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4337-15

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

[245A2100DD/AAKC001030/A0A501010.999900]

RIN 1076-AF71

Land Acquisitions

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final Rule.

SUMMARY: Section 5 of the Indian Reorganization Act (IRA or Act) authorizes the Secretary of the Interior (Secretary) to acquire lands in trust for the benefit of Tribal governments and individual Indians. This final rule provides the procedures governing the discretionary acquisition of lands into trust, often referred to as the fee-to-trust process, under the Act. Since these regulations were first promulgated in 1980, the Bureau of Indian Affairs (BIA) has developed extensive experience in the fee-to-trust acquisition process. Relying on that experience and input from multiple stakeholders, this final rule makes the fee-to-trust process more efficient, simpler, and less expensive to support restoration of Tribal homelands.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: This final rule is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs (Assistant Secretary; AS-IA) by 209 Departmental Manual (DM) 8.

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I. Statutory Authority and Background

Congress enacted the Indian Reorganization Act (IRA) in 1934 to address the devastating effects of prior policies and to secure a land base for Indian tribes to engage in economic development and self-determination. Act of June 18, 1934, Pub. L. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. 5101 through 5129). Congress expressly authorized “the Secretary, in his discretion,” under section 5 of the IRA, 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, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians” as the term is defined in section 19 of the IRA *Id.* at § 5, codified at 25 U.S.C. 5108; *id.* at § 19, codified at 25 U.S.C. 5129. The regulations at 25 C.F.R. part 151 (part 151) implement this authority and provide the process by which Tribes submit applications to the Department and the criteria under which the Secretary will review the applications.

In October 2021, the Department of the Interior (Department) held consultations on the protection and restoration of tribal homelands and used the feedback from these consultations to inform draft revisions to the part 151 regulations. The Department then held four consultation sessions on the draft revisions in May 2022. Utilizing feedback from those consultations, the Department published the proposed rule on December 5,

2022, 87 FR 74334, and held three Tribal consultation sessions during the public comment period. The first Tribal consultation was held in person on January 13, 2023, at the Bureau of Land Management Training Center in Phoenix, Arizona. The next two Tribal consultations were conducted virtually on Zoom, which occurred on January 19, 2023, and January 30, 2023. Following the consultation sessions, the Department accepted written comments until March 1, 2023.

II. Acquisition of Land in Trust Process

The acquisition of land in trust is the transfer of fee land title from an eligible Indian Tribe or eligible Indian individual(s) to the United States of America, in trust, for the benefit of the eligible Indian Tribe or eligible Indian individual(s). Indian Tribes and individual Indian people who meet the requirements established by federal statutes and further defined in federal regulations are eligible to apply for a fee-to-trust land acquisition. All applications for a fee-to-trust acquisition must be in writing and specifically request that the Secretary of the Interior take land into trust for the benefit of the applicant. Applications shall be submitted to the BIA office that has jurisdiction over the lands contained in the application.

The applicant must provide a legal description of the land to be acquired, the legal name of the eligible Indian Tribe or individual, proof of an eligible Indian Tribe or eligible individual(s), the specific reason the applicant is requesting that the United States of America acquire the land for the applicant's benefit, title evidence addressing the lands to be acquired and information that allows the Secretary of the Interior to comply with the National Environmental Policy Act (NEPA) (43 U.S.C. 4321 *et seq.*) and 602 Departmental Manual 2 (602 DM 2) – Hazardous Substances. Each application is

evaluated to determine if the applicable criteria defined in part 151 have been addressed. State and local governments having regulatory jurisdiction over the land contained in the application will be notified upon written receipt of an application for a fee-to-trust acquisition. The notice will inform the entities that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. The official authorized to accept the request to fee-to-trust acquisition will decide whether to approve the application and acquire the land in trust. All decisions to accept or deny a fee-to-trust acquisition shall be in writing. The length of time to complete the process varies depending on completion of the required steps by the applicant and the BIA.

III. Overview of the Final Rule

This final rule updates the Department's part 151 regulations which govern how the BIA responds to, considers, and processes applications from Tribal governments and individual Indians to acquire land in trust status. The Bureau of Indian Affairs (BIA) has acquired over a million acres of land into trust for Tribes and individual Indians since Congress passed the IRA in 1934. *See* 87 FR 74334, 74335 (Dec. 5, 2022). This final rule is intended to make the fee-to-trust process less burdensome and more cost-efficient. In addition, the Department seeks to improve the fee-to-trust land acquisition process because of the many benefits afforded to Tribal governments and their citizens, such as heightened regulatory jurisdiction over the lands, exemptions from state and local taxation, and restoration of Tribal homelands.

This final rule addresses delays in the current land acquisition process. The average length of time to receive a final fee-to-trust decision is approximately 985 days.

Currently, there are 941 cases pending approval by the Department – the majority of which are for non-controversial, on-reservation acquisitions. This final rule will reduce the time it takes BIA to process land into trust applications going forward and address the existing backlog.

The final rule affirms the Secretary’s policy to actively implement the IRA’s discretionary land into trust authority in a manner that supports self-determination and strengthens Tribal sovereignty. The final rule also furthers implementation of subsequent congressional enactments, such as the Indian Land Consolidation Act (ILCA) and the American Indian Probate Reform Act’s (AIPRA) amendments to ILCA, which sought to “prevent further fractionation of Indian trust allotments, consolidate fractional interests and their ownership into usable parcels, consolidate those interests in a manner that enhances Tribal sovereignty, promote Tribal self-sufficiency and self-determination, and reverse the effects of the allotment policy on Indian Tribes.” Indian Land Consolidation Act, Pub. L. 97-459, 96 Stat. 2515; American Indian Probate Reform Act of 2004, Pub. L. 110-453, 118 Stat. 1804 (codified as amended at 25 U.S.C. 2201 through 2221). The Secretary’s land acquisition policy recognizes these objectives and that a Tribal land base “enhances Tribal sovereignty by accreting land to the Tribes on which they can offer Tribal services and engage in enterprises that promote Tribal self-sufficiency and self-determination.” See, e.g., *Quinault Indian Nation v. Northwest Regional Director, Bureau of Indian Affairs*, 48 IBIA 186, 203 (2008)., 48 IBIA 186, 203 (2008).

Through this rulemaking, the Department seeks to improve processing timelines by establishing a 120-day time frame for issuing a decision once the BIA receives a complete application package. This contrasts with no timeline in the current rule. The

average length of time to receive a final fee-to-trust decision is approximately 985 days. Currently, there are 941 cases pending approval by the Department – the majority of which are for non-controversial, on-reservation acquisitions. The final rule also incorporates the Department’s process for determining whether a Tribe was “under Federal jurisdiction” in 1934, as required under *Carcieri v. Salazar*, 555 U.S. 379 (2009).

The final rule articulates criteria for processing four different types of land acquisition: on-reservation, contiguous, off-reservation, and the newly identified initial acquisition. Each acquisition includes certain presumptions intended to improve efficiency based on the BIA’s longstanding practices and experience. Several other changes to the regulations seek to solve problems and remove obstacles for Tribes and individual Indians engaged in the BIA’s land acquisition process.

IV. Summary of Final Rule and Changes from Proposed Rule to Final Rule

On December 5, 2022, the Department published the proposed rule, 87 FR 74334. The sections below discuss the changes from the proposed rule to the final rule.

§ 151.1 What is the purpose of this part?

The final rule clarifies that this regulation does not govern acquisitions mandated by federal law. The Department has issued guidance concerning such mandatory acquisitions, including the guidance found in the BIA’s Fee-to-Trust Handbook (FTT Handbook), and does not believe regulations are necessary at this time. This is because there are many, varying authorities for mandatory acquisitions, and it is difficult to draft regulations that would be consistent with all current and future mandatory acquisitions. We avoid the risk of creating inconsistency with statutory authorities and judicial orders

mandating acquisitions by employing simple guidance on how we approach such acquisitions rather than one-size-fits-all regulations.

Changes from the proposed rule to the final rule in § 151.1 include:

- The opening paragraph of § 151.1 was revised to reference “acquisition of land mandated by federal law” instead of “acquisition of land mandated by Congress or a federal court.”

§ 151.2 How are key terms defined?

The final rule adds new definitions for the following terms: *contiguous, fee interest, fractionated tract, Indian land, Indian landowner, initial Indian acquisition, interested party, marketable title, preliminary title opinion, preliminary title report, and undivided interest.*

The definitions are also now listed in alphabetical order in § 151.2.

Initial Indian acquisition. Among the new definitions, we note that the term “initial Indian acquisition” refers to a new category of acquisitions provided under § 151.12. BIA wishes to support acquisitions for Tribes that do not currently have land held in trust, furthering the BIA’s policy of supporting restoration of Tribal homelands. The regulatory criteria for considering initial Indian acquisitions provide a new, more supportive process for Tribes without trust land, as discussed further in § 151.12. Tribal consultation commenters expressed concern that the consultation draft of this revision used the word “yet” rather than “currently” when referring to land held in trust status. Commenters wanted to ensure that Tribes which may have had land in trust in the past but do not have land in trust now would be covered by the initial Tribal acquisition provision and asked that “yet” be changed to “currently” to clarify that approach. We

have done so here in the final rule. We clarify, in response to the comments, that the final rule's intention is to treat Tribes that previously held land in trust but do not currently hold land in trust in the same manner as Tribes which have never held land in trust.

Marketable title. Tribal consultation commenters also expressed concern regarding the term "marketable title", and so we have added a definition for that term to the final rule. Commenters believed that requiring marketable title was inappropriate because land held in trust will not likely ever be sold on the market again, and Tribes may seek to acquire land for cultural, conservation, spiritual, or other reasons that are entirely separate from commercial concerns. BIA appreciates and supports those purposes for an acquisition but notes that the term marketable title is used here in a strictly legal sense rather than a commercial sense, referring to title that a reasonable buyer would accept because it is sufficiently free from substantial defects and covers the entire property that the seller purports to sell.

Individual Indian. The definition of "individual Indian" has been modified to remove § 151.2 (g)(4), which covered acquisitions outside of Alaska by an Alaska Native. This definition implied that acquisitions of land in trust within Alaska was not permissible under these regulations which is inconsistent with Sol. Op. M-37076, *The Secretary's Land Into Trust Authority for Alaska Natives and Alaska Tribes Under the Indian Reorganization Act and the Alaska Indian Reorganization Act and Akiachak Native Community v. Jewell*, 935 F. Supp. 2d 195 (D.D.C. 2013) (finding that the Department's part 151 Alaska exception violated the privileges and immunities clause of the IRA), *vacated as moot, Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d

100 (D.C. Cir. 2016) (the State of Alaska’s appeal was deemed moot after the Department’s rulemaking eliminated the Alaska exception from 25 CFR part 151).

Tribe. The definition of “Tribe” has been modified such that an Indian Tribe is any Tribe listed under section 102 of the Federally Recognized Indian Tribe List Act of 1994 (List Act) or slated to be included in the next publication of that list. The List Act was not in place when these regulations were first promulgated in 1980 but should be used now as it is the official record of federally recognized Tribes.

Indian reservation. The definition of “Indian reservation” has been modified slightly to ensure a comprehensive understanding of reservation status in Oklahoma after the Supreme Court’s decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The new definition provides that in the State of Oklahoma, “wherever historic reservations have not yet been reaffirmed”, the term Indian reservation means land constituting the former reservation of the Tribe as defined by the Secretary. By including this phrase, the final rule makes clear that the Secretary will consider all historic Oklahoma reservations, consistent with *McGirt* and its progeny, as Indian reservations for purposes of this regulation, regardless of whether courts have concluded reaffirmation litigation addressing such historic reservations.

Tribal consolidation area. Finally, we removed the definition of “Tribal consolidation area”. This term was used only once in the existing rule, regarding the Department’s land acquisition policy. The final rule’s updated statement of the Department’s land acquisition policy will cover any acquisitions in such an area.

