frames for decisionmaking, and tribes have suffered greatly from the lack of time frames in the current rule.

In sum, the final rule strikes a balance between the tribal interest in reacquiring lands to move forward with self-determination, and the state and local government interest in a process that will appropriately include any objections they may raise. The final rule has a great deal of merit in its approach to land to trust decisionmaking and should be made effective.

On the other hand, the effect of withdrawing the rule would be to perpetuate uncertainty and to encourage further controversy between tribes and states over trust land acquisitions. The trust land acquisition issue has been under consideration within the Department for a considerable period of time, and the Department issued its decision based on a massive record. If the Department withdraws the rule now, that entire effort could be rendered a nullity, and future trust land acquisitions would remain clouded and uncertain. Tribal efforts to plan land acquisitions to achieve important tribal objectives would be jeopardized by not knowing how the Department intends to proceed in this area. Likewise, state and local government efforts to address land in trust issues in a rational manner would be undermined by the uncertainty regarding the Department's position. Instead, states and local governments would be encouraged to continue attacking the rulemaking process in the hope of gaining further concessions. And, the Department itself would be hamstrung – as Department staff would be reluctant to address pending trust land acquisitions when the Department's long term position has not been established.

Moreover, withdrawal of the final rule would likely lead to additional litigation over trust land acquisitions. Uncertainty about the Department's position in the long term encourages attacks on the Department trust land decisions. In our view, implementing the final rule will have the effect of settling the rules and reducing the incentives for litigation.

Finally, the final rule is ultimately fair and balanced because the final decision on trust land acquisitions always remains with the Secretary as required by the underlying statute. Trust land acquisition decisions involve uniquely local matters, as do all real property issues, that are

particular to a certain location and community. The final rule cannot be expected to anticipate every situation that might arise, and so the rule focuses on the development of the information and the standards that the Department will utilize in making its decisions. The final rule provides an ample forum for local communities to raise objections to a particular acquisition, and it reinforces the Secretary's statutory authority to reject any acquisition that would harm a local community. With this framework, there is nothing to fear from immediately implementing the final rule.

In short, the Department can support its own fair process and end the longstanding uncertainty in this area by implementing the final rule. It is not in anyone's interest to endlessly revisit all of these issues. The final rule was derived through a fair process, and the result overall is balanced. The most important thing now is to end the uncertainty that has clouded this area for too long, and to allow the Department to go forward with making decisions under the final rule.

Issues Raised by the August 13 Notice

The Aug. 13 notice focuses on four issues where the Department is considering specific changes to the final rule. No rule of this nature is ever perfect and there may be a number of changes that would help to refine and improve the rule. But as we noted above, the final rule relies on considering appropriate factors under a fair standard and leaving discretion in the hands of the decisionmaker. Because of this, we do not believe that any of the issues raised in the August 13 notice require that the rule be withdrawn and revised.

Nevertheless, the Department has raised the issues and we want to respond to the concerns that the Department has identified. Overall, tribal leaders have expressed that the August 13 notice did not provide enough information to assess how the proposed changes would actually affect the land to trust process, and we are concerned that there may be some misunderstandings. We feel that it is extremely important for the Secretary to engage in full and meaningful consultation with tribal leadership in order for tribes to understand the concerns and be able to respond to them, as well as for the Secretary to understand the full context of tribal land recovery efforts.

The August 13 notice raised four areas of concern:

1) Prioritizing land to trust for individual homesites of five acres or less: The notice describes a proposal to expedite and prioritize land to trust applications for housing of five acres or less. While land for individual housing is a priority, it is not a greater priority than land for many other beneficial purposes. The issue of small individual homesites was never prioritized above other uses by NCAI or most tribes. In addition, the five acre limitation would make this a very small benefit as most Indian allotments that might be placed back in trust are larger in size. Moreover, much tribal housing occurs in projects in excess of five acres – and such larger housing projects should not be disadvantaged under the rule.

We believe that the final rule already provides an expedited process for consideration of the applications of individuals. As a practical matter, nearly all individual applications for home sites must take place on-reservation. See 151.13. The on-reservation process is already streamlined, requiring only the basic information that would be necessary for any application. 151.9. And there is already a 120 day time frame in place in which the Secretary is to make a decision. 151.6. Ideally, NCAI would like to see the Department address all trust land acquisitions in an expeditious manner, but we do not believe that there is much that can be done to expedite the process for individual homesites beyond the provisions already in place in the final rule.

