

**SUMMARY SHEET OF CONSULTATION DRAFT  
OF REVISIONS TO TRUST ACQUISITION REGULATIONS AT  
25 CFR § 151.11 & § 151.12**

**What does the Consultation Draft suggest revising?**

The Consultation Draft suggests revising existing regulations governing trust acquisitions, and specifically sections 151.11 (Off-Reservation Acquisitions) and 151.12 (Action on Requests).

Specifically, the Draft suggests:

- A. Creating a **two-phased Secretarial review and approval process** for discretionary off-reservation trust acquisitions so that certain resource-intensive application information will be required only if the application meets the threshold criteria to reach the second phase of review and approval;
- B. **Distinguishing acquisitions for gaming** from off-reservation trust acquisitions for other (non-gaming) purposes;
- C. Revising **application items** required for a discretionary off-reservation trust acquisition, including:
  - Information on the Tribe’s connection to the land,
  - Whether the acquisition will facilitate the consolidation of Tribal land holdings and reduce checkerboard patterns of jurisdiction;
  - Whether the Tribal government can effectively exercise its governmental and regulatory jurisdiction over the land (in deference to Tribal sovereignty and self-determination, instead of focusing on whether the BIA is equipped to discharge additional responsibilities);
  - For acquisitions for economic development (including gaming) a plan that specifies anticipated economic benefits to the Tribe, its members, and to the local community (if any); and,
  - For acquisitions for gaming, an analysis of the effect the project would have on the unemployment rate, on-reservation benefits from the proposed gaming, and evidence of cooperative efforts to mitigate impacts to the local community.
- D. Reinstating the 30-day delay for taking land into trust following a decision by the Secretary or Assistant Secretary, or exhaustion of administrative remedies under 25 CFR Part 2; and
- E. Explicitly stating that the Department will comply with court orders to take land out of trust.

Affects Off-Reservation Trust Acquisitions Only

Affects Both Off- and On-Reservation Trust Acquisitions

**Each of these changes is described in more detail on the following pages.**

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### A. Two-Phased Secretarial Review and Approval Process

Currently, applicants must submit all the application information, including certain resource-intensive application information, before the Department will consider whether to approve the trust application.

The Consultation Draft would bifurcate that process, so that an applicant must first provide basic application information and, only if an application meets certain threshold criteria, may the applicant then proceed to the next step of:

- Undergoing the sometimes lengthy and costly process of complying with the National Environmental Policy Act (NEPA),
- Providing an analysis of whether the Tribe was under Federal jurisdiction in 1934 under the reasoning in *Carcieri*<sup>1</sup> and,
- If applicable, complying with the requirements of 25 CFR part 292 regarding the eligibility to conduct gaming.

Although identification of the statutory authority is required during the initial application phase, evidence to support the Department's statutory authority analysis is not required until the final phase. This approach reduces burden, saving applicants time and money from expending resources on NEPA compliance, a *Carcieri* analysis, and (if applicable) information regarding eligibility to conduct gaming under 25 CFR 292, for an application that the Department would ultimately disapprove on other factors. If the Department disapproves an application following initial review, depending on the official who issues the decision, that decision could be administratively appealed or challenged in Federal district court.

### B. Distinguishing Acquisitions for Gaming from Other Off-Reservation Acquisitions

Currently, the same application requirements apply to all discretionary off-reservation trust acquisitions, regardless of whether the purposes for which the land will be used are for gaming, other economic development, government facilities, housing, or some other use. Distinguishing acquisitions for gaming purposes allows the Secretary to better assess the unique issues raised by off-reservation gaming and reduces the burden on applications that do not include gaming.

The Consultation Draft suggests requiring four additional items in off-reservation trust acquisitions for gaming purposes. A list of those items and explanations for each is provided in the following table:

Suggested Additional Item for Off-Reservation Acquisitions for Gaming	Explanation
Identification of the unemployment rate on the reservation, and an analysis of the effect on the unemployment rate by the operation of the gaming project	This item is necessary to determine the effect the trust acquisition will have on the current reservation. This information is already frequently provided by applicants under § 151.11(c) and/or as part of NEPA compliance.
Identification of the on-reservation benefits from the proposed gaming, including whether any of the revenue will be used to create on-reservation job opportunities	This item is necessary to determine the effect the trust acquisition will have on the current reservation. This information is already frequently provided by applicants under § 151.11(c) and/or as part of NEPA compliance.
Evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and the State and local governments, if any, or an explanation as to why no such agreements or efforts exist	This item is not explicitly required under the current regulations; nevertheless, applicants provide it as a matter of practice.
Identification of economic benefits, if any, to the local community from the gaming project	This item is not explicitly required under the current regulations; nevertheless, applicants provide it as a matter of practice through the NEPA process and in response to comments from state and local governments.

