

Talking Points on Federal Fee-to-Trust Land Title Transfers

Causes for the Bureau of Indian Affairs to Deny a Tribal Request to Bring Fee Lands Under Federal Trust Status:

(1) **No Clear title**, includes liens, claims or judgments, easements, or restrictions on title, easements, inadequate evidence of title, lack of physical survey, lack of probate, etc.

(2) **Non-Compliance with National Environmental Policy Act (NEPA)**, includes finding of hazardous substances on site, necessity of protecting cultural and/or historical resources on site.

(3) **Lack of Secretarial Authority**, includes a finding that the Secretary of the Interior (Secretary) lacks the authority to bring land under Federal trust for the benefit of a tribal entity because that tribal entity was not under Federal jurisdiction in 1934. Example: Narragansett Tribe, see *Carcieri v. Salazar*, 555 U.S. 379 (2009).

(4) **Lack of Historical Connection**, includes a finding that the tribe making the request never used or occupied the subject land historically. Example: Scotts Valley Band of Pomo Indians of CA, BIA denial 2012.

(5) **Lack of Proximity to Existing Reservation**, includes a finding that the land proposed for trust acquisition is too distant from the tribe's existing trust lands.

(6) **Detriment to Surrounding Community**, includes finding that gaming on the land propose would be detrimental to the surrounding community.

(7) **Lack of Adequate Statement of Purpose**, includes inadequate information about the tribe's proposed use of land and/or misinformation about the intended use, such as stating that the land is for housing development when the intent is to establish gaming. Example: Mescalero Apache Tribe of NM(see *Village of Ruidoso, NM v. Albuquerque Area Director*, 32 IBIA 130 (1998).

(8) **Inability to Provide Adequate Service**, includes a finding that the BIA is not equipped to take on the responsibility of the acquisition because the land is too distant from a BIA office, the BIA lacks the staff to provide inspections and/or other services, the land is not accessible by roads, etc. Example, United Keetoowah

Band of Cherokee Indians of OK, see *United Keetoowah Band of Cherokee Indians in Oklahoma v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 90 (2008);

(8) Jurisdictional Problems, includes zoning issues, inadequate or unclear law enforcement and/or judicial services.

Consideration of a Hypothetical Restrictive Covenant

This section considers if it possible for a owner of private land in fee title to ban acquisition of the land by the Federal Government by establishing a restrictive covenant in the title. On the positive side for such a possibility is the fact that the BIA is cognizant of the fact that land held in fee title may be bound by restrictive covenants. The BIA's Fee-to Trust Handbook indicates that the title to land requested for trust acquisition may have certain "encumbrances and infirmities." It includes a form for the benefactor of the trust status to acknowledge any restrictive covenants. However, this form is only for the trust acquisition of land for individual Indians. The Handbook does not indicate if a tribe must also acknowledge that the land requested for trust acquisition is bound by a restrictive covenant.

Also on the positive side are the facts that subsequent purchasers of land are generally bound by a negative covenant (a provision not to do something) and courts usually enforce restrictive covenants. Such covenants are often considered to "run with the land" (called a *covenant appurtenant*), meaning that any future owners of the land must abide by the terms. Common examples of such covenants are those that restrict what can be done with the land (such as

subdividing the parcel), those that restrict the purposes for which the land may be used (such as only for residences or non-commercial use), those that restrict the size, quality, color, and types of improvements that can be developed on the land, those that restrict or ban animal use, those that ban aesthetically objectionable elements such as blocking a scenic view, storing junk, or not maintaining the existing landscape, and those that restrict the building of fences, walls, outbuildings, swimming pools, etc.

On the negative side of the possibility of an owner of private land in fee title to ban acquisition of the land by the Federal Government are the facts that the experts I consulted with on this issue had never heard of such a restrictive covenant and doubted if it could be enforced. They thought that the authority of the United States to preempt any State and/or local land use regulation would prevail if tested. They also thought that if the restrictive covenant could be tied to the intent of banning a trust acquisition for the benefit of Indians, it could be ruled as being discriminatory under the Federal Housing Act of 1968 or similar anti-discrimination statutes.