

LAND ACQUISITION POLICY: **LOOKBACK AND UPDATE**

BUREAU OF INDIAN AFFAIRS

WESTERN REGIONAL OFFICE

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Generally Applicable Statutes

- IRA Section 5 (25 U.S.C. § 465) – Authorizes acquisition of land “within or without existing reservations” and originally authorized appropriations of \$2 million/year (in 1934 dollars) for purchase; legislative history suggests intent to assist “landless” Indians, with need then estimated at more than 25 million acres, but purchase funds were not consistently appropriated.
- ILCA Section 203 (25 U.S.C. § 2202) – Extends IRA Section 5 general acquisition authority – but not the counterpart reservation proclamation authority in Section 7 – to non-IRA tribes.
- IGRA Section 20 (25 U.S.C. § 2719) – Does not authorize gaming acquisitions, but rather prohibits gaming on off-reservation, non-contiguous (“ORNC”) land acquired after October 1988, unless one of the statutory exceptions (including a two-part, “best interest/no impact” determination by BIA, subject to Governor concurrence) applies.
- Miscellaneous – Other statutes such as the Indian Financing Act (25 U.S.C. §§ 1451 et seq.), a 1970 FmHA Act (25 U.S.C. §§ 488 et seq.), and the 1932 Act authorizing purchased-restricted acquisitions for individual Indians (25 U.S.C. § 409a) provide additional general authorities and/or create general exceptions to otherwise-applicable acquisition rules.

Past History – To 1980

- Early Policy Memos – On-reservation acquisitions were essentially unrestricted, but off-reservation land was to be “taken in fee unless there are very unusual circumstances, perhaps involving a land exchange.”
- Early Court Decisions – In a series of court decisions from the late ‘70’s, the IRA was interpreted to authorize acquisitions for tribes that were not strictly “landless,” both on and off reservation.
- Regulations – As recommended by the American Indian Policy Review Commission, land acquisition regulations (now found at 25 CFR Part 151) were proposed for the first time in 1978 and finalized in 1980, to allow tribes to more fully take advantage of the IRA authority while ensuring that issues of local concern are adequately considered.
- Implementation Instructions – As issued by Secretary Andrus of the Carter Administration, immediately after publication of the Final Rule in 1980, the instructions went beyond the rule to: (1) require that trust status be “essential” for ORNC tracts; (2) impose a higher standard as distance from the reservation increases; and (3) formally establish a 30-day “notice and comment” period.

Past History – The 1980's

- Proposed Rulemaking – Proposed “Part 151” amendments purporting to implement the acquisition and disposition provisions in ILCA (1984) and ban off-reservation gaming acquisitions (1987, pre-IGRA) were published but never finalized.
- Court Decisions – Acquisition decisions by BIA were essentially considered to be unreviewable, either because the land was already in trust and protected by the Quiet Title Act (“QTA”), or because the decisions were thought to be totally “committed to agency discretion by law” and thus unreviewable under the Administrative Procedure Act (“APA”).
- Delegations of Authority – Beginning with the Andrus Implementation Instructions, the approval authority for acquisitions of ORNC land was withheld in Washington; this restriction was lifted/reinstated/modified/expanded throughout the decade, through a series of policy memos and formal delegation documents.
- IGRA – IGRA, enacted in 1988, effectively normalized the “lower standard” for off-reservation, contiguous land that had been established in the 1980 Final Rule and Implementation Instructions, with gaming generally being “allowed” on contiguous land even when such land is within an urban area.

Past History – The 1990's

- The Lujan Policy Memo and Targeted Rulemaking - Subject to future rulemaking, Secretary Lujan of the “Bush 41” Administration proposed in 1990 to: (1) strictly limit out-of-state acquisitions, acquisitions in urban areas, and acquisitions for non-conforming uses; (2) force consultation between tribes and local and state officials; and (3) require a cost/benefit analysis; a “conforming” Proposed Rule was published in 1991, but a much less stringent, process-not-policy Final Rule (simply revising § 151.10 and adding § 151.11) was ultimately promulgated by the Clinton Administration in 1995.
- The Lower Brule Case and Targeted Rulemaking – In order to strengthen DOJ’s position in the Lower Brule case challenging the constitutionality of Section 5 of the IRA (based on allegedly “non-ascertainable” standards and an overbroad delegation of legislative power), a new § 151.12(b) was added in 1996, to ensure that decisions were made reviewable before final acceptance of title in trust status (after which the QTA would presumably continue to bar further review).
- Policy Directives – The authority to approve all non-gaming acquisitions having generally been restored/re-delegated to the Regions in 1994, Washington issued Implementation Instructions for the 1995-1996 rule changes (including clarifications as to the new notice requirements).
- Legislative Proposals – In the late ‘90’s, various bills and “riders” were introduced in Congress, proposing drastic measures such as mandatory revenue-sharing agreements and tribal means-testing, ultimately leading the Clinton Administration to consider a regulatory overhaul, in contrast to the earlier, targeted rulemaking proposals.

