

Discussion of S. 1879

The “Interior Improvement Act”

to amend the Indian Reorganization of 1934

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Top Opportunities for Fall 2015

- Tribal Labor Sovereignty Act
- Dollar General v. Miss Choctaw – contact State AG
- Carcieri Fix
- VOCA – Victims of Crime Act funding
- Appropriations
- Trust Asset Management Reform Act
- Indian Energy Legislation
- Self-Governance legislation

Background

- Section 5 of IRA is Secretarial authority to acquire land in trust for Indians and tribes
- Section 19 of IRA defines “Indian” to include “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.”
- In 2009 – *Carcieri v. Norton* - Supreme Court rules limits trust land to tribes “under federal jurisdiction” in 1934
- Since 2009 – continuous tribal effort to restore trust land acquisition for all federally recognized tribes

S. 1879- Interior Improvement Act

- 1) Carcieri Fix in Section 19 - “any federally recognized tribe”
- 2) Retroactive Protection for lands already in trust
- 3) Section 5 - New Process for Off-Reservation Acquisitions

Section 5 of the Indian Reorganization Act

“The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations...for the purpose of providing land for Indians.

Title to any lands...shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

New Process for Off-Reservation Land Acquisitions

- 1) Codifies elements of an off-reservation application
- 2) Requires Interior to post applications on website
- 3) “Contiguous” jurisdictions have 30 days to comment from receipt of notice, additional 30 for amended application
- 4) “Weight and preference” to applications w/ cooperative agreement(s) with counties
- 5) With cooperative agreement, Secretary to issue decision 60 days after NEPA completed, or 30 days if NEPA inapplicable
- 6) “Deemed approved,” if no decision in that time
- 7) If no cooperative agreement, Secretary shall issue a statement of mitigation within 30 days, whether economic impacts mitigated to extent practicable
- 8) Statement of mitigation considered in final decision. A) economic impact, and B) failure to work in good faith

Elements off-reservation application

- a) Written request
- b) Legal name of applicant
- c) Legal description of land
- d) Description of need
- e) Description of use of land
- f) Instrument of title, such as a deed
- g) Statutory authority
- h) Business plan if applicable
- i) Location relative to state and reservation boundaries
- j) A copy of any cooperative agreement between the applicant and contiguous jurisdiction

Questions

If applications with cooperative agreements receive preference, does this disadvantage land-in-trust applications where the local county will not agree?

A. The legislation is specific that the Secretary is to consider whether the lack of an agreement is a result of bad faith. Applications with cooperative agreements may move a little more quickly, but this is true under the current process where applications that are unopposed move more readily. The timelines and “deemed approved” provision will likely speed up all applications.

What about timelines for on-reservation applications?

A. The legislation as currently drafted only addresses “off-reservation” acquisitions. However, on-reservation acquisitions are much less controversial, and consideration could be given to also imposing timeframes and automatic approval for on-reservation acquisitions.

Do neighboring tribes have a voice in this proposed land to trust process?

A. Under the current process the Department considers the views of any party who submits comments on a proposed acquisition, and gives weight to any tribal comments. The legislation would provide greater preference to applications with a cooperative agreement with contiguous jurisdictions, including another tribe with contiguous lands.

Questions

Many county and tribal governments have cooperative relationships, while others are not as cooperative. Does the legislation give a bigger role to the counties than under the current regulations?

A. The legislation would give counties more time to respond and better access to application materials on the internet. There is a preference for cooperative agreements, but the current process also favors unopposed applications that come with local agreements.

This legislation may improve the opportunities for all tribes because it requires the Secretary to consider whether the absence of a cooperative agreement is the result of a failure to work in good faith to reach an agreement

Questions

What is "good faith"?

A. Good faith is an abstract and comprehensive term that encompasses a sincere motive and fair dealing without discrimination or fraud. It will be a useful standard when dealing with unreasonable positions in objecting to tribal land restoration.

Does the preference for cooperative agreements with contiguous jurisdictions only apply to counties, or does it also apply to cities, townships, municipalities, and other local governments?

A. As currently drafted, it applies to counties, "county equivalents," and tribes. A "county equivalent" is the largest territorial division for local government within a State with the authority to enter into enforceable cooperative agreements with Indian tribes. (For example in Louisiana the unit of local government is called a "parish.")

Questions

If a Tribe seeks an off-reservation casino outside their contiguous lands, and has a county agreement, would the application be expedited in the new process?

A. If the legislation were enacted, a tribe seeking off-reservation gaming must independently comply with the Indian Gaming Regulatory Act which places limits on off-reservation gaming. The proposed legislation would not change the limitations on off-reservation gaming in IGRA.

The processes in Section 20 of IGRA and its regulations would suppress any “expedited” review because they are time-consuming.

Questions

Contiguous parcels are not always available, so the tribe will seek nearby. Under 25 CFR Part 151.11 the proximity to existing Indian lands weighs in favor of the tribe. Will this weighting will be lost with the enactment of the legislation?

A. The 25 CFR 151 regulations may or may not need to be revised if the legislation were enacted. It is possible that the current regulations could be retained. Even if the regulations were amended, it seems likely that proximity (distance from current lands) would be retained.

If desired by tribal leaders the legislation might be modified to include a reference to proximity and the factors at 151.11(b).

Questions

Will tribes have an opportunity to respond to comments?

A. Under the current regulations applicants for land to trust have an opportunity to respond to any comments. See §151.10. The proposed legislation doesn't include that opportunity in its procedures, but also doesn't preclude the opportunity to respond. If desired by tribal leaders, the legislation might be modified by including a reference to the opportunity to respond.