2) Proposal to require Secretarial approval of land use plans for off-reservation trust land acquisition: This proposal is described in general terms: “the Department is considering the advisability of requiring that tribes submit land use plans for the parcel to be acquired. The Secretary would approve those land use plans as a part of her review of the application.” Because the final rule already requires that a tribe submit a huge amount of information on the proposed use of the land as a part of the application process for off-reservation acquisitions, this new proposal raises concerns that the Secretary is considering additional burdens and restrictions in the process.

In the IRA, Congress recognized that the loss of millions of acres of Indian land from allotment meant that, as a practical matter, the restoration of a viable tribal land base would often require land acquisitions off-reservation. This is clear on the face of Section 5 itself, which provides the Secretary with broad authority to take land into trust “*within or without existing reservations.*” The legislative history also shows that the acquisition of land outside reservation boundaries was deemed necessary to meet the goals of providing adequate land for tribes:

Furthermore, that part of the allotted lands which has been lost is the most valuable part. Of the residual lands, taking all Indian-owned lands into account, nearly one half, or nearly 20,000,000 acres, are desert or semidesert lands.... Through the allotment system, more than 80 percent of the land value belonging to all of the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all the allotted Indians has been taken away.

Readjustment of Indian Affairs, Hearings before the House Committee on Indian Affairs on H.R. 7902, 73rd Cong. 2nd. Session. at 17, 1934.

Recognizing that much of the land remaining to tribes within reservation boundaries was economically useless, the drafters explicitly intended to promote land acquisition off-reservation to meet the economic development goals of the legislation. The creation of new regulatory barriers to off-reservation land acquisitions would be contrary to the statute’s purpose. In addition, it is often those tribes who have lost the most land and are forced to rely on off-reservation land acquisitions to attempt to rebuild their homelands who have the least ability to meet the additional regulatory burdens.

Section 151.12 of the final rule requires that applicants submit an enormous amount of information in connection with off-reservation acquisitions, covering every possible aspect of land use, including the need, benefits, and uses for the land as well as information on housing, business plans, location, tax and revenue effect, zoning, law enforcement, fire protection, emergency medical services, flood control, traffic, sewage, trash pickup, water supply, electric service, heating, and federal environmental compliance. The requirements are extremely comprehensive. Adding the additional requirement of a land use plan would be redundant and in our view wholly unnecessary. Already, the cost of providing much of the requested information is prohibitive given the resources of most tribal applicants, and additional requirements could put the goal of land restoration beyond the reach of many tribes.

While we understand the Department's goal of creating a process that will appropriately include the concerns of states and local governments, we feel strongly that erecting such extreme barriers to off-reservation land acquisitions is directly contrary to the statute's purpose. If the Department feels strongly that the requirement of a land use plan is preferable to the existing requirements, fundamental fairness would require that the Department eliminate the redundant requirements of 151.12, and streamlining the section to eliminate those requirements that may be inapplicable or irrelevant to a particular acquisition.

NCAI has long felt that Section 151.12 was drafted without a sufficient context for the vast majority of trust land applications which are noncontroversial. As a result, the proposed regulations assume that conflict is the norm and require information that would be relevant only to a large, high-impact economic development project. A great majority of trust land acquisitions are not for development, but for cultural protection, sacred site protection, land consolidation or environmental and natural resource protection. A better method would be to require parties to submit information on only the relevant issues. This method would protect the procedural interests of states and local governments without placing an undue burden on tribal governments.

NCAI has strongly opposed the extremely burdensome information requirements of 151.12. For off-reservation acquisitions, a tribe is required to submit information on every conceivable aspect of land use, whether or not it is relevant to the application. Our view is that an additional requirement of a land use plan would be redundant with the existing requirements and thus completely unnecessary.

3) Standards - The Jan. 16 final rule contains defined standards for when land will be taken into trust, whereas the current regulations do not. This was one of the major objectives behind the development of the final rule, and the NCAI Land Recovery Task Force has strongly supported establishing standards that are firmly grounded in the Indian Reorganization Act and its purposes of reestablishing the tribal land base and reversing the negative consequences of tribal land loss. Because these standards are the heart of the regulations, it is of great concern that the Department has indicated a desire to revisit the standards in the August 13 notice.