The 1990's Contd. – Lower Brule

Background and Fallout

- The Eighth Circuit decision in the Lower Brule case in the early '90's held Section 5 of the IRA to be unconstitutional, due in part to the lack of "ascertainable standards" in Part 151; that decision was appealed by DOJ due to a fear that the trust title to all previously-IRA-acquired land could be clouded.
- Part 151 was amended in 1996 to require pre-acceptance public notice of intent, to invite litigation and address QTA due process concerns; based in part on the theory that the 1995 rule changes had provided more "ascertainable" standards/criteria, IBIA also began reviewing BIA discretionary decisions in more detail (rather than treating them as unreviewable), to ensure that all "legal prerequisites" are met and decisions are not "arbitrary and capricious."
- Based on the Part 151 amendments published early in 1996, the Supreme Court remanded the Lower Brule case later that year and did not decide the constitutionality issue; Washington then purported to remove the trust status of the land at issue (and moot the case) via a public notice in the Federal Register (and without objection by the Tribe, which later re-applied for trust status).
- Work then began on an overhaul of Part 151, to require much more application information, establish a higher standard for off-reservation acquisitions, and provide more clarity with respect to the review process, culminating in an April 1999 Proposed Rule that was objected to by both tribal and state/local interest groups in more than 1000 comments.

Past History – The “Bush 43” Administration

- A “Final Rule” purporting to completely overhaul Part 151 was published during the Clinton-Bush Transition in January 2001, but that rule was ultimately withdrawn (at the request of the State Governors, without ever becoming effective) by the “Bush 43” Administration.
- Central Office review (but not approval) of ORNC cases was required by a policy memo issued in February 2002, indicating that such review might be completed within a week; in fact, the policy operated as a de facto moratorium for almost five years.
- In 2006, the GAO issued a report that criticized the BIA for its delays and failure to maintain an accurate Land Acquisition database, and an unrestricted delegation of the authority to approve and (actual approvals) followed the subsequent appointment of Carl Artman as Assistant Secretary – Indian Affairs.
- Land Acquisition was deemed to be outside the scope of the Trust Reform initiative of the 2000’s, and the all-encompassing nature of the Cobell litigation almost certainly contributed to the “Bush 43” Administration’s failure to follow up on the withdrawal of the 2001 Final Rule with its own regulatory proposal.

The Obama Administration – New Priorities

- The Obama Administration made land acquisition one of its top priorities in Indian Country, and announced in the fall of 2016 that it had reached its goal of 500,000 acres added in trust status.
- To reach its goal, the Administration established “time frame” policies (now incorporated in the Indian Affairs Manual) for acknowledgments of receipt, notices of deficiencies/decisions, and the deactivation of cases where deficiencies are not addressed.
- The Administration also created detailed handbooks, forms, form letters, tracking systems, checklists, and Quarterly Reporting requirements, but no additional funds were appropriated or otherwise made available to the Realty program to address the increased workload or the new priorities.
- The role of the Solicitor’s Office has been expanded to some extent, to include policy-making, “eligibility” determinations for non-historical applicant tribes, and threshold determinations for applications involving a mandatory acquisition authority or “contiguous” property, while the title review role of that Office is now somewhat unclear for mandatory acquisitions (and may vary from Region to Region).