<sup>1</sup> *Carcieri v. Salazar*, 555 U.S. 379 (2009).

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**C. Revising Criteria BIA Considers and Items That Must Be Included in a Discretionary Off-Reservation Trust Acquisition Application**

Currently, the regulations require BIA to consider certain criteria as part of their review for an off-reservation trust acquisition but do not specify what an application for an off-reservation acquisition should include. Applicants provide information to assist BIA in its review of the regulatory criteria. The Consultation Draft instead suggests the regulations explicitly list what an application must include, depending on whether the applicant is a Tribe or individual, and whether the purpose of the acquisition is gaming or non-gaming and, further, revises some of the criteria. Appendix A shows a comparison of these requirements.

**D. Suggested Revisions to § 151.12 (Action on Requests), Which Affect All Trust Acquisitions**

The Consultation Draft suggests making the following changes that will affect all trust acquisitions.

<b>Existing 25 CFR § 151.12</b>	<b>Suggested Change in Consultation Draft</b>
(c)(2)(iii) "Immediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Department requirements."	<ul style="list-style-type: none"> <li>• Delete the word "Immediately" and replace the words "on or" with the phrase "no sooner than 30 days". The draft amended § 151.12(c)(2)(iii) would read: "Acquire the land in trust under § 151.14 no sooner than 30 days after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Department requirements." On the 31st day, the Department will take the land into trust unless a court orders otherwise.</li> </ul>
(d)(2)(iv) "Immediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon fulfillment of the requirements of § 151.13 and any other Department requirements."	<ul style="list-style-type: none"> <li>• Delete the word "Immediately" and insert the phrase "no sooner than 30 days after" before the phrase "exhaustion of administrative remedies..." The draft amended § 151.12(d)(2)(iv) would read: "Acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or no sooner than 30 days after exhaustion of administrative remedies under part 2 of this title, and upon fulfillment of the requirements of § 151.13 and any other Department requirements. On the 31st day, the Department will take the land into trust unless a court orders otherwise.</li> </ul>
	<ul style="list-style-type: none"> <li>• Add a paragraph (e)</li> <li>• The draft paragraph (e) would read: "If land has been acquired in trust before judicial review of the decision to take the land into trust had concluded, and a court rules that the Department erred in making the trust acquisition decision, the Department will comply with a final court order and any resulting judicial remedy, including, for example, taking land out of trust."</li> </ul>

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**Appendix A: Comparison of Application Items**

<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
N/A	New requirement for the historical or modern connection, if any, of the Tribe to the land. This includes a historical connection or present-day connection, such as the location of the Tribal government offices on or near the site.  See draft § 151.11(a)(1)(i).	New requirement for the historical or modern connection, if any, of the Tribe to the land. This includes a historical connection or present-day connection, such as the location of the Tribal government offices on or near the site.  See draft § 151.11(a)(2)(A).	N/A
The existence of statutory authority for the acquisition and any limitations contained in such authority.  See § 151.10(a), as incorporated by § 151.11(a).	Clarifies this is an application requirement. No change to criteria BIA must consider.  See draft § 151.11(a)(1)(ii).	Clarifies this is an application requirement. No change to criteria BIA must consider.  See draft § 151.11(a)(2)(ii).	Clarifies this is an application requirement. No change to criteria BIA must consider.  See draft §§ 151.11(a)(2)(ii) and (a)(3).
The need of the individual Indian or the [T]ribe for additional land.  See § 151.10(b), as incorporated by § 151.11(a).	Clarifies this is an application requirement. No change to criteria BIA must consider.  See draft § 151.11(a)(1)(iii).	Clarifies this is an application requirement. No change to criteria BIA must consider.  See draft § 151.11(a)(2)(iii).	Clarifies this is an application requirement. No change to criteria BIA must consider.  See draft §§ 151.11(a)(2)(iii) and (a)(3).
The purposes for which the land will be used.  See § 151.10(c), as incorporated by § 151.11(a).	Clarifies this is an application requirement. Revises criteria BIA required to consider to include a detailed description of the project, if applicable.  See draft § 151.11(a).	Clarifies this is an application requirement. Criteria BIA required to consider revised to require a detailed description of the project, if applicable.  See draft § 151.11(a).	Clarifies this is an application requirement. Revises criteria BIA required to consider to include a detailed description of the project, if applicable.  See draft § 151.11(a).

