

**TO:** First Light**FROM:** DW**DATE:** March 1, 2022**RE:** Fee to Trust Procedures for the Wabanaki Nations

The Maine Indian Claims Settlement Act (“MICSA”)<sup>1</sup> and the Aroostook Band of Micmac Settlement Act (“ABMSA”) (collectively, the “Acts”)<sup>2</sup> are federal laws that create the trust land acquisition framework for the Wabanaki nations. The Acts gave federal permission for the State of Maine to impose limited state jurisdiction on the trust land acquisition process through its implementing laws while preserving a federal trust relationship between the Wabanaki nations and the United States.<sup>3</sup> The trust acquisition procedures imposed on some the Wabanaki Nations are perhaps the most stringent and burdensome trust acquisition procedures in the United States. Upon completion of the Maine state acquisition procedures described in this memorandum, an application to have land placed in trust by the United States must be forwarded to the BIA Eastern Regional Office for acceptance by the Secretary of Interior (“Secretary”) pursuant to federal law.

## **I. Tribal Trust Land**

Tribal trust land is real property the title to which is held by the federal government for the benefit of a tribe. Federal law dictates how land owned by a tribe or otherwise is converted into trust status. Since Congress’s passage of the Indian Reorganization Act (“IRA”) of 1934 and other similar federal statutes, tribal nations have recovered their original homelands through a federal approval process administered by the Secretary or their designee, the Assistant Secretary-Indian Affairs. The intent of the IRA was “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”<sup>4</sup> The IRA authorizes the Secretary to acquire “any interest in lands, water rights,

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<sup>1</sup> PL 96-420, 94 Stat. 1785 (1980); 25 USC 1721 *et. al.*

<sup>2</sup> PL 102-171, 105 Stat. 1143 (1991).

<sup>3</sup> Maine Indian-Tribal State Commission (“MITSC”), *The Drafting and Enactment of the Maine Indian Claims Settlement Act* (2017); Maine Indian Claims Settlement Act, 30 MRSA §6205(5), (“No lands held or acquired by or in trust for the Passamaquoddy Tribe or the Penobscot Nation...shall be included within or added to the Passamaquoddy Indian territory or the Penobscot Indian territory except upon recommendation of the [Maine Indian Tribal-State Commission] and approval of the State...provided, however, that no lands within any city, town, village or plantation shall be added...without approval of the legislative body of said, city, town, village or plantation in addition to the approval of the State.”); 30 MRSA §6205-A (“The State of Maine approves the acquisition, by the secretary, of Houlton Band Trust Land within the State of Maine provided as follows...C. No land or natural resources located in within any city, town, village or plantation may be acquired by the secretary for the Houlton Band of Maliseet Indians without the approval of the legislative body of the city, town, village or plantation.”); Micmac Settlement Act, 30 MRSA §7204 (“The State of Maine approves the acquisition, by the secretary, of Aroostook Band Trust Land within the State of Maine provided as follows...C. No land or natural resources located in within any city, town, village or plantation may be acquired by the secretary for the Aroostook Band of Micmacs without the approval of the legislative body of the city, town, village or plantation.”).

<sup>4</sup> H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934).

or surface rights to lands within or without existing Indian reservations” through purchase, gift, or exchange “for the purpose of providing land for Indians.”<sup>5</sup> Once a complete trust land application is submitted to DOI, the Bureau of Indian Affairs conducts an administrative compliance analysis including a 30-day comment period for state and local governments and then accepts the land into trust status.<sup>6</sup> This memorandum does not explore the federal part of the fee to trust process.

## **II. Trust Land Acquisition for the Wabanaki Nations**

Maine law provides different trust acquisition processes for the Passamaquoddy Tribe and Penobscot Nation, than for the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs.

### **A. Passamaquoddy Tribe and Penobscot Nation**

Maine state law prescribes a trust land acquisition procedure for the Passamaquoddy Tribe and Penobscot Nation whereby land acquired by those tribes may only become designated as “Indian territory” following a multi-step state and local approval process that requires approvals from the Maine Indian Tribal State Commission (“MITSC”) and multiple levels of state government. Generally speaking, 30 MRSA § 6205(5) provides that no land shall become Indian territory except upon: (1) recommendation by the Maine Indian Tribal–State Commission; (2) enactment of a law by the Legislature approving the Commission's recommendation; (3) signature of the legislation by the Governor; and (4) approval by the legislative body of the municipality (when the parcel is located in a city, town, village, or plantation).<sup>7</sup>

### **B. MITSC Review, Public Notice and Local Approval**

According to the bylaws of the MITSC, the Commission must verify the following:

1. The Tribal Government seeking the addition of lands to Indian Territory certifies that it has approved such action in accordance with its governing laws and procedures.
2. In the case where the lands are within a city, town, village, or plantation, the legislative body of that municipality certifies that it has approved such action in accordance with its governing laws and procedures.

