Insights: Alerts

The Department of the Interior Proposes Additional Regulatory Hurdles to Restoring Tribal Homelands

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On October 4, the Acting Assistant Secretary – Indian Affairs proposed substantial changes to the current land into trust process by circulating a Consultation Draft to Tribal leaders. This new proposal impacts every Tribe. Currently, when the Department finally approves a Tribe's land into trust application, the Department "immediately" places the land in trust. The Consultation Draft proposes to eliminate this immediate action and instead proposes to delay actually placing land in trust for all applications approved by the Department. The likely practical effect of this proposed approach is that land will not be placed into trust until after the final completion of litigation.

Take for example a Tribe's application to place land into trust for housing on its reservation. Under the current rules, the land is placed into trust "immediately" after a final positive decision is issued. This promotes better access to financing and provides a measure of stability moving forward. Rather than embrace and implement its positive decision, the Department now proposes to destabilize this process by requiring additional delay before actually placing the land into trust. This will encourage costly litigation challenges. In essence, the Department proposes granting opponents of the trust acquisition the upper hand in any litigation with the likely result that the on-reservation parcel for housing does not actually go into trust until after years of litigation.

The Department also proposes significant delays for all off-reservation applications – a process that can already typically take years. If your Tribe is landless or does not have a reservation, these changes impact you as well. If your Tribe has only trust land, these changes impact you. If there is a parcel even a quarter-mile outside your reservation that you may want to place into trust, these changes impact you. Whether for gaming or non-gaming purposes, the Consultation Draft proposes new and higher hurdles to restoring such homelands by fragmenting the process so that NEPA and *Carcieri* compliance (which can often take years to complete) begins only *after* the Department makes a positive initial determination. An initial positive determination does not provide any certainty – it only allows the application to move to the next stage in the new process.

The Department's proposal also includes new, additional requirements. The Department proposes to judge whether the Tribe "can effectively exercise its governmental and regulatory powers" on the land. If the Tribe cannot effectively do so in the eyes of the Department, the application can be denied. Increasing the financial and time burden on Tribes, the applicant Tribe will now need to provide analyses of its governmental effectiveness over the land, how the acquisition consolidates tribal land holdings and reduces checkerboard jurisdiction, and how the local community economically benefits if the acquisition is for non-gaming economic development.

In short, the Department's proposal does nothing to promote the restoration of tribal homelands. The changes proposed will make an already lengthy process far more arduous and costly. In addition, the proposal enhances the tools for those seeking to challenge trust acquisitions. And finally, the Interior Department proposes to substitute its

judgment for the Tribe's judgment as to whether a tribe can effectively govern its lands.

The Department is moving quickly. Its first listening session is in 11 days at the National Congress of American Indians Annual Convention in Milwaukee, WI. Three formal Tribal consultation sessions are scheduled for November and written comments are due by December 15, 2017.

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