Marketable title. The definition of “marketable title” was revised for clarity to read “defect and that covers the entire property” instead of “defect and to cover the entire property.”

§ 151.3 Land Acquisition Policy

The existing rule’s statement concerning when the Secretary will exercise the discretion to acquire land in trust does not reflect congressional policy clearly in favor of trust acquisition for Tribes and individual Indians, nor does it capture the broad range of purposes for which the lands are used to further Tribal welfare. The revision makes plain that the Secretary’s policy is to support acquisitions of land in trust for the benefit of Tribes and individual Indians and that it is the policy of the Department that the Secretary exercise the discretion to acquire land in trust when doing so furthers the broad range of interests outlined in the final rule. The prior technical introductory language has been moved to § 151.3 (a).

In § 151.3 (b)(3), the Department added additional policy reasons that support an acquisition on behalf of a Tribe, including any reason the Secretary determines will support Tribal welfare, consistent with the goals of the IRA and other statutes authorizing trust acquisitions. We note, however, that none of these policy reasons are required if the subject land is within a reservation (per § 151.3 (b)(1)) or if the Tribe already owns an interest in the land, such as a fee interest (per § 151.3 (b)(2)). We received comment during the 2022 Tribal consultation encouraging us not to use the word “establish” in regard to homelands, and therefore we have changed language to use the word “protect.” We also included the policy goal of establishing a Tribal land base and providing for climate change-related acquisitions. Commenters also suggested adding “cultural

practices” to the list of policy reasons in addition to “cultural resources,” and we have done so.

In § 151.3 (c), several Tribal consultation commenters pointed out that the word “adjacent” is used where the intended meaning was “contiguous.” We have changed the text to read “contiguous,” to be consistent with commenters’ recommendations and our understanding of the existing rule’s meaning.

There were no other changes in this section from the proposed rule to the final rule.

§ 151.4 How will the Secretary determine that statutory authority exists to acquire land in trust status?

Section 151.4 lays out in regulatory text the Department’s approach to determining statutory authority for acquisitions as required by the Supreme Court’s decision in *Carciere v. Salazar*, 555 U.S. 379 (2009), which determined that the word “now” in the phrase “now under Federal jurisdiction” in the IRA refers to the time of the passage of the IRA in 1934. The final rule incorporates caselaw and analysis by the Department interpreting the Department’s statutory authority as guided by *Carciere*.

The final rule identifies three categories of evidence used to evaluate whether a Tribe was under Federal jurisdiction: conclusive; presumptive; and probative. Conclusive evidence establishes in and of itself both that a Tribe was placed under Federal jurisdiction in or before 1934 and that this jurisdictional status persisted in 1934. If conclusive evidence exists, no further analysis is required. Presumptive evidence strongly indicates that a Tribe was placed under Federal jurisdiction in or before 1934 and may indicate that such jurisdictional status persisted in 1934. Even where

presumptive evidence exists, the Department will engage in a detailed review of the historical record to address whether the Tribal applicant came under Federal jurisdiction in or before 1934 and whether that jurisdictional status remained extant in 1934. If neither conclusive nor presumptive evidence exists, the Department will consider all probative evidence in concert, i.e., in a holistic manner to determine whether the historical record, in whole, supports a finding that the Tribal applicant was under federal jurisdiction in 1934 and retained such status in 1934. Examples of probative evidence are listed in § 151.4 (3)(i).

We note that § 151.4 (c) explains that, if the Department has previously issued a favorable “under Federal jurisdiction” analysis for a Tribe, no additional analysis is needed unless there has been a change in law. Such prior determinations remain valid under the revision.

Section 151.4(e) clarifies that where a statute other than the IRA has authorized trust land acquisitions, the “under federal jurisdiction” IRA analysis provided for in §§ 151.4(a) through (d) does not apply, and the Secretary may acquire land in trust as permitted by the other federal law.

Finally, we note that existing section 151.4, “Acquisitions in trust of lands owned in fee by an Indian,” has been deleted in the final rule as unnecessary. The rule provides for such acquisitions, and existing section 151.4 adds no additional information or process regarding such acquisitions.

Changes from the proposed rule to the final rule in § 151.4 include:

- Adding an introductory paragraph explaining when § 151.4 is applicable.

- Adding “land held in trust by the United States in 1934” as conclusive evidence a Tribe was under federal jurisdiction in 1934.
- Adding “land claim settlements” as an example of “federal legislation for a specific Tribe, which acknowledges the existence of jurisdictional relationship with a Tribe in or before 1934” as presumptive evidence in § 151.4(a)(2)(v).
- Adding “efforts by the federal government to conduct a vote under section 18 of the IRA to accept or reject the IRA where no vote was held;” federal “approval of contracts between a Tribe and non-Indians;” and federal “enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions)” as examples of probative evidence in § 151.4(a)(3)(i).
- Revising § 151.4(a)(2)(vi) and adding a new provision, § 151.4(a)(4), to confirm that the Secretary may rely on any evidence within the part 83 record that the Tribe was under federal jurisdiction, consistent with §§ 151.4(a)(2) and (3).
- Renumbering proposed § 151.4(a)(4) as § 151.4(a)(5) and revising it to read “[e]vidence of executive officials disavowing federal jurisdiction over a Tribe in certain instances is not conclusive evidence of a Tribe’s federal jurisdictional status. This is because such disavowals cannot themselves revoke federal jurisdiction over a Tribe.” instead of “[e]vidence of executive officials disavowing legal responsibility for a Tribe in certain instances cannot, in itself, revoke federal jurisdiction over a Tribe without express congressional action.”

- Revising § 151.4(c) to reference the “Department” instead of the “Office of the Solicitor.”
- Additional technical edits were made to make language consistent throughout § 151.4.

§ 151.5 May the Secretary acquire land in trust status by exchange?

Minor stylistic changes were made to § 151.5. There were no changes from the proposed rule to the final rule.

§ 151.6 May the Secretary approve acquisition of a fractional interest?

A modification to § 151.6 has been made to clarify how its provisions are consistent with section 2216(c) of ILCA. ILCA at section 2216(c) allows for mandatory acquisitions of fractional interests of a parcel at least a portion of which was in trust or restricted status on November 7, 2000, and is located within a reservation. Tribal consultation commenters were concerned that existing section 151.6 requires use of the discretionary process for such acquisitions, in contravention of past practice and section 2216(c) of ILCA. We assure commenters this is not the case; where section 2216(c) of ILCA provides for mandatory acquisitions of fractional interests, the Department will continue to employ that statutory authority. However, where a fractional interest is off-reservation or trust or restricted status of another fractional interest in the same parcel did not exist on November 7, 2000, section 2216(c) of ILCA does not provide authority for mandatory trust acquisitions, and thus the Department must typically rely on the discretionary acquisition authority provided by the IRA and developed in these regulations. Consistent clarifying language has been added to the introduction of § 151.6.

The proposed rule and the final rule replace the term “buyer” with “applicant.” The term “buyer” is inapposite here; the individual or Tribe is not typically buying any property, but rather applying to the Department to take the individual’s or Tribe’s fractional interest into trust for the individual’s or Tribe’s benefit.

Changes from the proposed rule to the final rule in § 151.6 include:

- The opening paragraph of § 151.6 was revised to read “[t]he Secretary may approve the acquisition of a fractional interest in a fractionated tract in trust status by an individual Indian or a Tribe including when:” instead of “[t]he Secretary may approve the acquisition of a fractional interest in a fractionated tract in trust status by an individual Indian or a Tribe only if:”.

§ 151.7 Is Tribal consent required for nonmember acquisitions?

There are no changes to § 151.7. Section 151.8 in the existing rule is redesignated as § 151.7 in the Final Rule.

§ 151.8 What documentation is included in a trust acquisition package?

Section 151.8 expands substantially upon existing rule § 151.9, “Requests for approval of acquisitions.” § 151.8 describes all the pieces of information necessary for the Department to assemble a complete trust acquisition package. Once a complete package is assembled, the final rule requires the Department to notify the applicant and then issue a decision on the application within 120 days. Many Tribal consultation commenters were concerned that no timing deadline was applied to the Department’s responsibility to notify applicants of a complete acquisition package; therefore, the final rule includes a requirement that the BIA provides tribes such notification within 30 days.

Tribal consultation commenters also pointed out that § 151.8 may be confusing in that some pieces of a complete application package are provided by the applicant, while some are developed by the Department. The following chart clarifies how the Department and applicants work together to develop a complete application package.

Paragraph Number	Applicant Contribution	Department Contribution
§ 151.8(a)(1)	A signed letter from the Tribal government supported by a Tribal resolution or other act, or if an individual applicant, a signed letter.	None
§ 151.8(a)(2)	Documentation from the applicant explaining purpose, and, if an individual, need.	No Department contribution is needed to complete this component of the package. Rather, the Department will consider this information in coming to a decision.
§ 151.8(a)(3)	Statement identifying statutory authority for the acquisition. If the acquisition relies on satisfying the IRA's first	The Department will determine whether statutory authority exists based on the Tribe's submission. If the Tribe

	<p>definition of Indian, the statement should include evidence that the Tribe was under federal jurisdiction in 1934 consistent with § 151.4.</p>	<p>relies on the IRA’s first definition of “Indian,” to establish such authority, then the Department will review all relevant evidence to determine whether the Tribe was under federal jurisdiction consistent with § 151.4.</p>
§ 151.8(a)(4)	<p>An aliquot legal description of the land and a map, or a metes and bounds land description and survey, including a statement of the estate to be acquired, e.g., all surface and mineral rights, surface rights only, surface rights and a portion of the mineral rights, etc.</p>	<p>Concurrence that the description is legally sufficient</p>
§ 151.8(a)(5)	<p>Information, or permission to access the land to gather such information, allowing</p>	<p>The Department will develop or adopt and complete NEPA analyses,</p>

	the Department to comply with NEPA and 602 DM 2 regarding hazardous substances.	including any required public process, and develop or adopt Phase I and Phase II Environmental Site Assessments produced under 602 DM 2.
§ 151.8(a)(6)	Evidence of marketable title	Preliminary Title Opinion
§ 151.8(a)(7)	None (applicant replies to comment letters are invited but not required for a complete acquisition package).	Notification letters to state and local governments and any response letters.
§ 151.8(a)(8)	Statement that any existing encumbrances on title will not interfere with the applicant's intended use.	None
§ 151.8(a)(9)	None unless warranted by specific application.	None unless warranted by specific application.

Regarding the requirement under § 151.8(a)(3) that the Department concur that a description is legally sufficient, many commenters were concerned that this adds a novel

requirement to the land into trust process that may present obstacles. The Department clarifies that concurrence with the land description presented by the applicant was and has always been a necessary part of the acquisition process. *See* BIA National Policy Memorandum: Modernizing the Land Description Review Process for Fee-to-Trust Acquisitions, NPM-TRUS-43 (April 6, 2023). The Department has always reviewed land descriptions to ensure they are accurate, that the parcel “closes,” and that, generally, the description describes with sufficient specificity what land is to be acquired. The Department’s land description concurrence listed in § 151.8 is needed primarily to be comprehensive in the requirements for a complete acquisition package. Without such a provision, a flawed or otherwise insufficient land description could be construed as completing an acquisition package, forcing the Department to deny a request if not resolved before the 120-day time frame expires.

Changes from the proposed rule to the final rule in this section include:

- § 151.8(a)(1) through (6), (8), and (9) were revised to read “[t]he applicant must submit”.
- Clarification, in new § 151.8(a)(3), that the Tribe is responsible for submitting a statement and any evidence to support a finding of it being under federal jurisdiction in 1934 to satisfy § 151.4, and renumbering of subsequent provisions of § 151.8(a).
- Clarifying language that an acquisition package is not complete until a pre-acquisition Phase I environmental site assessment, and if necessary, a Phase II environmental site assessment completed pursuant to 602 DM 2 is determined to be sufficient by the Secretary, the Secretary completes a Preliminary Title

Opinion, and the Secretary determines that the legal description or survey is sufficient.