We believe that the standards in the final rule are clear from their language and structure that the application must show that the acquisition is necessary to facilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resources protection. It is entirely unnecessary to specifically require that a tribe show this “by substantial evidence” because the Administrative Procedures Act §556(d) imposes the initial burden of proof on the applicant and already requires “reliable, probative, and substantial evidence.”

We also do not believe that the burden of proof for those opposing a trust land application should be changed. The final rule requires state and local governments to show that the negative impact is “clear and demonstrable and supported in the record.” We believe that this standard is entirely appropriate based on the experience that the Department has with much of the opposition to trust land acquisitions. It is an unfortunate fact that in most cases the opponents do not actually review the merits of the application but instead submit knee jerk form letters that reiterate a number of generalized and speculative policy objections to taking land into trust. In many cases the local governments do not even bother to calculate any lost tax revenues, but instead assert that there will be a “substantial” loss of tax revenues. We believe that a trust land acquisition that would further the purposes of Congress should not be defeated based on a negative impact that is illusory or speculative. Instead, the objection should be required to have a factual foundation. Because of this, we strongly support the burden of proof that is articulated in the final rule.

Finally, we find of particular concern the suggestion that for off-reservation acquisitions, the tribe would be required to show that “no demonstrable harm to the local community is realized.” A tribe generally does not have the information available to meet this standard. In addition, a standard of “no demonstrable harm” would put the tribe in a position of trying to prove a negative and may be impossible to meet given that most trust acquisitions involve some small loss of property tax revenues to the local government. It seems more likely that the Department intends to apply the standard (found in the next sentence the August 13 notice) of whether there is “significant harm to the local community” and that this is a burden of proof that should be borne by the local community which is opposed to the acquisition.

Even if the standard were something other than “no demonstrable harm,” we would object to placing the burden on the tribal applicant to address issues that might be grounds for an objection for to a trust land application. A tribe applying to have land taken into trust can reasonably be required to demonstrate that the acquisition will further the purposes of the IRA. Having made this showing, basic fairness requires that the burden must then shift to the opponents to demonstrate the adverse consequences, if any, from the trust land application.

4) Availability of Applications for Review - Here the Department has identified a concern of state and local governments that they might not have enough time to obtain copies of an application package from the BIA and respond to it within the time frames of the Jan. 16 final rule (30 days on-res, 60 days off-res). The notice suggests extending each of those deadlines by

an additional 30 days. While we support a fair process, we do not believe that the rule must be withdrawn to accomplish this goal. First, the Department's current process is to regularly grant extensions of time upon request by the state or local government. Second, the Freedom of Information Act provides the authority for any interested party to request documents from the Bureau of Indian Affairs, and the recent Supreme Court decision in Interior v. Klamath Water Users has underscored that tribal documents submitted to the federal government are subject to disclosure. Any necessary adjustments could be made after the Department gains experience with the new rule. We believe that the Department could address this issue during the implementation process providing appropriate FOIA instructions to BIA officials involved in processing of land to trust applications or through a simple technical amendment.

The notice also asks for comments on how the Internet or use of technology could make the review of applications easier and more efficient. Tribes have had great concerns about the great delays occasioned under the current rule, and supports the use of technology to make the applications more readily available. It seems logical that the complete application package could be made available electronically on a web page, and that the web address could be contained in the notice letter. However, we would also note that if the applications are readily available via the Internet, then the longer time frames for review would clearly not be necessary.

Consultation

Tribal leaders have raised a number of concerns related to the rulemaking and consultation process in the event that the Department decides to withdraw the rule. If there is another round of rulemaking, we believe that the process for consulting with tribal governments would be absolutely critical to ensuring the success of the rulemaking procedure and to maintaining the government-to-government relationship between tribes and the Department.

On July 8, 1970, President Nixon issued a historic message to Congress setting forth the policy of Tribal Self-Determination, which has been eloquently stated by President Reagan and endorsed by each Administration since President Nixon's.¹ As President Reagan said in his message to Congress on Indian Affairs:

“This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.”

¹See, *Special Message to the Congress on Indian Affairs*, [1970] Pub. Papers 564 (President Nixon); *Statement by the President: Indian Policy, the White House*, January 24, 1983 (President Reagan); *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments*, June 14, 1991 (President Bush); and *Presidential Memorandum for the Heads of Executive Departments and Agencies*, April 29, 1994 (President Clinton).

