

BACKGROUND INFORMATION ON INDIAN TRIBAL LAND TO TRUST REGULATIONS
JULY 18, 2001

A new final rule on acquisition of land in trust was published by the Department of Interior on January 16, 2001 (66 Fed. Reg. 3452). On April 16, 2001, the Department of Interior issued a notice seeking public comments on "whether the final rule should be amended in whole or in part or withdrawn in whole or in part" (66 Fed. Reg. 19403). The Secretary of Interior is now considering whether to allow the final regulations to take effect or whether to begin a new process for amending the regulations. This background information is designed to assist in understanding the underlying purpose for tribal land acquisitions and the scope of the regulations currently under consideration.

Background on Federal Trust Land Acquisition Policy

During the "Allotment Era" initiated by passage of the Dawes Act in 1887 and continuing until the policy was discontinued in 1934, the federal government took away over 90 million acres of tribal lands that were previously guaranteed to tribes by treaties and federal law. This was over two thirds of the tribal land base, and over 80% of their value, as the best and most productive lands were the first to be taken. The remaining tribal lands are most often discontinuous, fractionated, and difficult to use for any economically productive purpose such as grazing or agriculture. The effects of the Allotment Era were devastating to tribal communities, economically and socially, and the effects of allotment continue to this day.

The Allotment Era was but one such period. Similarly unjustified tribal land grabs occurred regionally throughout the late 1800's and into the Termination period in the 1950's and 1960's. Every tribe has a different history, but the theme is the same. The federal government has taken the lion's share of precious remaining tribal land, land held under U.S. title, without justification

In 1934, Congress ended the Allotment Era by passing the Indian Reorganization Act or the Wheeler-Howard Act. The IRA is comprehensive legislation intended to rebuild tribal governments, tribal economies, and the tribal land base. Section 5 of the IRA provides the authority for the Secretary to put land into trust for the benefit of the tribes and individual Indians. One of the chief legislative sponsors of the IRA, Congressman Howard of Nebraska, in 1934 explained this federal law as follows:

the land was theirs under titles guaranteed by treaties and law; and when the United States set up a land policy which, in effect, became a forum of legalized misappropriation of the Indian estate, the government became responsible for the damage that has resulted from its faithless guardianship.

Since 1934, the BIA has maintained a very conservative policy for putting land in trust. Only 8 million acres have been returned to the tribes, 9% of the lost land, and most of this was unallotted land held by the federal government. Moreover, land is going out of trust every day in Indian Country, with allotments going out of trust and going onto the state tax rolls. In many years, the amount of land going out of trust exceeds the amount of land going into trust.

A tribe must have its land in trust in order to exercise its jurisdiction over tribal members. Land into trust is a critical part of addressing tribes' need to build self-sustaining communities.

Contemporary Implementation of and Proposed Revisions to Land to Trust Regulations

- **Most land to trust transactions are not controversial.** While some controversies exist, what is often misunderstood is that the vast majority of trust land acquisitions take place in extremely rural areas and are not controversial in any way. Most acquisitions involve home sites of 30 acres or less within reservation boundaries. Trust land acquisition is also necessary for consolidation of fractionated and allotted Indian lands, which most often are grazing, forestry or agricultural lands. Other typical acquisitions include land for Indian housing, health care clinics that serve both Indian and non-Indian communities, and land for Indian schools.
- **The new regulations take a conservative and balanced approach to trust land acquisition.** Those regulations were the result of a comprehensive process undertaken by the Department – going back to 1997. There were hundreds of comments on the proposed regulations – by all concerned including NCAI and tribes, as well as many state and local governments. The Department balanced the views in the final regulations.
- **The new regulations provide a much greater role for state and local government participation.** State governments have been advocating for a greater role in the land to trust process for a number of years, and the new regulations provide this increased role. The new regulations provide opportunities for all concerned parties to be heard, and place an enormous burden on tribes to justify the trust land acquisition. Particularly in the off-reservation context, the regulations require a tribe to provide documentation on a wide range of matters.
- **The new regulations create standards that provide fairness for all parties.** Both the states and the tribes advocated that the regulations should provide more concrete standards for when land will be taken into trust, and the new regulations provide such standards. The standards reflect the congressional purpose of the Indian Reorganization Act to take land into trust, but balance this against any harms to local governments and communities. As advocated by the states, the standards for off-reservation acquisitions are much tougher than the on-reservation standards.
- **The Secretary of Interior retains the authority to reject any trust land acquisition that would harm a local government or local community.** It is important to recognize that land issues require case by case balancing of the benefits and costs unique to a particular location and community. Because of this, the new regulations list general factors that the Secretary must weigh, but leave the Secretary ample discretion to reject any particular land transaction where there are harmful effects to the local community. The regulations cannot be expected to anticipate every situation that might arise, but they do provide an ample forum for local communities to raise opposition to a particular acquisition and they reinforce the Secretary's statutory authority to reject any acquisition that would harm a local community.
- **The new regulations provide opportunity for states and tribes to engage in productive, mutually agreeable approaches to land use planning.** In place of routine opposition to tribal land to trust applications, state and local governments have an opportunity to engage in constructive dialogue with tribes taking into account the tribes history of land loss, its need for additional lands, and the most sensible and mutually agreeable options for restoring consolidated Indian land blocks. In many cases, a "tax loss" of less than \$100 per year is a minimal trade off for the development of schools, housing, health care clinics, and economic development ventures that will benefit surrounding communities as well as the tribe.