- Deleting “including any associated responses where requested by the Secretary” from proposed § 151.8(a)(6), now renumbered as § 151.8(a)(7).
- Stylistic changes.

§ 151.9 How will the Secretary evaluate a request involving land within the boundaries of an Indian reservation?

Section 151.9 is the first of four sections providing process for the Secretary’s consideration of different types of acquisition applications based on the location of the subject land in relation to an Indian reservation or, in the case of initial Indian acquisitions, the fact that the Tribe has no land currently in trust.

The existing rule considers both on-reservation and contiguous applications under the on-reservation criteria in § 151.10. In the new final rule, the on-reservation acquisition process has been simplified and designed to result in faster decisions in several ways. First, under § 151.9(a), the Secretary is no longer required to consider some of the issues that § 151.10 of the current regulations requires her to consider, such as the need for a Tribal government’s acquisition, the impact on state and local government tax rolls, and jurisdictional problems or conflicts of land use which may arise, except as described below. BIA is making this change based on decades of experience showing that on-reservation acquisitions are generally not contentious or challenged because the acquisition may be within existing reservation boundaries, may help to lessen jurisdictional complexities arising from privately-held fee tracts adjacent to tracts held in trust, may help to consolidate Tribal land interests, or may be mandatory

under other statutory processes, such as the Indian Land Consolidation Act, as amended. *See* Pub. L. No. 97-459, tit. II, *codified at* 25 U.S.C. 2201 *et seq.* Moreover, the Department believes that this change in policy better aligns with the purpose of the IRA. Indeed, the IRA was passed to address “[t]he disastrous condition peculiar to the Indian situation in the United States” that was “directly and inevitably the result of existing.” Readjustment of Indian Affairs: Hearings Before the Committee on Indian Affairs, House of Representatives on H.R. 7902, 73d Cong., 2d Sess., at 15-16 (Feb 22, 1934), *cited in* Sol. Op. M-37029 “*The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act*” (March 12, 2014), at 6 (discussing the (General Allotment Act of 1887, Pub. L. 49-105, 24 Stat. 388 (formerly codified at 25 U.S.C. §§ 331-357)).

Section 5 of the IRA says nothing about whether restoring these lands to Tribal ownership satisfied a particular need, would negatively impact state and local tax revenue, or would complicate jurisdiction or create conflicts in land use. Given that the subject land is within an Indian reservation set aside by the United States government for the use and welfare of a Tribe and based on the long experience of BIA in processing such applications and then administering land placed into trust, these factors need not be considered for every acquisition. However, under § 151.9(d), the final rule retains notice and an invitation to state and local governments to comment on the acquisition’s potential impact on regulatory jurisdiction, real property taxes, and special assessments. If such comments are received, the Secretary will consider them in a holistic analysis of the application. More specifically, the Secretary will no longer be required to consider impacts to state and local taxes for on-reservation acquisitions unless it is raised by a State or local government. The Department also notes and confirms that any comments

received on an application, even if not requested, will be considered as part of the overall decision-making process. If no such comments are received, no consideration of these factors is required under the final rule. We note that some commenters wished to eliminate the purpose criterion in § 151.9(a) as well. Because an understanding of purpose is necessary to comply with NEPA and to support the approach described in § 151.9(b), BIA is retaining this criterion.

Second, under § 151.9(b), the Secretary will apply great weight to applications pursuing certain important purposes for Tribal welfare, including, for instance, the need to protect Tribal homelands. This will allow the Secretary to appropriately consider which acquisitions will most directly further the critical interests identified in § 151.3. This approach recognizes and incorporates the Secretary's policy to support acquisition of land in trust for the benefit of Tribes. The existing rule's land acquisition policy in § 151.3 was established when the first fee-to-trust regulations were promulgated in 1980. *See* 45 CFR 62034. The land acquisition policy in the existing rule is virtually unchanged from the 1980 version and does not account for the many important reasons, many of which were not contemplated in 1980, for which Tribes acquire land in trust today to further self-determination and self-governance. This final rule incorporates these important reasons in the revised § 151.3, which the Secretary's policy is intended to support. Under the new final rule, the Secretary will expressly consider the listed Tribal purposes for land acquisition as part of the holistic consideration applied to land into trust acquisitions under the discretionary authority of the IRA. If an application seeks to have land taken into trust for one of the purposes set forth in § 151.9(b), the Secretary will give great weight to this fact and, because such acquisitions further the policy purposes set out

in § 151.3, will provide a detailed explanation of the basis for any disapproval decision, taking into account the important purposes that such an acquisition would serve.

Third, under § 151.9(c), the Secretary will now presume that on-reservation acquisitions will benefit Tribal interests, and therefore should be approved. BIA believes this presumption will further the purpose of the IRA, which, as noted above, Congress enacted in 1934 to address the devastating effects of prior policies and to secure a land base for Indian tribes to engage in economic development and self-determination. Given that the subject land is within an Indian reservation set aside by the United States government for the use and welfare of a Tribe, and given the long history of such lands being removed from Tribal ownership through improper sale or the government's efforts to allot land originally held by the Tribal government, a presumption of benefits from restoring reservation lands to trust status is appropriate and consistent with the Department's policy on land into trust acquisitions. Where a Tribe takes land into trust within its reservation boundaries, that land nearly always serves an important economic, cultural, self-determination, or sovereignty purpose that supports Tribal welfare.

Changes from the proposed rule to the final rule in this section include:

- Making stylistic changes in § 151.9 (b) to emphasize the Secretary's recognition that applications that are for the listed purposes will further the important policy goals identified in § 151.3.
- Clarifying in § 151.9(c) that the Secretary will presume that the acquisition will "further the Tribal interests described above in subsection (b) and adverse impacts to local governments' regulatory jurisdiction, real property taxes, and

special assessments will be minimal, therefore the application should be approved.”

- Adding in § 151.9(d) that the notice to state and local governments will provide “30 calendar days in which to provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments. If the state or local government responds within 30 calendar days, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply, if they choose to do so in their discretion, or request that the Secretary issue a decision. In considering such comments, the Secretary presumes that the Tribal community will benefit from the acquisition.”
- Minor stylistic changes.

§ 151.10 How will the Secretary evaluate a request involving land contiguous to the boundaries of an Indian reservation?

For reasons similar to those noted above, the process for approving acquisitions contiguous to an Indian reservation has also been simplified and designed to result in faster decisions. Under the current regulation at section 151.10(a), the Secretary must consider the need for a Tribal government’s acquisition of contiguous land, the impact on state and local government tax rolls, and jurisdictional problems or conflicts of land use which may arise when considering acquisition of land contiguous to the Indian reservation. Under final rule §§ 151.10(a) through (c), like on-reservation acquisitions under final rule §§ 151.9(a) through (c), the Secretary is no longer required to consider the need for a Tribal government’s acquisition of contiguous land, the impact on state and

local government tax rolls, and jurisdictional problems or conflicts of land use which may arise, except as described below, because such impacts, problems or conflicts are presumed to have a minimal adverse impact. Given that the subject land is contiguous to an Indian reservation set aside by the United States government for the use and welfare of a Tribe, and would, after acquisition, form a contiguous parcel, and based on the long experience of BIA in processing such applications and then administering land placed into trust, these factors need not be considered for every acquisition. However, the final rule retains notice and an invitation to state and local governments to comment on the acquisition's potential impact on regulatory jurisdiction, real property taxes, and special assessments. If such comments are received, the Secretary will consider them in a holistic analysis of the application. If no such comments are received, no consideration of these factors is required under the final rule.

Under § 151.10(b), the same approach of granting great weight to important Tribal purposes will be applied in the same manner as for on-reservation acquisitions (i.e., within the boundaries of an Indian reservation) under § 151.9(b). The Secretary also presumes, based on decades of experience in acquiring and administering contiguous trust lands, that the Tribal community will benefit from the acquisition. The existing rule considers both on-reservation and contiguous applications under the on-reservation criteria in § 151.10. The presumption that a community will benefit from acquisition of land in trust reflects an update based on the Secretary's practice and is a change from the current regulations, which contain no presumption of whether a Tribal community will benefit from an acquisition. Trust acquisition of land benefits Tribes because Tribes have

new opportunities to pursue self-determination and self-governance on the land, and Tribes can access the federal programs and services that are available only on trust lands.

Changes from the proposed rule to the final rule in this section include:

- Making stylistic changes in § 151.10 (b) to emphasize the Secretary’s recognition that applications that are for the listed purposes will further the important policy goals identified in § 151.3. Clarifying in § 151.10(c) that the Secretary will presume that the acquisition “will further the Tribal interests described above in subsection (b), and adverse impacts to local governments’ regulatory jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.”
- Clarifying in § 151.10(d) that the notice to state and local governments will provide “30 calendar days in which to provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments.”
- Minor stylistic changes.

§ 151.11 How will the Secretary evaluate a request involving land outside the boundaries of an Indian reservation?

Off-reservation acquisitions have been streamlined and designed to result in faster decisions through the same reductions in review criteria described for on-reservation and contiguous acquisitions appearing in § 151.11(a), and by applying the same great weight standard to important Tribal purposes in § 151.11(b). The average length of time to receive a final fee-to-trust decision is now approximately 985 days. The expected time to

receive a final decision is expected to significantly decrease, particularly given the new 120-day timeframe in which BIA must issue a decision as established in § 151.8(9)(b).

In addition, existing § 151.11(b) applied a “bungee cord” approach, increasing the scrutiny applied to an acquisition as distance from a Tribe’s reservation increased. In 1995, the Department amended part 151 to establish a new policy for the acquisition of land in trust when such lands are located outside of and noncontiguous to a tribe’s existing reservation boundaries. *See* 60 FR 32874 (June 13, 1995). The proposed rule noted the need to eliminate adverse impacts on surrounding local governments as justification for increasing scrutiny of tribal benefits while giving greater weight to the concerns of state and local governments. *See* 56 FR 32278 (July 15, 1991).

The final rule abandons this approach, providing in new § 151.11(c) that the Secretary presumes the Tribe will benefit from the acquisition, and will consider the location of the land and potential conflicts of land use when reviewing state and local comments as part of the holistic analysis of the application. This revision is consistent with the BIA’s long experience in implementing the land into trust authorities under the IRA. Where a Tribe takes land into trust off-reservation, that land nearly always serves an important economic, cultural, self-determination, or sovereignty purpose that supports Tribal welfare. Tribal governments are rational actors that make acquisition decisions carefully based on available resources, such as tribal funds or financing to purchase the land, planning, and purposes valued by the Tribe. Accordingly, the Secretary will no longer apply heightened scrutiny based on distance from the Tribe’s reservation but will instead consider the location of the land broadly before issuing a decision.

Changes from the proposed rule to the final rule in this section include:

- Making stylistic changes in § 151.10 (b) to emphasize the Secretary’s recognition that applications that are for the listed purposes will further the important policy goals identified in § 151.3.
- Deleting “without regard to distance of the land from a Tribe’s reservation boundaries or trust land” in § 151.11(c).
- Adding in § 151.11(c) that “the Secretary will consider the location of the land and potential conflicts of land use” instead of “the Secretary will consider the location of the land.”
- Stylistic changes.

§ 151.12 How will the Secretary evaluate a request involving land for an initial Indian acquisition?