*Public Notice:* Upon receiving the certification(s), the Commission places a legal advertisement which requests public comment on the matter in at least two newspapers of

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<sup>5</sup> 25 U.S.C. § 5108 (2019).

<sup>6</sup> See 25 CFR Part 151 *et. al.*; Tribal trust land status is a common form of land tenure among tribal nations in the United States. There are approximately 56 million acres of Indian land currently held in some form of trust status. Between 1887 and 1934 alone, the federal government took more than 90 million acres of reservation lands from tribal nations without compensation and sold it to settlers.

<sup>7</sup> 30 M.R.S. § 6205(5); *Kimball v. Land Use Regulations Com'n*, 2000 ME 20; *Me. Op. Atty. Gen.* No. 86-11 (Me.A.G.), 1986 WL 288890.

statewide distribution and, when appropriate, one of regional circulation. At least ten days from the latest date the advertisement appears shall be allowed for comments to be received.<sup>8</sup>

*Public Hearing:* If, after reviewing the comments, the Commission determines that there are important issues of regional or statewide significance involved, the Commission may choose to conduct a public hearing. At least ten days' public notice shall be given for the hearing.<sup>9</sup>

*Review Criteria:* In making a recommendation the Commission shall consider the comments received and any issues raised which are of regional or statewide significance; suggest any inconsistency with the Act; or concern the social, economic, or legal relationship between the State and Tribal Governments.<sup>10</sup>

The Commission may consider the proposed usage of the land as set forth by the Tribal Government, but may not consider any issues regarding possible restrictions which might be put on the use of the lands by the Tribal Government if they are restrictions which any landowner, Indian or non-Indian, has the right to implement.<sup>11</sup>

#### C. State of Maine Approval of MITSC Recommendation

After the MITSC completes its review and passes a recommendation, the state of Maine legislature and governor must enact a law approving the MITSC recommendation and trust land application.

#### D. Houlton Band of Maliseet Indians

Trust land acquisitions for the Houlton Band of Maliseet Indians ("Band") are not subject to approval by the State of Maine, MITSC, or any local government. In 1980, MICSA appropriated \$900,000 to a federal trust account (the "Trust Account") for management by the Department of the Interior's Office of the Special Trustee ("OST")<sup>12</sup> for the benefit of the Band's land base restoration efforts.<sup>13</sup> The only allowable use of funds in the Trust Account is the acquisition of land or other natural resources.

To initiate a fee-to-trust acquisition, the Band must make written request to OST to have funds released for purposes of a land acquisition. The Band must then use Trust Account funds for the purchase or the lands will not be eligible for acquisition by the United States on behalf of the Band. Once the Band purchases land using proceeds from the Trust Account, the Band may

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<sup>8</sup> MITSC By-Laws, II (A).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Generally speaking, OST is the federally agency charged with managing and disbursing monetary resources held in trust by the United States for the benefit of federally recognized tribes pursuant to specific federal laws like MICSA.

<sup>13</sup> MICSA at sec. 5(d).

apply to the Secretary to have the land acquired in trust by the United States. The United States processes all such requests as “mandatory” trust acquisitions, meaning the Secretary has no discretion to deny the Band’s request.

#### E. Mi’kmaq Nation

Trust land acquisitions for the Mi’kmaq Nation (“Mi’kmaq”) are regulated under federal<sup>14</sup> and purportedly state law as well, although the state law component of the Aroostook Band of Micmac Settlement Act is still subject to ratification.<sup>15</sup> Neither federal nor state statutes addressing Mi’kmaq trust acquisitions require MITSC review. However, the laws generally require the Band to file with the Maine Secretary of State the following:

1. A certified copy of the deed, contract or other instrument of conveyance, setting forth the location and boundaries of the land or natural resources so acquired.
2. A certified copy of the instrument creating the trust described in section 7207 (Aroostook Band Tax Fund), together with a letter stating that the Secretary holds not less than \$50,000 in a trust account for the payment of obligations of the Mi’kmaq, and a copy of the claim filing procedures the Secretary has adopted.

30 M.R.S.A. § 7204 requires approval of a Mi’kmaq trust acquisition by the legislative body of the city, town, village or plantation where the land is located but this provision is in conflict with the federal Aroostook Band of Micmac Settlement Act, which does not contain this stipulation.<sup>16</sup> Thus, in practice, Mi’kmaq does not obtain local approval prior to requesting that the Secretary of the Interior acquire land in trust on its behalf.

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<sup>14</sup> Aroostook Band of Micmac Settlement Act, Pub. L. 102-171, sec. 5 (1991).

<sup>15</sup> The official version of the Micmac Settlement Act explicitly states that the statute “needs ratification by Indian tribes per the Secretary of State” and the Aroostook Band of Micmac has publicly stated that its governing body never ratified the Act. Thus, there is a legal question as to whether the statute is in effect.

<sup>16</sup> 30 MRS § 7204 (A – C).