The Self-Determination Policy supports autonomous tribal decision-making while continuing the fundamental federal trust responsibilities. The heart of the Self-Determination Policy lies in genuine respect for the government-to-government relationship between Indian tribes and the federal government, and in meaningful consultation on matters that significantly affect tribal interests. After 30 years of experience with this policy, it can be said unequivocally that Self-Determination has dramatically stabilized and improved the federal-tribal relationship.

As noted above, the Department's procedures for reacquiring land in trust are of extreme importance to the long term recovery and survival of Indian tribes in the United States. Should the Department decide to withdraw the final rule and propose a new rule, we would encourage the Department to consult with tribal leadership on the development of the new rule in a meaningful process. In this regard, we believe that the Department should follow the guidelines set forth in the Bureau of Indian Affairs Government-to-Government Consultation Policy.

At this stage, the Department has several options in the rulemaking process, which could include withdrawing the rule with immediate publication of a proposed rule, or withdrawing the rule and then consulting with tribal leaders in the development of a new draft. We believe the latter is the appropriate course. As we have worked through the rulemaking to date and reviewed the great variety of tribal land acquisition needs and circumstances, we have been struck by the unintended consequences that can arise from apparently well-intended regulatory language. We are concerned that a process where a small number of Interior officials try to draft a rule without tribal input is likely to create even more unintended consequences.

Consistent with the BIA Consultation Policy, we believe that the Department's first step should be to hold at least four meetings in various regions of Indian country where all tribal leaders and individual Indians can be invited to discuss the issues under consideration in the final rule. These meetings can be relatively informal discussions with the purpose of scoping out and identifying exactly what issues and concerns tribal leaders may have with the proposed changes. We believe it would be most useful if the officials who are responsible for drafting and carrying out the rulemaking process are on hand for the discussions to explain what the concerns of the Department are and to hear directly from tribal leaders.

Once a list of issues has been identified, the next step would be to work through some draft language in consultation with tribal leadership in a process that allows for dialogue, questioning and in-depth exploration of the issues. Tribal governments and tribal organizations are appropriate collaborative partners for this type of work. Since July of 1999, NCAI has been facilitating the Land Recovery Task Force, a group of tribal leaders and tribal staff with particular expertise in land acquisition matters. The Task Force welcomes all tribes and has served a useful role in creating a forum for discussion among tribes and with the Department about the land reacquisition rule. We will continue to hold these forums and would welcome and invite the Department's continued participation.

The August 13 notice mentions only four specific issues, but leaves open the possibility that there are other issues that are prompting the Department to consider the withdrawal of the rule. NCAI believes that there is merit in limiting the scope of the changes that the Department considers to the final rule, instead of putting the rule up for a complete revision. This rulemaking process has been ongoing for a long time and we have no desire to see it drag on indefinitely. All parties share an interest in resolving this matter and moving forward.

However, we would like to suggest two issues that the Department may consider if it moves forward to withdraw and repropose the rule. The first is developing some type of preference for acquiring contiguous or adjacent lands. Promoting contiguous land acquisition for tribes is sound federal policy because it helps to resolve any jurisdictional gaps that can so confound the relationships between tribes and local governments. The final rule made a drastic change by eliminating any type of preference for contiguous land acquisition. We feel the Department made a grave error in completely overlooking the matter of contiguous land, an error that will work to the detriment of tribes, states, local governments and the federal government if it is left uncorrected.

The fundamental fact is that allotment policies have left many Indian reservations with scattered and fractionated parcels of land that are essentially unusable. We would like to discuss with the Department whether there is a way to gain the benefits of a policy that promotes contiguous land acquisition and at the same time assures state and local governments that off-reservation acquisitions will receive adequate scrutiny. We believe that this could be a win-win for both tribes and states and is well worth discussing.

The second issue is the restriction on acquiring land in trust in Alaska. There is no valid reason in law or policy for denying Alaska tribes the benefit of land in trust, and NCAI has strongly urged the Department to support the right of Alaska tribes to participate to the same extent as other tribes in the trust land process. Although the preamble indicates that the Department will revisit this matter over the next three years, the final rule itself does not apply the trust land process to Alaska tribes. NCAI would encourage the Department to consider this matter very carefully and to consult directly with Alaska tribal leadership.

Conclusion

The final rule provides a fair process that will facilitate informed and timely decisionmaking under meaningful standards consistent with the Indian Reorganization Act. On behalf of the National Congress of American Indians and the Tribal Leader Task Force on Land Recovery, we urge the Department to consider all of the comments and then to make the final rule effective at the end of the current extension period.