Section 151.12 is designed to streamline decision-making and support Tribes which do not currently have land in trust. In 1995, the Department amended part 151 to establish a new policy for the placement of lands in trust status for Indian tribes when such lands are located outside of and noncontiguous to a tribe’s existing reservation boundaries. *See* 60 FR 32874 (June 13, 1995). This amendment did not, however, account for tribes without reservations. Since that time, applications from tribes without reservations have been processed under the existing rule’s off-reservation provisions even though § 151.11(b) does not apply to tribes without reservations. The final rule includes provisions that more appropriately apply to the Secretary’s review of applications from tribes without reservations, thus, eliminating confusion. The final rule removes any consideration of the location of the land, except if such consideration is necessary given state and local comments, while also providing the reduced criteria for

analysis in § 151.12(a) and great weight granted to important purposes in § 151.12(b). The final rule also establishes a presumption of Tribal benefits for such requests.

Changes from the proposed rule to the final rule in this section include:

- Making stylistic changes in § 151.10 (b) to emphasize the Secretary’s recognition that applications that are for the listed purposes will further the important policy goals identified in § 151.3. Clarifying in § 151.12(c) that the Secretary will presume that the acquisition “will further the Tribal interests described above in subsection (b), and adverse impacts to local governments’ regulatory jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.”
- Clarifying in § 151.12(d) that the notice to state and local governments will provide “30 calendar days in which to provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments.”
- Adding in § 151.12(d) that “the Secretary will consider the location of the land and potential conflicts of land use” instead of “the Secretary will consider the location of the land”.

§ 151.13 How will the Secretary act on requests?

Minor clarifying changes to language were made in § 151.13, including the use of “Office of the Secretary” rather than “Secretary” in §§ 151.13(c) and (d). Because the final rule uses the defined term *Secretary* in its inclusive sense to mean all Department staff with delegated authority from the Secretary, here in § 151.13 where we refer to the

unusual instance where the Secretary herself and her immediate office have taken over review of an application, we specify that circumstance by using “Office of the Secretary.”

In addition, the final rule adds new information on the steps that occur after a decision to take land into trust but before signature on the acceptance of conveyance document, described in subparagraphs (c)(2)(iii) and (d)(2)(iv). This change is explained in detail below with regard to new § 151.15. Before the BIA may accept a conveyance, the BIA must confirm that the environmental site assessment is current. The environmental site assessment is conducted to determine whether a parcel or parcels in question contain any environmental liabilities. This assessment is different than the BIA’s responsibilities under NEPA. The final rule has been revised at § 151.13(c)(2)(iii) and § 151.13(d)(2)(iv) to eliminate any confusion and to clarify that NEPA must be completed before a decision is made but that a second environmental site review can be completed after the decision is made but before the land is accepted in trust.

Changes from the proposed rule to the final rule in this section include minor stylistic changes.

§ 151.14 How will the Secretary review title?

Two significant changes were made to the Secretary’s title review process. First, our understanding is that in certain jurisdictions, including California, many title insurance companies decline to provide abstracts of title to Tribal applicants. This market failure has created substantial obstacles for such applicants to bring land into trust. Section 151.14(a)(2)(ii) is designed to address that issue by allowing applicants who cannot obtain an abstract of title to instead provide evidence of a title insurance company’s declination. In such cases the Secretary may accept the applicant’s

preliminary title report in place of an abstract of title as sufficient proof of good title under this section. Evidence of declination may be provided as a letter or email from the applicant's title insurance company declining to provide an abstract based on their business practices.

Second, §151.14(b) allows the Secretary to seek additional action, if necessary, to address liens, encumbrances, or infirmities on title. The existing rule mandates disapproval if the Secretary determines title is unmarketable. The new rule makes this choice discretionary by replacing "shall" with "may." While we expect the Department will need to disapprove if title is so deficient as to be unmarketable, the Secretary retains discretion here. The new rule balances the United States interest in obtaining marketable title with the legal consequence that land held in trust is inalienable. The current rule can serve as a barrier to an acquisition when there are infirmities to title that may not be acceptable to a reasonable buyer but would otherwise be acceptable to the Secretary if certain conditions are met (*e.g.*, limiting liability through an indemnification agreement).

Many Tribal consultation commenters were concerned that encumbrances on the land which cannot be conveniently eliminated may prevent acquisition in trust. We clarify here that the Department may accept, in its discretion, some encumbrances on title and, should those encumbrances have the potential to impose costs in the future, the Department may enter into indemnification agreements with the applicant to facilitate the processing of fee-to-trust applications. Under the Checklist for Solicitor's Office Review of Fee-to-Trust Applications, issued by Solicitor Tompkins on January 5, 2017, an indemnification agreement between the BIA and a Tribal applicant to address a responsibility that runs with the land may be appropriate if the Tribal applicant is willing

to enter into the indemnification agreement, the risk of liability for the responsibility is low, and the indemnification agreement is the only device that will allow the Department to continue processing the land into trust application. The Department has completed many such agreements and is willing to consider them whenever necessary to further an acquisition.

Changes from the proposed rule to the final rule in this section include:

- Adding in § 151.14(a)(2)(ii) that the Secretary may accept either a preliminary title report or an equivalent document prepared by a title company in place of an abstract of title in certain circumstances.
- Removing the requirement in § 151.14(a)(2)(ii) that the policy of title insurance be less than five years old.
- Updating § 151.14(a) to read “[t]he applicant submit title evidence as part of a complete acquisition package as described in § 151.8 as follows:”.
- Stylistic changes.

§ 151.15 How will the Secretary conduct a review of environmental conditions?

Section 151.15 covers the Department’s environmental responsibilities under NEPA and the Departmental Manual at 602 DM 2. Paragraph (a) simply states that the Department will comply with NEPA; no changes to BIA’s practices are created through this paragraph. Section 151.15(b) creates a new process in relation to 602 DM 2. That Departmental policy helps ensure that the Department does not acquire land that has been contaminated by hazardous substances, or that if it does acquire such land unknowingly, its due diligence in examining the property will ensure an innocent landowner defense to

liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601 *et seq.*).

The innocent landowner defense is only available where environmental site assessments developed pursuant to 602 DM 2 are performed or updated within 180 days of an acquisition. Under the existing regulations, many applicants have, therefore, needed to continually update their environmental site assessments while waiting for a decision on their application. Environmental consultant fees in performing this work added significantly to the cost of an acquisition. To address this problem, the proposed revisions anticipate a maximum of two environmental site assessments. One assessment should be prepared to develop a complete application package. Section 151.15(b) provides that, if this assessment will be more than 180 days old at the time of acquisition and thus an update is needed, then a single additional update may be performed after the Secretary issues her notice of decision approving the acquisition, but before the acceptance of conveyance document is signed. Based on lengthy experience in such acquisitions, if no recognized environmental conditions are identified in the first environmental site assessment, the chances are low that any such conditions will have emerged by the time of acceptance. Repeated updates are, therefore, an unnecessary expense for the applicant that will be avoided through new § 151.15(b). We note that § 151.15(b) states that this single additional update “may” be required by the Secretary; we use the term “may” because if the original environmental site assessment was performed less than six months before the acceptance of conveyance, there is no need to perform an update.

Changes from the proposed rule to the final rule include:

- Adding in § 151.15(b)(1) “or before formalization of acceptance and all other requirements of this section, § 151.13 and §151.14 are met, the Secretary shall acquire the land in trust.”
- Adding in § 151.15(b)(2) “or before formalization of acceptance” in the first sentence. And revising the second sentence to reference “prior to the formalization of acceptance” instead of “prior to taking the land in trust status”.

§ 151.16 How is formalization of acceptance and trust status attained?

Section 151.16 explains in greater detail how the final process of accepting land into trust occurs and when. This section replaces existing section 151.14 and expands on its description of formalization of acceptance.

In brief, this section explains that after all procedural steps are completed, including notice of intent to acquire the land in trust, title review, environmental review, and the expiration of the appeal period, the Secretary will sign an instrument of conveyance. That signature places the land into trust for the benefit of the applicant.

Changes from the proposed rule to the final rule in this section include:

- Clarifying in § 151.16 (a) that “[t]he Secretary shall sign the instrument of conveyance after the requirements of §§ 151.13, 151.14, and 151.15 have been met”.
- Clarifying in § 151.16 (c) that “[t]he Secretary shall record the deed with LTRO pursuant to part 150 of this chapter.”

§ 151.17 What effect does this part have on pending requests and final agency decisions already issued?

Section 151.17(a) addresses pending applications, offering a choice to applicants. By default, the Department will continue processing such applications under the existing regulations, with the understanding that altering the applicable process midstream might be an unnecessary disruption, especially for applications that are near the end of the process or awaiting decision.

However, if an applicant wishes to apply the new regulations to its pending application, the applicant may do so by informing us of their choice, with the single exception that the 120-day time frame created in §151.8(b)(2) will not apply. Given the number of pending applications before the Department, if a large number of such applications were placed at once under the 120-day time frame, the volume could potentially cause serious problems for agency decision-making.

Section 151.17(b) explains that any decisions already made under the existing regulations are not altered by the new regulation.

Changes from the proposed rule to the final rule in this section include:

- Adding that “[t]he Secretary shall consider the comments of state and local governments submitted under the notice provisions of the previous version of this regulation”.
- Clarifying that the new regulations do not alter decisions made by BIA officials that are undergoing appeal “on the effective date of this part”.

§ 151.18 Severability.

Section 151.18 provides that if any provision of this subpart, or any application of a provision, is stayed or determined to be invalid by a court of competent jurisdiction, it is the Secretary’s intent that the remaining provisions shall continue in effect. The Secretary

believes this is appropriate because the regulations are largely procedural and that if specific sections were stricken the Secretary would still be able to render decisions in compliance with statutory authority.

V. Public Comments on the Proposed Rule and Response to Comments

Individual comments were separated and categorized after the closing of the comment period on March 1, 2023. Over 95 different entities commented on part 151, including Tribal, state, and local governments, industry organizations, and individual citizens. In total, the submissions were separated into 650 individual comments.

Generally, around 81 comments were exclusively supportive, 114 were not supportive, and 455 were neutral or provided general support along with constructive feedback on how the rule may be improved. All public comments received in response to the proposed rule are available for public inspection. To view all comments, search by Docket Number “BIA-2022-0004” in <https://www.regulations.gov>. The AS-IA has decided to proceed to the final rule stage after careful consideration of all comments. The AS-IA’s responses to significant comments that were not supportive, neutral, or provided general support along with constructive criticism are detailed below. No responses are provided for comments that were exclusively supportive.

Indian Tribes

In general, Tribes who commented were supportive of the proposed part 151 regulations. However, many Tribes included constructive criticism. Commenting Tribes appreciated the Department’s inclusion of community benefits and presumptions for approval, the Department’s efforts to reduce burdensome requirements, the new tiered categories of acquisitions, and the establishment of timelines.

While Tribes were generally supportive, some comments raised concerns. For example, some Tribes were concerned about applying presumptions to applications for the acquisition of land outside of an applicant Tribe's aboriginal territory. Some Tribes also suggested that Tribal governments should have the same opportunity to comment on acquisitions that state and local governments do. Other Tribes advocated for more flexibility around land descriptions.

State and Local Government

State and local governments that commented opposed the regulations on multiple fronts, including questioning the authority of the Department to implement portions of the regulations under the Administrative Procedure Act (APA), caselaw, and principles of federalism. State and local governments were particularly concerned that the presumptions afforded Tribal applicants as well as the removal of certain provisions including: the scrutiny applied to Tribal benefits in relation to state and local government concerns as the distance of the land at issue from a Tribe's reservation or trust land increased; the requirement that Tribes demonstrate the need for additional land; and the requirement that Tribes supply business plans for review. They also opposed a perceived decreased role for state and local governments in the process, such as eliminating the consideration of jurisdictional problems or potential conflicts over land use and the removal of solicitations for state and local governments to comment on on-reservation acquisitions. State and local governments also provided detailed suggestions for how the Department should notify state and local governments. This rulemaking comports with the APA and is within contemplated congressionally delegated authority of the Assistant Secretary – Indian Affairs. Multiple federal courts of appeals have rejected claims that

section 5 of the IRA violates the nondelegation doctrine or that it otherwise violates constitutional concepts of federalism. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008); *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev'd on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379 (2009); *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548 (8th Cir. 2007); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999); *see also Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 698 (9th Cir. 1997) (stating in dicta that the land into trust power is a valid delegation).

