



U.S. Department of Justice

Environment and Natural Resources Division

LMB  
33-0 (W-10)

Land Acquisition Section  
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December 20, 2002



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U. S. Department of the Interior  
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Re: Applicability of the Attorney General's title regulations prescribed under 40 U.S.C. § 3111 (formerly 40 U.S.C. § 255) to lands acquired in trust for Indian tribes and individual Indians

Dear Ms. Kelley and Ms. Wilfahrt:

In separate letters you each requested waivers of the Attorney General's title regulations<sup>1</sup> to permit the acquisition of land by the United States in trust for Indian tribes or individual Indians, subject to restrictions on use. Inherent in your requests was the assumption that 40 U.S.C. § 3111 applies to such land acquisitions; however, Assistant Attorney General Thomas L. Sansonetti has concluded that the provisions of 40 U.S.C. § 3111, and the related Attorney General's title regulations, are inapplicable to federal acquisitions of land made in trust for Indian tribes or individuals pursuant to the 1934 Indian Reorganization Act (the "IRA"). Accordingly it is neither necessary, nor appropriate, for this department to consider your requests.

<sup>1</sup> Order No. 440-70 of the Attorney General, titled *Regulations of the Attorney General promulgated in accordance with the provisions of Public Law 91-393 approved September 1, 1970, 84 Stat. 835, An Act to Amend Section 355 of the Revised Statutes, as amended [now codified at 40 U.S.C. § 3111, formerly 40 U.S.C. § 255] Concerning Approval by the Attorney General of the Title to Lands Acquired for and on Behalf of the United States and for Other Purposes.*

Colleen Kelley, Attorney  
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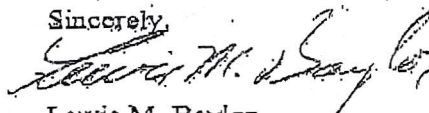
The Assistant Attorney General's decision is based on the title regulations' apparent focus on property acquired for government use and the discretion granted to the Secretary of the Interior in 25 U.S.C. § 465<sup>2</sup> and its implementing regulations. The Secretary of the Interior is authorized by 25 U.S.C. § 465 to acquire land in trust for Indian tribes and individuals. Such acquisitions are typically initiated by a request from the tribe or individual Indian to the Bureau of Indian Affairs. According to various Solicitor's Offices, there is normally no monetary consideration for transfer of title to the United States. The United States takes title not in its individual capacity, but in a fiduciary role as trustee.

Research conducted by the Land Acquisition Section revealed no indication that Indian trust acquisitions were considered in adoption of the Attorney General's title regulations. Likewise, no controlling case law was found. It is nonetheless apparent that the rationale expressed in regulation 5(c) for eliminating restrictions on use of lands does not apply to trust acquisitions. The title acquired in such acquisitions is that of a fiduciary; as a result, federal use is restricted without regard to the existence of restrictive covenants. Indian trust lands are not available for use by federal agencies, and the United States cannot appropriate these properties for its own use without paying compensation. Likewise, it cannot change the use of the properties absent the consent of the beneficiaries.

Additionally, 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire lands in trust "in his [her] discretion"; regulations promulgated thereunder provide that the Secretary will identify liens or encumbrances on title and decide which need to be eliminated. 25 C.F.R. § 151.13. Restrictive covenants are, by definition, encumbrances on title. Thus, this language also supports a conclusion that the Secretary's authority for Indian trust acquisitions is unconstrained by the Attorney General's title regulations.

Please call me at 202/305-0307, or e-mail me at [lewis.baylor@usdoj.gov](mailto:lewis.baylor@usdoj.gov), if you have any questions.

Sincerely,



Lewis M. Baylor  
Division Counsel for Title Matters

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<sup>2</sup> 25 U.S.C. § 465 authorizes the Secretary of the Interior "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands ... for the purpose of providing land for Indians." Title to such 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".