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<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
<p>If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.</p> <p>See § 151.10(e); § 151.11(d), as incorporated by § 151.11(a).</p>	<p>The State and local governments continue to have the opportunity to provide this information during the 30-day comment period, because they are best positioned to identify the impact resulting from removal of the land from their tax rolls.</p> <p>See draft § 151.11(b)(1).</p> <p>New requirement for Tribal applicants to provide evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and the state and local governments, if any, or an explanation as to why no such agreements or efforts exist.</p> <p>See draft § 151.11(a)(1)(xi).</p>	<p>No change to information applicant must provide or criteria BIA must consider. State and local governments continue to have the opportunity to provide this information during the 30-day comment period, because they are best positioned to identify the impact resulting from removal of the land from their tax rolls.</p> <p>See draft § 151.11(b)(1).</p>	<p>N/A</p>

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<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
<p>Jurisdictional problems and potential conflicts of land use which may arise.</p> <p>See § 151.10(f), as incorporated by § 151.11(a).</p>	<p>The State and local governments continue to have the opportunity to provide this information during the 30-day comment period, because they are best positioned to identify potential impacts on regulatory jurisdiction, and potential conflicts of land use. This will continue to be considered in the Secretarial review.</p> <p>See draft § 151.11(b)(1); § 151.11(c)(1)(B).</p> <p>New requirement for Tribal applicants to provide evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and the state and local governments, if any, or an explanation as to why no such agreements or efforts exist.</p> <p>See draft § 151.11(a)(1)(xi).</p>	<p>The State and local governments continue to have the opportunity to provide this information during the 30-day comment period, because they are best positioned to identify potential impacts on regulatory jurisdiction, and potential conflicts of land use. This will continue to be considered in the Secretarial review.</p> <p>See draft § 151.11(b)(1); § 151.11(c)(1)(B).</p>	<p>N/A</p>

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<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
<p>If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.</p> <p>See § 151.10(g), as incorporated by § 151.11(a).</p>	<p>BIA is still required to consider this, and new requirement for Tribal applicants to provide an analysis by the Tribe whether the Tribal government can effectively exercise its governmental and regulatory powers at the proposed site.</p> <p>See draft § 151.11(a)(vi).</p> <p>The Department must still determine during the second review phase whether BIA is equipped to discharge additional responsibilities.</p> <p>See draft § 151.11(c)(3)(A).</p>	<p>BIA is still required to consider this, and new requirements for Tribal applicants to provide an analysis by the Tribe whether the Tribal government can effectively exercise its governmental and regulatory powers at the proposed site.</p> <p>See draft § 151.11(a)(2)(vi).</p> <p>The Department must still determine during the second review phase whether BIA is equipped to discharge additional responsibilities.</p> <p>See draft § 151.11(c)(3)(A).</p>	<p>N/A</p>
<p>The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.</p> <p>See § 151.10(h), as incorporated by § 151.11(a).</p>	<p>Moved to the second review phase, so that NEPA and hazardous substance documentation and analysis need only be completed if the application is not denied during the first review phase.</p> <p>See draft § 151.11(c)(2).</p>	<p>Moved to the second review phase, so that the NEPA and hazardous substance documentation and analysis need only be completed if the application is not denied during the first review phase.</p> <p>See draft § 151.11(c)(2).</p>	<p>Moved to the second review phase, so that the NEPA and hazardous substance documentation and analysis need only be completed if the application is not denied during the first review phase.</p> <p>See draft § 151.11(c)(2).</p>