§ 151.1 What is the purpose of this part?

Comment. Many Tribes see this as a necessary revision because “the fee-to-trust regulations normally do not apply to transactions in these categories because of the legal framework governing them,” including acquisition of fee land by Tribes and acquisitions mandated by statute. They suggest that numbering this section may improve comprehension – like so: “This part does not cover: (1) acquisition of land by individual Indians and Tribes in fee simple even though such land may, by operation of law, be held in restricted status following acquisition; (2) acquisition of land mandated by federal law; (3) acquisition of land in trust status by inheritance or escheat; or (4) transfers of land into restricted fee status unless required by federal law.”

- *Response:* The Department agrees that clarifying when the Secretary will apply the part 151 regulations is an important addition to the final rule. The final rule clarifies that this regulation does not govern acquisitions mandated by federal law. The Department has issued guidance concerning such mandatory acquisitions, including the guidance found in the FTT Handbook,

and does not believe regulations are necessary at this time. The formatting in the subsection is consistent with the rest of the rule therefore the Department declines to make the suggested formatting revision.

Comment. One Tribe noted that the regulations do not set out the procedures in a comprehensive manner. The Tribe suggested that this section reference all applicable procedures, letting applicants know exactly what will be applied and when.

- *Response:* Specific instructions regarding the fee-to-trust process are contained in guidance outside the regulation (*e.g.*, FTT Handbook). However, policy and guidance change over time, including where it is located, so the regulation does not identify specific policy and guidance documents. BIA will be updating the FTT Handbook to reflect the changes made in this final rule.

Comment: One Tribe suggested that consideration should be given to the terms “trust” and “restricted” for clarity.

- *Response:* The final rule is sufficiently clear and articulates the scope of the rule without the need for additional definitions.

Comment: One commenter suggested that this section include a baseline process for fee-to-trust, including a provision stating that acquisitions mandated by federal law be exempt. The commenter also pointed out that federal courts have no authority to acquire land in trust for Indians without some action by the Congress.

- *Response:* The final rule makes clear that the new regulations govern discretionary decisions to acquire land into trust. The FTT Handbook clarifies how the Department will process acquisitions mandated by federal law.

Comment: One Tribe noted a concern that the proposed regulations may unintentionally advantage some Tribes at the expense of others. The Tribe suggested an addition to this section clarifying that neither the definitions and terminology in the part 151 regulations nor the findings and decisions made in the applications of the part 151 regulations are intended to be binding for purposes of other decision-making processes conducted under other authorities, including, without limitation, 25 U.S.C. 2719 and 25 CFR part 292 (part 292).

- *Response:* The Department agrees that the definitions and terminology are not intended to be binding for other decision-making processes, including those made under 25 U.S.C. 2719 and part 292 but disagrees that the rule requires additional clarification of that point.

Comment: One Tribe suggested that this section specify that the Secretary's land acquisition regulations should apply to mandatory and discretionary acquisitions to the extent that it does not conflict with federal legislation resolving land claims.

- *Response:* The Department acknowledges that Congress often addresses both mandatory and discretionary trust acquisitions as part of legislation. The regulations as written apply solely to discretionary acquisitions provided for in legislation. The requirements for discretionary acquisitions set forth in this rule, and mandatory acquisitions set forth in the FTT Handbook, aim to ensure the Department's compliance with applicable requirements, including the National Environmental Policy Act (NEPA) and the Departmental Manual at 602 DM 2.

§ 151.2 How are key terms defined?

Contiguous

Comment: Several commenting Tribes proposed the addition of “navigable rivers” to the definition of “contiguous” as follows: “Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or navigable rivers or a public road or right-of-way and includes parcels that touch at a point.” One Tribe suggested adding the following phrase: “Contiguous shall include two parcels of land separated by navigable water if the navigable water is subject to the Tribe’s treaty or other fishing rights and each parcel is accessible by water.”

- *Response:* Under the rule, the process for approving acquisitions contiguous to an Indian reservation has been simplified. The definition of contiguous is intended to formalize long-standing BIA practice with respect to evaluating contiguity and is sufficiently clear to guide the Department and applicants regarding whether a parcel is contiguous. There of course will be fact patterns that require additional analysis. The Department declines to add “navigable rivers” to the definition because in some instances such a change could result in parcels that are a significant distance from one another being considered contiguous.

Comment: One Tribe requested more clarity on what constitutes a “public road” for this definition. The Tribe also suggested that the Department address whether there is a distinction between “contiguous” and “adjacent.”

- *Response:* The Department agrees that the nature of a public road could be dramatically different depending on the location and may require additional analysis. Separation of two parcels by a public road does not necessarily

render the parcels noncontiguous for purposes of part 151. The definition is sufficiently clear to guide the Department and applicants regarding whether a parcel is contiguous. There of course will still be instances that require additional analysis. We acknowledge that the terms “adjacent” and “contiguous” are similar but have slightly different meanings, i.e., adjacent generally means close to or near something rather than sharing a common boundary. The Department believes the definition of contiguous is sufficient to cover lands that are contiguous and no separate definition of adjacent is necessary.

Comment: Another Tribe urged the Department to clarify that land accepted into trust as “contiguous” pursuant to 25 CFR 151.10 is “contiguous” for gaming purposes under 25 CFR 292.2.

- *Response:* The definition of contiguous is consistent with the part 292 definition, and in general should result in a similar analysis; however, determinations made under part 151 and part 292 are separate and rely on different statutory authority.

Comment: Other Tribes also requested clarification on whether the definition should include two *or more* parcels of land and whether parcels with common corners or those separated only by a road or right of way are included.

- *Response:* The use of the phrase two “or more” parcels could cause confusion where, for example, parcels may share more than one border. To avoid confusion, the definition was not changed. This definition includes parcels that touch at their corners. Separation of two parcels by a public road or right-

of-way does not necessarily render the parcels noncontiguous for purposes of part 151. There of course will still be instances that require additional analysis.

Comment: One Tribe recommended the addition of the following definition for “adjacent” property to section 151.2: Adjacent means two parcels of land connected by natural, social, cultural, or economic ties, though they are not contiguous, as determined by any of the following factors: (1) the physical distance between parcels, (2) the ease of travel between parcels, (3) the parcels sharing the same natural characteristics or supporting the natural functions of each other, (4) the cultural connection between the parcels, or (5) the parcels being part of a larger economic plan or strategy.

- *Response:* The definition of contiguous is sufficient to guide the analysis.

There of course will still be instances that require more in-depth review. The rule only uses the term contiguous. We acknowledge that the terms “adjacent” and “contiguous” are similar but have slightly different meanings, i.e., adjacent generally means close to or near something rather than sharing a common boundary. The Department believes the definition of contiguous is sufficient to cover lands that are contiguous and no separate definition of adjacent is necessary.

Indian Land

Comment: One Tribe pointed out that including a definition of the term *Indian land* could lead to confusion in the future because the term “Indian Lands” is a term from the Indian Gaming Regulatory Act (IGRA), which is not at issue here and suggested the definition might not be necessary.

- *Response:* The definition clarifies that Indian land as it relates to the part 151 regulations includes those held in trust or restricted status. IGRA provides a separate definition for the term Indian lands which is applicable in the gaming context. *See* 25 U.S.C. 2703(4). The Department believes there is sufficient statutory clarity and distinction for how the term is used in the IGRA context such that the part 151 definition will not lead to confusion. The part 151 definition should not be used in the gaming context or to determine gaming eligibility; it is for the purpose of land into trust.

Indian Reservation or Tribe's reservation

Comment: Some Tribes would like clarification on whether “The Secretary will consider all historic Oklahoma Reservations consistent with *McGirt*” is intended to include all Oklahoma Tribes or just the Five Tribes.

- *Response:* This provision applies to all Oklahoma Tribes.

Comment: One Tribe suggested that the principles of *McGirt* are broadly applicable. Therefore, the regulations’ language should apply in Oklahoma and to any place where historic reservations have yet to be reaffirmed. The Tribe suggested the following language:

- (1) That area of land set aside for the use and occupancy of an Indian Tribe(s) by treaty, statute, executive order, or Secretarial proclamation or order, including both formal and informal reservations as well as dependent Indian communities, allotments, and restricted fee lands;
- (2) That area of land over which a Tribe is recognized by the United States as having governmental jurisdiction; or

(3) That area of land constituting the former reservation of a Tribe as defined by the Secretary, including:

- (a) In Oklahoma, where there has been no final determination affirming the Tribe's reservation; or
- (b) Elsewhere, where there has been a final determination the Tribe's reservation has been diminished or disestablished.

- *Response:* The proposed language in section (1) could, in some instances, go beyond what is intended to be included within the definition. The Department therefore declines to include the proposed revision. The proposed language in section (2) is part of the proposed rule and articulates the general definition that an *Indian reservation* or *Tribe's reservation*, for purposes of part 151, includes those lands over which the Tribe is recognized by the United States as having governmental jurisdiction. Specific to Oklahoma, the rule provides for a concise statement consistent with the *McGirt* decision as well as agency precedent. *See, e.g., Shawano County, Wisconsin v. Acting Midwest Regional Director, BIA*, 53 IBIA 62 (2011) (because there was a judicial determination that the Tribe's reservation was disestablished and the parcels were within the original boundaries of the disestablished reservation, BIA's consideration under the "on-reservation" criteria was appropriate). The Department therefore declines to adopt the proposed language in section (3).

Individual Indian

Comment: One Tribe pointed out a possible error in the definition of *Individual Indian*, noting that it requires that an individual be both (1) a descendent of an enrolled

Tribal member, and (2) personally have lived on a reservation in 1934. Under this definition, only a person above the age of 88 (the youngest possible age to have been alive in 1934) would be eligible. The Tribe suggested the following revision to proposed section 151.2(c)(2): “any person who is a descendent of an enrolled Tribal member who, on June 1, 1934, was physically residing on an Indian reservation.”

- *Response:* This language is adapted from the IRA, 25 U.S.C. 5129, and is sufficiently clear to guide the Department and applicants. The Department agrees the second category in the definition constitutes a closed class of individuals consistent with Sol. Op. M-37054, “*Interpreting the Second Definition of ‘Indian’ In Section 19 of the Indian Reorganization Act of 1934*” (Mar. 9, 2020).

Comment: One commenter stated that the third definition of Individual Indian appears to be based on racial or ethnic criteria and asked what processes and procedures are used to determine the degree of Indian blood?

- *Response:* The language is taken from the IRA and the process for determining eligibility under the third definition is separate from the part 151 regulations.

Initial Indian acquisition

Comment: While some Tribes supported the definition of *Initial Indian acquisition*, others pointed out that where land has been acquired or held in trust, but for various reasons, the United States no longer holds land in trust for a Tribe, it is not technically an initial acquisition.

- *Response:* The Department believes the definition provides sufficient clarity that an initial acquisition applies to Tribes with no land *currently* held in trust status and no revision is necessary.

Interested party

Comment: Several Tribes raised questions regarding terms within the definition of *Interested party*, including what constitutes a legally protected interest and to what extent such an interest must be affected to meet the definition. There was general concern that the definition was overly broad.

- *Response:* The Department weighed these concerns and looked at the effect of adopting a narrower definition of the term *Interested party*. *Interested party* is used in section 151.13 to define those parties entitled to notice of a decision and any appeal rights. The commenters' suggestion to narrow the definition unnecessarily limits those parties who should receive notice of the decision. As a result, the substance of the final rule is the same as the proposed rule. We note that it is possible for a party to satisfy the definition of *Interested party* yet have no right to appeal a decision, i.e., have no standing to do so. The Department also notes that providing notice to a party does not confer legal standing to bring a challenge.

