



National Congress of American Indians

NCAI NEWS

Interior to Restart Rulemaking Process for Land to Trust December 5 Meeting of NCAI Land Recovery Task Force Will Discuss Options Nov. 25, 2002

At NCAI's Annual Meeting in San Diego, the Land Recovery Task Force met with Larry Scrivener, the Director of BIA Realty in Central Office, and discussed the Department's plan to restart the land to trust rulemaking process. Mr. Scrivener requested that the Land Recovery Task Force provide its views on the process for consulting with tribes and for consulting with interested state and local governments. The Department intends to begin the process of consultation sometime in March of 2003. The Co-Chairs of the Task Force, Chairman Tex Hall of the Mandan, Hidatsa & Arikara Nation, and Chairman Bob Chicks of the Stockbridge Munsee Band of Mohican Indians, have called a meeting to discuss this issue on December 5, 2002 in Washington, DC at the NCAI offices, 1301 Connecticut Ave., NW, Washington, DC. The meeting will begin at 9:00 am and will continue until 1:00 pm, or as long as continued discussion is needed. All tribal leaders and representatives are invited and welcomed to participate.

Background: The process for trust land reacquisition is extremely important to addressing the impacts of land loss in Indian Country, and to ensuring the long-term survival of Indian Nations. On April 12, 1999, then Assistant Secretary for Indian Affairs Kevin Gover began a rulemaking process to revise the regulations for acquiring land in trust status found at 25 C.F.R. 151. This process culminated in a final rule that was published on January 16, 2001. On November 9, 2001, Assistant Secretary Neal McCaleb withdrew the final rule, citing the need for "clear direction and processing standards" for land into trust applications. At that time, the Department indicated that it intended to begin a new rulemaking process and to consult with Indian tribes before beginning the development of the new rule.

The Department had published a notice of proposed withdrawal of the final rule on August 13, 2001 that specified four specific areas of concern. These included individual applications for land into trust for home site purposes; the requirement of land use plans for off-reservation acquisitions; clarifying the standards contained in the final rule; and the timeframes and availability of applications for review. In the November 9 notice, the Department stated its intention to consult with Indian tribes and to consider amendments to the final rule in only in regard to these four areas of concern. The Department stated that it was withdrawing the entire rule because repealing only part of the final rule would be impracticable and inefficient.

1) Applications for housing to meet individual housing needs: The August 13 notice described a proposal to expedite and prioritize land to trust applications for housing of five acres or less. Comments on this proposal indicated that the five-acre limitation would make the provision of little benefit to Indian housing needs. The November 9 notice indicates a desire to look at this issue more broadly.

2) Proposal to require land use plans for off-reservation trust land acquisition: This proposal has been described in non-specific terms in both the August 13 and November 9 notice. However, Department officials have described that the issue they want to address is to provide some predictability in land use for the surrounding communities who may be affected by a tribe's use of land. They describe a general intention to require that a tribe must submit a land use plan adopted by the tribal council, and the plan would be subject to review by the Secretary as a part of the application. The plan or the tribal laws would have to provide a process for any land use changes to be heard by a body of the tribal government. On the technical side, the Department would like to discuss how tribes might adopt local land use standards if they have not set their own, and other details about how this requirement could be practically implemented.

The proposal for requiring land use plans raises two major concerns. First, the final rule already requires a very burdensome amount of information on every aspect proposed land use for off-reservation acquisitions. Second, some of the comments have urged the Secretary to place restrictions on use of land acquired in trust. This would be an invasion of a tribe's ability to manage and control its own land and would run counter to tribal self-determination. In addition, there are clear practical limitations on the ability of the Department to engage in land use management on tribal lands over the long term.

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 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 significant concern that the Department has indicated a desire to revisit the standards.

The proposal outlined by the Department in the August 13 notice would require tribes to provide "substantial evidence" that the acquisition would facilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resources protection. This "substantial evidence" standard is essentially unchanged from the Administrative Procedures Act §556(d), which imposes the initial burden of proof on the applicant and requires "reliable, probative, and substantial evidence."

The Department also proposes that the burden of proof for those opposing a trust land application would be changed to a showing of "clear evidence" that the acquisition would result in severe harm (on-reservation) or significant harm (off-reservation). This would be a lower burden of proof for opponents than the Jan. 16 final rule that would have required a showing that the negative impact is "clear and demonstrable and supported in the record." Nevertheless, the Department's proposal does indicate an understanding that the Indian Reorganization Act states a preference for acquiring land in trust and addressing the loss of tribal lands, and accordingly would require a somewhat greater showing by any opponents of the acquisition.

However, there is a particular concern about a part of the Department's proposal for off-reservation acquisitions, that the tribe be required to show that "no demonstrable harm to the local community is realized." 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.

In previous discussions, Department officials indicated that they are not wedded to the "no demonstrable harm" language, but that they are interested in finding a way to encourage the tribal applicants to grapple with the real issues that might serve as an objection to the application. Moreover, they would like the process to encourage tribal applicants and surrounding communities to discuss these issues and try to reach an accommodation.

4) Availability of Applications for Review - The Department identified a concern of states and local governments that they will 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-reservation, 60 days off-reservation). The August 13 notice suggests extending each of those deadlines by an additional 30 days and requests comments on whether the use of internet technology could improve accessibility. The November 9 decision indicates the decision to conduct further consultation on the length of time and the use of technology to improve access to the applications.

Other Areas of Concern – The Department's November 9 notice indicates an intention to address only those four areas for further consultation and amendments to the January 16 final rule. However, there are a number of other key concerns that have been raised by Indian tribes, such as contiguous lands, land to trust in Alaska, the retroactive effect on pending applications, and the treatment of Tribal Land Consolidation Areas. Also, there are many other issues that have been raised by state and local governments, who in their comments have voiced strong objections to Tribal Land Acquisition Area, and have desired state veto authority over land to trust, as well as removing the decisions on land to trust from the Regional Offices and giving them to court-like decision makers or Administrative Law Judges.

Tribal leaders have objected to this narrowing of issues to three significant issues raised by the state and local governments, and one issue of individual housing, while none of the tribal issues have been identified for reconsideration. On the other hand, some have raised the concern that if the Department decides to reconsider all of the issues in the final rule, basically starting from scratch, it could decide to address a number of negative issues that have been raised by the states and have been resolved in favor of the tribes.

Consultation - The Department has indicated that it plans to consult with tribal leaders and with state and local government officials. In discussions, Department officials indicate that they are looking to tribal leaders and to the NCAI Land Recovery Task Force for ideas about how the consultation process should be facilitated, and that they plan to look to tribal leadership for their assistance in developing appropriate amendments.

Conclusion - The process for consulting with tribal governments will be critical to maintaining the government-to-government relationship between tribes and the Department and to developing success in this critical rulemaking procedure on acquisition of land in trust. These are the issues for discussion at the upcoming December 5 meeting of the NCAI Land Recovery Task Force.

For more information, please feel free to contact NCAI at 202-466-7767.