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<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
<p>The location of the land relative to state boundaries, and its distance from the boundaries of the [T]ribe's reservation.</p> <p>See § 151.11(b).</p>	<p>Clarifies that the Tribal applicant must submit a map showing the location of the land to be acquired, the exterior boundaries of the reservation, if any, the shortest distance of the land from the boundaries of the Tribe's reservation, if any, and the shortest distance between the Tribe's trust lands, if any, and the land to be acquired, as part of the application. Revised to delete the requirement that BIA must consider the location of the land relative to state boundaries, because that information is irrelevant.</p> <p>See draft § 151.11(a)(1)(iv).</p>	<p>Clarifies that the Tribal applicant must submit a map showing the location of the land to be acquired, the exterior boundaries of the reservation, if any, the shortest distance of the land from the boundaries of the Tribe's reservation, if any, and the shortest distance between the Tribe's trust lands, if any, and the land to be acquired, as part of the application. Revised to delete the requirement that BIA must consider the location of the land relative to state boundaries, because that information is irrelevant.</p> <p>See draft § 151.11(a)(2)(iv).</p>	<p>N/A</p>
<p>Where land is being acquired for business purposes, a plan which specifies the anticipated economic benefits associated with the proposed use.</p> <p>See § 151.11(c).</p>	<p>Revised to clarify that the plan should specify anticipated economic benefits to the Tribe and its members.</p> <p>See draft § 151.11(a)(1)(vii).</p>	<p>Revised to clarify that the plan should specify anticipated economic benefits to the Tribe, its members, and the local community (if any).</p> <p>See draft § 151.11(a)(2)(vii).</p>	<p>N/A</p>
<p>N/A</p>	<p>New requirement for an analysis of whether the acquisition will facilitate the consolidation of Tribal land holdings and reduce checkerboard patterns of jurisdiction.</p> <p>See draft § 151.11(a)(1)(v).</p>	<p>New requirement for an analysis of whether the acquisition will facilitate the consolidation of Tribal land holdings and reduce checkerboard patterns of jurisdiction.</p> <p>See draft § 151.11(a)(2)(v).</p>	<p>New requirement for the amount of trust or restricted land the individual already owns.</p> <p>See draft § 151.11(a)(3).</p>

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<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
N/A	<p>New requirement to identify the unemployment rate on the reservation, and an analysis of the effect on the unemployment rate by the operation of the gaming, although this information is frequently provided by applicants under 151.11(c) and/or as part of NEPA compliance.</p> <p>See draft § 151.11(a)(1)(ix).</p>	N/A	N/A
N/A	<p>New requirement, although frequently provided by applicants under 151.11(c) and/or as part of NEPA compliance. Identification of the on-reservation benefits from the proposed gaming, including whether any of the revenue will be used to create on-reservation job opportunities.</p> <p>See draft § 151.11(a)(1)(x).</p>	N/A	N/A
N/A	<p>New requirement; however, in practice, applicants often provide this information currently and it is required by the BIA FTT Handbook. Evidence of any cooperative efforts to mitigate impacts to the local community, including copies of any intergovernmental agreements negotiated between the Tribe and the State and local governments, if any, or an explanation as to why no such agreements or efforts exist.</p> <p>See draft § 151.11(a)(1)(xi).</p>	N/A	N/A

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<b>Current regulations</b>	<b>Draft application requirements for Tribal acquisitions for gaming purposes</b>	<b>Draft application requirements for Tribal acquisitions for other (non-gaming) purposes</b>	<b>Draft application requirements for individuals' trust acquisitions of restricted fee land</b>
N/A	<p>New requirement; however, in practice applicants often provide this information. Information on economic benefits, if any, to the local community from the gaming project.</p> <p>See draft § 151.11(a)(1)(viii).</p>	<p>Revised requirements for applications for economic development purposes, excluding gaming, to add benefits to local community; however, in practice applicants often provide this information.</p> <p>See draft § 151.11(a)(2)(vii).</p>	N/A
<p>The Secretary notifies State and local governments having regulatory jurisdiction over the land to be taken into trust to provide them with 30 days to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.</p> <p>See § 151.10(e); § 151.11(d).</p>	<p>No change.</p> <p>See draft § 151.11(b)(1).</p>	<p>No change.</p> <p>See draft § 151.11(b)(1).</p>	N/A
N/A	N/A	N/A	<p>A description of the degree to which the individual needs assistance in handling his or her affairs.</p> <p>See draft § 151.11(a)(3).</p>