Comment: Some commenting Tribes suggested that the Department clarify that an interested party must show its legally protected interests would be *adversely affected* by a decision.

- *Response:* The 25 CFR part 2 (part 2) regulations further define those parties *adversely affected* by a decision. For purposes of part 151, it is not necessary

for an interested party to be *adversely affected*, instead an interested party is one with a legally protected interest affected by a decision. The Department has not adopted the specific language suggested by the commenter, nor added a definition of legally protected interest.

Comment: Several Tribes suggested merging the definition of *Interested party* in proposed section 151.2 with part 2. One Tribe included a detailed description of how the language from part 2 could be incorporated into the part 151 regulations.

- *Response:* The part 151 *Interested party* definition closely resembles the part 2 regulation, wherein interested party is defined as “a person or entity whose legally protected interests are adversely affected by the decision on appeal or may be adversely affected by the decision of the reviewing official.” *See Proposed Rule, Appeals from Administrative Actions*, 87 Fed. Reg. 73688 (Dec. 1, 2022). The part 2 regulation further defines those entities adversely affected by a decision. For purposes of part 151, it is not necessary for an interested party to be adversely affected but instead that they have a legally protected interest affected by a decision. We note that it is possible for a party to satisfy the definition of *Interested party* and yet have no right to appeal a decision, i.e., have no standing to do so. The Department also notes that providing notice to a party does not confer legal standing to bring a challenge.

Comment: One Tribe recommended the following definition for *Interested party*: “any person, organization or other entity who can establish a legal, factual or property interest in a determination and who requests in writing to the decision maker an opportunity to submit comments or evidence or to be kept informed of general actions

regarding a specific application or action. In addition to showing a legal interest, an interested party needs to demonstrate an individualized right or interest - some interest distinct from any other members of the public that they have been adversely affected in a concrete and particularized way.”

- *Response:* The Department has not adopted the specific language suggested by the commenter because it limits the definition to those adversely affected. The final rule is written to aid in understanding which parties will receive written notice of a decision not to identify those parties that have standing to challenge the decision in an administrative appeal. We note that it is possible for a party to satisfy the definition of *Interested Party* and yet have no right to appeal a decision, i.e., have no standing to do so. The Department also notes that providing notice to a party does not confer legal standing to bring a challenge.

Comment: Another Tribe said that appellants that do not or would not, due to the decision, exercise jurisdiction over or have the right to use the property subject to appeal, should lack standing to bring an appeal. The Tribe also asserted that status as a government does not confer standing to bring such an appeal and that an appellant’s basis for appeal should not be purely economic.

- *Response:* The Department weighed these concerns and looked at the effect of adopting a narrower definition. The term *Interested party* is used in § 151.13 to define those parties entitled to notice of a decision. The commenter’s suggestion is too narrow and eliminates parties that should receive notice of the decision if made known to the decision maker. As a

result, the substance of the final rule is the same as the proposed rule. We note that it is possible for a party to be an interested party yet not have the right to appeal a decision i.e., lack standing to do so. The Department also notes that providing notice to a party does not confer standing.

Comment: Some Tribes expressed concern that the proposed language opens the possibility that if a group of neighbors opposes and appeals a final decision on a fee-to-trust application, the acceptance of their appeal may give them the perception that they have a legally protected interest. They further recommended that the definition track the language used in § 151.13, that an “interested party” must have “made themselves known, in writing, to the official, prior to a decision being made.”

- *Response:* While agreeing with the premise, the Department believes that definition of *Interested party* is sufficient to identify the parties entitled to notice of a decision and that issues of standing are more appropriately addressed as part of the appellate authority vested in the agency and the federal courts. The suggested revision to the definition would complicate § 151.13 because the term Interested party is also used to identify appeal periods for “unknown interested parties” provided notice via publication.

Marketable Title

Comment: Multiple commenting Tribes expressed support for the new proposed definition of “marketable title.” One Tribe pointed out a possible grammatical mistake in the definition of marketable title: “to cover” as it appears to disagree with the preceding clause. They recommended substituting “to cover” with “that covers” instead.

- *Response:* The Department agrees and has made this change in the final rule.

Comment: One Tribe requested that marketable title be clarified as including all easements and rights of way of record, including any shared maintenance and other agreements that are part of those interests of record.

- *Response:* The definition serves to protect the United States from acquiring land in trust with title infirmities a reasonable buyer would not accept. In general, most easements, rights of way of record and shared maintenance agreements of record are acceptable but still must be evaluated on a case-by-case basis.

Preliminary Title Opinion

Comment: One Tribe commented that preliminary title opinions (PTO) should be defined as non-privileged communications by the Solicitor regarding the existing title status. Because proposed § 151.8 requires a PTO as part of a complete application, the Tribe said it would not make sense to include privileged material. The lack of clarity in the current regulations causes unnecessary delays.

- *Response:* The PTO is a lawyer-client privileged communication between the Office of the Solicitor and BIA. That said, any exceptions to title that must be met prior to acquisition will be communicated to the applicant.

Tribal Homelands

Comment: Some Tribes requested a definition of “Tribal Homelands,” as the term is used throughout the regulations. Tribes noted that specific criteria to establish Tribal Homelands would help avoid confusion or conflict in instances where Tribes have overlapping historical territories.

- *Response:* The IRA authorizes the Secretary to acquire lands “for the purpose of providing land for Indians.” The regulations articulate the Department’s general support for the restoration of Tribal homelands consistent with the IRA’s purpose of providing land for Indians and, as such, Tribal homelands is not a term of art that requires definition. The Department agrees that it can be difficult to demarcate a Tribe’s historical territory and that it may overlap with the historical territory of other Tribes, but adding a requirement that the Department render “Tribal homeland” determinations in connection with land into trust decisions would unnecessarily lengthen and complicate the review process. The Department therefore declines to include a definition of “Tribal homelands” in the final rule.

Tribe

Comment: One Tribe commented that while the List Act contains recognized Tribes eligible for IRA benefits, it also contains Tribes not eligible for IRA benefits.

- *Response:* The Department agrees that the availability of IRA section 5 fee-to-trust authority depends on more than just federal recognition under the List Act. The definition of federally recognized Tribe is still useful; however, in that acquisitions are limited to federally recognized Tribes.

Other

Comment: Many Tribes expressed support for inclusion of definitions for the terms “Fee Interest,” “Fractionated Tract,” “Secretary,” “Restricted Land,” “Trust Land or Land in Trust Status,” and “Tribe.”

- *Response:* The final rule will include the same definitions as the proposed rule.

§ 151.3 What is the Secretary’s land acquisition policy?

Comment: Many commenting Tribes expressed support for the land acquisition policy. One Tribe also encouraged the Department to apply § 151.3(b) as broadly as possible.

- *Response:* The broad policy statement in § 151.3 is grounded in the statutory text and authority of the IRA which the Secretary will actively implement to the extent permissible.

Comment: One Tribe referred to the land acquisition policy as “inappropriately limited and does not describe the policy articulated by the Indian Reorganization Act (IRA),” codified at 25 U.S.C. 5108. Consequently, the Tribe recommended that the proposed rule use section 5 of the IRA as the authority for the policy.

- *Response:* The Secretary’s land acquisition policy articulated in § 151.3 relies on IRA Section 5 authority codified at 25 U.S.C. 5108 and provides a broad range of purposes for acquiring land that meet the intent of the IRA.

Therefore, the substance of the final rule is the same as the proposed rule.

Comment: A few Tribes commented that the land acquisition policy should include language like the following: “When the Secretary determines that the acquisition of the land will further Tribal interests by . . . advancing environmental justice for Tribal communities that have been disproportionately impacted by climate change, pollution, dumping of industrial waste, and other environmentally destructive practices, by helping them to secure safe and usable land.” Another commenter suggested that the policy is an

exercise of the Secretary's fiduciary obligation and should therefore be informed by the Department's desire to address the devastating effects of the federal government's treaty, allotment, and termination periods and policies, as well as decisions beyond a Tribe's control that threaten the safety of current Tribal land.

- *Response:* The Department appreciates the commenter's additional basis for the Secretary to acquire land into trust. However, we decline to incorporate the additional language because § 151(b)(3) already includes broad language allowing the Secretary to acquire land in trust status if it is "for other reasons the Secretary determines will support Tribal welfare."

Comment: Several Tribes noted the importance of including explicit language stating that the land acquisition policy is intended to "protect sacred sites and Tribal cultural resources, establish or maintain conservation areas, *burial grounds or cemeteries*, consolidate land ownership to strengthen Tribal governance over reservation lands and reduce checkerboarding, protect treaty or subsistence rights, and facilitate Tribal self-determination, economic development or Indian housing." It was further noted that many Tribes are seeking new acquisitions to bury ancestors being repatriated or excavated from their resting places due to development outside of Tribal lands.

- *Response:* The Department agrees that the purposes listed by the commenters are important considerations in the discretionary land into trust process. Section 151.3(b)(3) articulates these broad purposes as reasons the Secretary may acquire land into trust and includes the broad statement that includes "for other reasons the Secretary determines will support Tribal welfare."

Comment: One Tribe proposed adding the phrase “increasing a Tribe’s resilience to climate change” as another reason for the Secretary to approve an acquisition.

- *Response:* The Department agrees that there are purposes not specifically identified that may be important considerations in the discretionary land into trust process. Section 151.3(b)(3) articulates that the Secretary may acquire land into trust “for other reasons the Secretary determines will support Tribal welfare.”

Comment: Several Tribes recommended § 151.3(b)(3) be revised to read, in pertinent part: “. . . if the acquisition will further Tribal interests by establishing a land base or protecting Tribal homelands, protecting sacred sites or cultural resources and practices, establishing or maintaining conservation or environmental mitigation areas, consolidating land ownership, acquiring land lost through allotment, reducing checkerboarding, protecting *rights secured by treaty, Executive Order, or other federal or subsistence rights*, or facilitating self-determination, economic development, or Indian housing.” These same Tribes also suggested making this change to all sections where this language appears: §§151.9(b), 151.10(b), 151.11(b), and 151.12(b).

- *Response:* The Department agrees that Tribes may have rights beyond those secured under treaty. Section 151.3(b)(3) however is not exhaustive and articulates that the Secretary may acquire land into trust “for other reasons the Secretary determines will support Tribal welfare.”

Comment: Some non-Tribal entities asserted that the Secretary was applying a blanket policy, stating “the Department appears to draw little or no differentiation between vastly different types of potential trust acquisitions, including those with

considerably different land uses, which invariably result in dramatically different impacts to communities.”

- *Response:* The broad policy statement in § 151.3 is grounded in the statutory text and authority of the IRA. NEPA requires federal agencies to examine the environmental effects of proposed actions before making a decision. The Department’s NEPA process requires the BIA to examine environmental and related social and economic effects. The use of the land identified in an application will dictate the level of environmental review that is appropriate to comply with the Department’s obligations under NEPA.

Comment: One Tribe commented that language should be added to make clear that even though an acquisition may be authorized under federal law there may nevertheless be other federal law or binding agreements (e.g., Tribal-state compacts) that prohibit the Secretary from acquiring land into trust.

- *Response:* Whether a separate agreement (e.g., a gaming compact) constrains the Secretary’s authority is a fact specific analysis. For that reason, the Department declines to add the suggested language to the final rule.

Comment: One Tribe commented that lands acquired within a Tribe’s reservation or Tribal consolidation area should be deemed to be reservation land without further action. This would avoid any question of whether an on-reservation acquisition requires a Reservation Proclamation.

- *Response:* A reservation proclamation is a separate action under the authority of section 7 of the IRA. The Department notes, however, that an area of land over which a Tribe is recognized by the United States as having governmental

jurisdiction (e.g., lands held in trust for the Tribe) are considered reservation under the § 151.2 definition of *Indian reservation* or *Tribe's reservation*.