The Obama Administration – Recent Rule Changes

- Effective in January 2015, 25 CFR § 151.1 was amended to remove the “Alaska” exception and make it possible for Alaska native groups to apply for trust status under the IRA.
- Effective in December 2013, 25 CFR § 151.12 was amended, in response to the Supreme Court’s decision in the Patchak case (rejecting the Government’s QTA defense in a case involving land already in trust), to require immediate public notice of decisions (with information on the right to appeal).
- The so-called Patchak Patch was thus intended to force any interested party to file an appeal with the Interior Board of Indian Appeals (“IBIA”) within 30 days (or be barred from suing later due to a failure to exhaust administrative remedies), while: (1) eliminating the post-appeal-period public notice requirement that had been in place since the 1990’s, and the associated “self stay” delay that followed that appeal period; and (2) complementing the Washington Office’s (separate) blanket assumption of jurisdiction over any appeals to IBIA involving 200 or more acres.
- Effective in May 2016, 25 CFR § 151.13 was amended to remove the provision that made the DOJ title standards applicable to trust acquisitions, extending a policy decision that had formerly been limited to “mandatory” acquisitions; the new rule requires that an applicant submit either: (1) a title commitment; or (2) a title insurance policy issued at the time the land was acquired by the applicant or other prospective grantor, plus an abstract dating from the time the land was acquired.

The Obama Administration – Other New Interpretations

- The Supreme Court’s 2009 decision in the Carcieri case has had significant impacts in other Regions, but within the Western Region BIA has received favorable determinations for its non-historical tribes based on language in the recognition statutes (e.g., Yavapai-Prescott, Tonto Apache, Pascua Yaqui).
- In other cases/jurisdictions, the Solicitor’s office has developed a two-part test for determining whether the tribe was “now under federal jurisdiction” when the IRA was enacted in 1934.
- The Central Office has put out a series of policy memorandums on mandatory acquisitions, purporting to relax the applicable title and environmental requirements; while NEPA and prior “notice and comment” are clearly inapplicable, WRO will require title evidence in line with the new 25 CFR § 151.13 and environmental site assessments (but not necessarily remediation), both at the applicant tribe’s expense, and standard post-decision notice under the new 25 CFR § 151.12 will be required.
- The “mandatory acquisition” memorandums have characterized individual fee-to-trust applications made under Section 217(c) of the amended Indian Land Consolidation Act (involving fractional interests in on-reservation tracts, where some interest was held in trust in November 2000) as mandatory; in those cases, a BIA record search of the county records will suffice for title evidence, and an environmental site assessment will not be required.

Proposed Legislation – 114th Congress

- Senator Barrasso of the Senate Committee on Indian Affairs sponsored the proposed “Interior Improvement Act,” which would resolve the Carcier litigation with a “recognized tribes” clarification and a retroactive ratification in the affected tribes’ favor, as part of a bill which would significantly modify the discretionary, off-reservation acquisition process.
- The Barrasso bill would require that all off-reservation discretionary acquisition applications be made available to the public via the Department’s website and publication in the Federal Register, with decisions to be subject to mandatory time frames and publication in the local paper as well as on the website and in the Federal Register.
- Under the Barrasso bill, the current application criteria would largely be unchanged, but cooperative agreements with contiguous jurisdictions would be encouraged, to include provisions on mitigation of impacts, changes in land use, dispute resolution, fees, etc.
- Under the Barrasso bill, applications supported by agreements would be deemed approved if decisions are not made within the applicable time frame, and decisions not supported by agreements would need to include BIA “determinations of mitigation” as to anticipated economic impacts.

Back to the Future? – Former Proposals re Application, Consultation and Mitigation

- Planning and Justification - Even though not strictly required by current case law, will a higher application standard (perhaps including a detailed development plan and/or a nexus between the proposed use and trust status) be made applicable to ORNC land generally, or to land in urban areas more particularly?
- Tax Revenue Losses – Even though not strictly required by current case law, will tribes be required to consult on ORNC proposals and offer to mitigate state/local revenue losses, at least to the extent not offset by projected revenue increases?
- Land Use Conflicts – Even though not strictly required by current case law, will tribes be required to consult on ORNC proposals and offer to mitigate land use conflicts via enforceable restrictions as to reasonable/conforming uses?
- Infrastructure and Public Services Costs– Even though not strictly required by current case law, will tribes be required to consult on ORNC proposals and offer to mitigate or reimburse any offsite costs of development, or (at a minimum) prepare a comparison of public costs vs. public benefits?