There is no requirement that there be a formal proclamation before a parcel may be considered *Indian reservation* or the *Tribe's reservation* for purposes of a land acquisition under part 151. The final rule provides for a concise statement and the Department declines to make the suggested change.

§ 151.4 How will the Secretary determine that statutory authority exists to acquire land in trust status?

Comment: Numerous Tribes expressed appreciation for the clarity about how the Department will ensure that it has statutory authority to acquire land into trust status. One supportive commenter suggested that the Department elaborate on or provide a non-exhaustive list of “other forms of evidence.” Another commenter suggested that the Department include “Evidence of determinations by appropriate federal officials that a Tribe or Tribal members were eligible for benefits under the IRA.” One Tribe expressed support for proposed section 151.4(a)(4) (now renumbered as 151.4(a)(5)), which gives no legal force or effect to past disavowals of a jurisdictional relationship by executive officials. Another Tribe suggested that evidence of treaty negotiations, non-ratified treaties, and termination legislation should all be considered conclusive rather than presumptive evidence. Another Tribe suggested that this section specifically include federal legislation settling land claims as conclusive evidence where the legislation provides for mandatory or discretionary acquisitions. Another Tribe suggested that federal efforts to conduct an accept or reject vote under section 18 of the IRA, even where no vote was held, should be treated as conclusive evidence.

- *Response:* Section 151.4 includes non-exhaustive lists of evidence to meet the conclusive and presumptive standards, as well as a third category for making a determination in the absence of conclusive or presumptive evidence. The “other forms of evidence” category is intended to be a catch-all category that allows the Secretary to give appropriate weight to forms of evidence not identified in the lists of “conclusive” or “presumptive” evidence.

The Department finds that federal legislation settling tribal land claims is indicative that a Tribe was under federal jurisdiction in or before 1934, therefore the Department has included such settlements as presumptive evidence. The Department finds that evidence of federal efforts to conduct elections under section 18 of the IRA, even where no vote was held, should be treated as probative evidence of federal jurisdiction in the absence of conclusive or presumptive evidence.

Presumptive evidence is rebuttable and, even where presumptive evidence exists, the Department will engage in a detailed review of the historical record. If there is evidence that a Tribe was not under federal jurisdiction in 1934, the Department will review all available evidence in concert to determine whether, as a whole, the evidentiary record supports a finding that the Tribe was under federal jurisdiction in 1934.

Comment: One Tribal community requested that the Department publish a list of Tribes that met these thresholds so that future applicants on that list could reference that publication. Another commenter suggested that the rules clarify that proposed section 151.4(c) applies to all Tribes with favorable “under federal jurisdiction” determinations

and not just those “eligible under section 5 of the IRA.” A Tribe suggested that the Department clarify that past unfavorable “under federal jurisdiction” determinations receive no precedential effect, and that the Department will review such applicants’ future applications under this newly articulated standard.

- *Response:* Each Tribe is notified when they receive a positive “under federal jurisdiction” determination and that analysis is maintained by the Department for future applications. Tribes that receive a positive determination from the Department will not need a future “under federal jurisdiction” analysis for subsequent fee-to-trust applications. Such prior determinations remain valid under the proposed revision. If a Tribe has received a negative “under federal jurisdiction” determination from the Department prior to the issuance of the final rule, the Tribe may request a new determination under § 151.4. Because the Department provides notice as described here, the Department declines to provide a separate publication of Tribes that have met the threshold.

Comment: A Tribe requested clarification that proposed section 151.4 “incorporates existing case law” and that the tests described have been “repeatedly upheld by the federal courts” and suggested language to further clarify how the IRA and related laws are treated under this section.

- *Response:* Section 151.4 is based on the legal analysis articulated in Sol. Op. M-37029, “*The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act,*” as well as the Secretary’s experience applying IRA’s first definition of “Indian” under section 19 in the almost fifteen years since the Supreme Court’s decision in *Carciere v. Salazar*, 555 U.S. 379

(2009). The Department agrees that the legal analysis and the types of evidence articulated in Sol. Op. M-37029 have been upheld as a reasonable interpretation of the IRA in federal district and circuit courts. As such, future determinations made under § 151.4 criteria will benefit from the jurisprudence developed around Sol. Op. M-37029. Because § 151.4 is sufficiently clear on this point, the Department declines to make the suggested revision.

Comment: Several Tribes believe that the current language in § 151.4, as it relates to the acquisitions of trust lands owned in fee by an Indian, was replaced without providing additional details or clarity for these types of acquisitions. Therefore, they suggested that the text from the existing section 151.4 be maintained and further clarified in the new proposed section to account for this issue.

- *Response:* Existing section 151.4, “Acquisitions in trust of lands owned in fee by an Indian,” was deleted as unnecessary, since the rule already provides for such acquisitions and no additional process or information was established.

Comment: A commenting town suggested that the presumption that Tribes acknowledged through 25 CFR part 83 (part 83) were “under Federal jurisdiction” in 1934 should be eliminated, or a process should be established where this rebuttable presumption may be challenged. Others believe this provision is “arbitrary and capricious” and should be withdrawn, noting that federal acknowledgment materials reviewed under part 83 could show instead that the Tribe was under state jurisdiction in 1934.

- *Response:* The final rule revises proposed section 151.4(a)(2)(vi)), and adds a new provision, § 151.4(a)(4), to confirm that the Secretary may rely on

evidence submitted in a 25 C.F.R. part 83 proceeding to demonstrate the assertion of federal jurisdiction in or before 1934. Depending on the nature of the evidence, it may be considered presumptive or probative, consistent with §§ 151.4(a)(2)-(3).

At the outset, the Department reiterates the principle that there is no temporal limitation on the term “recognized” in 25 U.S.C. 5129, and therefore a Tribe need not have been recognized by the federal government in 1934 to meet the IRA’s definition of Indian. *See Confederated Tribes of the Grande Cmty. Of Oregon v. Jewell*, 830 F. 3d 552, 561 (D.C. Cir. 2016). The question and analysis of whether the federal government acknowledges a Tribe under part 83 is a wholly different question than whether federal jurisdiction existed over a Tribe in 1934. *See id.* at 565 (“Whether the government acknowledged federal responsibilities toward a Tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed. And as the Secretary explained, we can understand the existence of such responsibilities sometimes from one federal action that in and of itself will be sufficient, and at other times from a “variety of actions when viewed in concert.”); *Carcieri v. Salazar*, 555 U.S. 379, 398 (2009) (Breyer, J., concurring) (noting that a Tribe may have been “‘under Federal jurisdiction in 1934’—even though the Department did not know it at the time.”).

By relying on evidence that supports both recognition under part 83 and an “under federal jurisdiction” determination for purposes of part 151, the Department is in no way suggesting that these inquiries are equivalent. Rather,

when the evidence gathered as part of the part 83 process includes evidence that the federal government had asserted jurisdiction over a Tribe in or before 1934, such evidence is relevant and the Secretary may consider it as part of her analysis under § 151.4.

The Department declines to establish a new process for challenges to an “under federal jurisdiction” analysis, as the process is internal to the Department and can be challenged through administrative appeal or federal litigation after final decisions are issued.

Comment: One Tribe provided suggested edits on how treaty negotiations should be treated under these regulations and proposed that section 151.4(a)(2)(i) be moved to section 151.4(a)(1) “as conclusive evidence of federal jurisdiction.” The Tribe applauded the elevated treatment of “[c]ontinuing existence of treaty rights . . .” from presumptive evidence to conclusive evidence.

- *Response:* The Department declines to accept the commenter’s suggestion to move evidence of treaty negotiations from presumptive to conclusive evidence. The Department has generally treated evidence of treaty negotiations in concert with other supporting evidence to evaluate whether a Tribe was under federal jurisdiction in 1934.

Comment: One non-Tribal commenter urged the rule to be limited to within reservation boundaries and, where outside those boundaries, to require consistency with enumerated policies. This commenter requested: examples of evidence in the regulations that would indicate federal jurisdiction did not exist in 1934; and the elimination of any reference to “climate change” acquisitions.

- *Response:* The Department declines to accept the commenter’s suggestions. Under the IRA, the Secretary’s discretionary authority to acquire land in trust status is not limited to on-reservation acquisitions. The Department believes that it is unnecessary to list evidence that may indicate federal jurisdiction did not exist and declines to eliminate references to climate change.

Comment: Alaska Tribes suggested specific language exempting them from the under federal jurisdiction analysis.

- *Response:* This is addressed in the Sol. Op. M-37076 and the revised FTT Handbook. Because Alaska Tribes are eligible to have land taken into trust under 25 U.S.C. 5119 and a separate stand-alone definition of Indian in the IRA, it is not necessary that Alaska Tribes show they were under federal jurisdiction and § 151.4 does not apply.

Comment: One Tribe requested that the Department further clarify what types of legislation are included in legislation enacted “after 1934 making the IRA applicable to the Tribe” within the meaning of § 151.4(b).

- *Response:* There are several statutes under which Congress expanded the Secretary’s authority to take land into trust under the IRA. Determining whether a statute extended this authority to a specific Tribe, thereby eliminating the need for an under federal jurisdiction analysis, requires a close examination of the statute’s language and purpose. Because each statute varies in the language used, it is not feasible to identify in the final rule which types of legislation make the IRA and its fee-to-trust provisions applicable. One specific example of a subsequent statute extending section 5 of the IRA,

and further underpinning the identification of a section 18 election as conclusive evidence, is the ILCA. In the 1980s, Congress amended the IRA through ILCA, 25 U.S.C. 2202, to extend section 5 to all Tribes who voted in section 18 elections, notwithstanding the outcome of those elections.

Comment: Some Tribes questioned whether the under federal jurisdiction analysis provided for in § 151.4 would be applied to a mandatory acquisition.

- *Response:* Per § 151.1, the part 151 regulations do not apply to the acquisition of land mandated by federal law. Therefore, no under federal jurisdiction determination is required for a mandatory acquisition.

§ 151.5 May the Secretary acquire land in trust status by exchange?

Comment: One Tribe commented that § 151.5 only contemplates a situation where a fee land-owning party and an individual Indian or Tribe might exchange lands with each other. However, the Tribe noted that another important instance involving an exchange of lands occurs when the small reservations of some Tribes, including the commenting Tribe, are bounded by and contiguous to other federal lands, such as National Forest and Bureau of Land Management lands. For the commenting Tribe to add lands to their Reservation, they must acquire federal lands through a land exchange with a federal agency. Consequently, the Tribe requested that the following language be added to proposed section 151.5: “The Secretary may acquire land in trust status on behalf of an individual Indian or Tribe by exchange under this part if authorized by Federal law and within the terms of this part. The secretary may directly acquire land to be conveyed to an individual Indian or Tribe pursuant to a federal land exchange upon the individual Indian or Tribe authorizing the direct transfer of title from the federal

agency involved in the land exchange to the United States in trust for the individual Indian or Tribe. The disposal aspects of an exchange are governed by part 152 of this title, as applicable.”

- *Response:* The purpose of the regulations is to detail the process the Secretary will use in acquiring lands in trust. It is beyond the scope of these regulations to grant substantive rights without statutory authority and the Department declines to make the suggested revision.

§ 151.6 May the Secretary approve acquisition of a fractional interest?

Comment: While one Tribe commented that they have no problem with the proposed changes, another objected to the revisions in proposed section 151.6. While the objecting Tribe appreciated the Department’s replacement of the term “buyer” with “applicant” (which they believe better reflects the nature of such acquisitions), they expressed concern that the Department has taken no action to expand opportunities for the acquisition of a fractional interest through the discretionary process. The Tribe believes that both federal law and the general principles of self-determination favor the idea that Tribal governments should be free to purchase fractional interests in their members’ restricted Indian land over time and have such land taken into trust. Accordingly, they recommend revising proposed section 151.6 to use “including, but not limited to” language prior to the list of circumstances under which the Secretary may approve a fractional interest, signaling that the regulatory list is not exhaustive. In the alternative, they also recommended supplementing this section with additional categories that may extend opportunities for such acquisitions to Tribal governments that may be otherwise excluded under the current scheme.

- *Response:* The regulations are intended to guide the applicant and the agency in determining which fractional interests in lands are eligible for trust acquisition. The list is not intended to be exhaustive, and the enumerated categories covers the range of applicable conditions authorizing such acquisitions. Therefore, the Department has changed the language prior to the list of circumstances from “only if” to “including when.”

§ 151.7 Is Tribal consent required for nonmember acquisitions?

Comment: Many Tribes requested that the “consent provision” be clarified to state that it does not apply to Tribes with shared jurisdictions.

- *Response:* The Department understands that in certain instances Congress may have overridden the consent requirement provided for in the rule; however, the Department views the consent requirement as consistent with the IRA in that it supports Tribal self-governance.

§ 151.8 What documentation is included in a trust acquisition package?

Comment: Most comments expressed overwhelming support for the new 120-day time frame for decision, although many commenting Tribes also suggested that the regulations include a provision that an application will be deemed approved if the Secretary fails to meet this deadline or allow Tribe’s recourse if a decision is not issued within the prescribed time frame.

- *Response:* The 120-day time frame for a decision is not intended to establish an independent cause of action but instead ensures the agency issues a decision on a completed application as efficiently and expeditiously as practicable. Because there are certain prerequisites that must be completed

prior to acquiring land into trust (e.g., environmental analysis under NEPA) a deemed approved provision would be inappropriate.

Comment: A few Tribes commented that the changes to proposed section 151.8(a)(5) impose no deadline on the Department to prepare a PTO to render the application “complete”, which subsequently they assert makes the 120-day time frame illusory. To address this, they suggested that the proposed regulations be changed to permit a Tribe to prepare the PTO and require the Solicitor’s Office to review and approve it within 30 days of receipt from the Tribe.

- *Response:* The FTT Handbook will include a time frame for completing the PTO but the Department notes it is outside BIA’s authority to impose deadlines on other Departmental bureaus or offices.

Comment: Several Tribes also noted that the proposed changes to § 151.8(a)(4) impose no deadline on the Department to conduct a public review process under the National Environmental Policy Act (NEPA) and issue a final Environmental Assessment (EA) or an Environmental Impact Statement (EIS) document to render an application “complete.” They suggested that where no categorical exclusion is issued, the proposed regulation should be changed to require the Department to name the applicant Tribe as a cooperating agency in a NEPA public review process; begin that process no later than 30 days after the Department receives a specific request from the Tribe; and conclude any EA process within six months and any EIS process within 12 months.

- *Response:* Because each application contains different circumstances, the time for completing each NEPA document is different and cannot be

mandated. The Secretary will grant Tribal requests for cooperating agency status where applicable and appropriate.

Comment: One Tribe suggested that the Department consider adding additional clarification to the proposed regulations concerning the applicant's required contribution to the Secretary's environmental review under proposed section 151.8(a)(4).

- *Response:* As written, this section maintains flexibility regarding the type of information the applicant must submit to comply with NEPA.

Comment: One Tribe requested that the Department make clear that “many of the application requirements may be carried out simultaneously and need not proceed in sequential order as they are listed in the proposed rule.”

- *Response:* The FTT Handbook will specify the process for consideration of a Tribe's application. The Department notes that the fee-to-trust process is not always the same for each parcel. As described in § 151.8(b), the Secretary will issue a decision on an application “within 120 calendar days after issuance of the notice of a complete acquisition package.”

Comment: Several Tribes noted that under proposed section 151.8(a)(3)(i), there is a requirement for a Tribe to “include a statement of the estate to be acquired,” but that this is not also mentioned for metes and bounds and survey descriptions.

- *Response:* The requirement for a Tribe to “include a statement of the estate to be acquired” has been added to the metes and bounds survey description in the renumbered § 151.8(a)(4)(ii).

Comment: One Tribe noted that requests for additional information under proposed section 151.8(a)(8) that delay the acceptance of an application as complete may

greatly extend the timeline. The Tribe suggests that proposed section 151.8(a)(8) should be adjusted to read as follows: *Any additional information or action reasonably requested by the Secretary in writing if warranted by unique and unusual circumstances in the specific application.*

- *Response:* The Department notes the section to which the Tribe refers now appears at proposed section 151.8(a)(9). The Department declines to adopt the proposal. This section maintains flexibility to address the circumstances of each application and the need to ensure that the Secretary's final decision is legally sufficient.

Comment: The Tribe also suggested that the Department maintain metrics following the final adoption of the proposed rule, showing the entire timeline from original submission to approval (or denial) and examining whether significant delays occur before acceptance.

- *Response:* The Department maintains the official records of each application, including evidence of the timeline from original submission to decision. This information allows examination of delays prior to acceptance.

Comment: A Tribal consortium requested more flexibility in environmental issues and suggested that Tribes be given the option to assume liability for environmental issues that remain on land being taken into trust.

- *Response:* In certain instances, the Department can accept land into trust with an encumbrance, lien, or infirmity when the Tribe agrees to enter into an indemnification agreement in favor of the BIA. While not expressly stated in the regulations, the ability exists with the Department on a case-by-case basis.

Comment: Some commenting Tribes noted concerns over fee-to-trust acquisitions for gaming, suggesting that such applications be denied when gaming on the land in question would be prohibited by IGRA.

- *Response:* An application to take land in trust specifically for gaming purposes cannot proceed for gaming purposes if the land is determined to be ineligible for gaming pursuant to IGRA.

§ 151.9 How will the Secretary evaluate a request involving land within the boundaries of an Indian reservation?

Comment: Several Tribes suggested that the Department remove “any requirement to show the BIA has the capacity to carry out its responsibilities if the land was placed in trust” proposed section 151.9(a)(4)).

- *Response:* Because trust land acquisitions are discretionary, the Secretary must demonstrate support for their decision in the record. To ensure a complete evaluation, the Secretary will consider whether the BIA is equipped to fulfill its trust responsibilities for land acquired in trust and to provide the federal programs and services that it makes available on trust lands.

Comment: One Tribe commented that the Department should clarify what is meant by “great weight” under section 151.9(b).

- *Response:* Section 151.9(b) acknowledges that certain purposes for land acquisition are particularly salient in light of the purposes of the IRA and the Secretary’s land acquisition policy as articulated in § 151.3. The Secretary will apply great weight to applications pursuing these listed purposes by recognizing, and appropriately considering, the particular importance of

acquiring land for these purposes. The Secretary would thus need to take the importance of the proposed acquisition into consideration in reviewing a request and would need to address this in any disapproval decision.

Comment: One Tribe commented that while it welcomes a presumption in favor of approval for requests for acquisition of land within and contiguous to reservation boundaries, the proposed presumption should be clarified.

- *Response:* The Department has revised § 151.9(c) to clarify that the Secretary presumes that an acquisition within the boundaries of a reservation will: (1) further at least one of the Tribal interests described in § 151.9(b); (2) that adverse impacts to local governments' regulatory jurisdiction, real property taxes, and special assessments will be minimal; and (3) that the application should therefore be approved. The revised language clarifies which factors the presumption applies to and when the Secretary presumes an acquisition will be approved.

Comment: One Tribe commented that if the effects on a state or local government's regulatory jurisdiction, real property taxes, and special assessments will be minimal, then the burden shifts to those opposing the acquisition to either prove that the acquisition does not meet one of the criteria listed at § 151.9(b) or that the acquisition would adversely impact state or local governments.

- *Response:* The Department has revised § 151.9(d) to include a comment period for state and local governments to submit written comments to rebut the presumption that the acquisition will have minimal adverse impacts to regulatory jurisdiction, real property taxes and special assessments.

Comment: One Tribe believes the policies afforded great weight under proposed section 151.9(b) may unduly limit the needs and uses for which Tribes may acquire land under the IRA. The Tribe suggests adding the following to the IRA’s purpose: “for the purpose of providing land for the Indians,” along with the prior listing of “housing” and “economic development” needs. The Tribe also suggests a rewording of the “no change in use” category.

- *Response:* The regulation does not limit the needs or uses for which a Tribe may acquire land within the boundaries of its reservation. The Department intended that § 151.9(b) be broad by including the broad purpose of “facilitating self-determination.” Section 151.9(b) states that the Secretary will give great weight to acquisitions that “will further Tribal interests by establishing a Tribal land base or protecting Tribal homelands.” Establishing a Tribal land base or protecting Tribal homelands is equivalent to the IRA’s purpose of “providing land for Indians.” Section 151.9(b) also includes housing and economic development as a purpose.

Comment: One Tribe strongly suggested that proposed section 151.9(a)(3) be removed entirely, asserting that it second-guesses the Tribal applicant’s self-governance decisions and is not necessary under NEPA. Another Tribe suggested that it is unclear what must be submitted to comply with proposed section 151.9(a)(3), specifically concerning NEPA compliance implications referenced in the “Summary of Changes” in the *Federal Register*. Several Tribes also suggested edits to proposed section 151.9(b) that account for Tribes with rights tied to executive orders or other federal laws.

- *Response:* It is important for the Secretary to understand the current proposed use of the land to be acquired. The use of the land will dictate the level of environmental review that is appropriate to comply with the Department's obligations under NEPA. NEPA requires federal agencies to examine the environmental effects of proposed actions before making a decision. The Department's NEPA process requires the BIA to examine environmental and related social and economic effects. In some instances, they also require the Department to seek public comment. We do not agree that this undermines Tribal self-governance. In conducting an analysis under NEPA, the Department is not rejecting a Tribes reason for wanting the Department to accept the land in trust. But rather, it is reviewing the impacts of such an acquisition.

Comment: Several counties, towns, and states expressed opposition to proposed section 151.9, specifically expressing concern over how notice is afforded to states and local governments. Collectively, they asserted that: (1) it is not clear what will be included in the notice, (2) whether the notice is merely a courtesy, given the presumption to acquire on-reservation lands, or whether they will be given an opportunity to comment; and (3) whether the new presumptions for acquiring land, when coupled with the removal of the consideration of jurisdictional problems, potential conflicts of land use, the removal of considering the effects on a state and local government's regulatory jurisdiction, real property taxes, and special assessments, and the expressed needs of Tribal applicants for additional land, are lawful. One commenter also suggested that the term "state and local governments *with regulatory jurisdiction over the land to be*

acquired” could result in a lack of any notice where jurisdiction is complicated or debatable, because the Department makes its own interpretation on that question.

- *Response:* Section 151.9(d) has been revised to solicit comments from state and local governments to rebut the presumption that an acquisition within the reservation boundary will have minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments. The Department also notes and confirms that any comments received on an application, even if not requested, will be considered as part of the overall decision-making process. While not included in the regulation, the BIA will publish guidance in the FTT Handbook outlining how notice will be provided.

Comment: Several Tribes commented that the Department should clarify in the preamble or the final rule that “state and local governments only have regulatory jurisdiction over on-reservation fee land *owned by non-Indians*.” One Tribe also urged the Department to not allow state and local comments on their own to overcome “a decision to approve a trust acquisition.”

- *Response:* The scope of state and local jurisdiction over fee lands within the boundaries of Indian reservations is outside the scope of these regulations and, for that reason, the Department declines to adopt the recommendation. With respect to the role of state and local comments, the decision to approve or disapprove an application will be based on whether the application complies with the regulatory criteria and other applicable statutory or regulatory requirements. The Department will consider comments submitted on pending applications.

§ 151.10 How will the Secretary evaluate a request involving land contiguous to the boundaries of an Indian reservation?

Comment: One Tribe suggested that “great weight” should be afforded contiguous acquisitions “within the original boundary of the Tribal applicant’s reservation.”

- *Response:* The Department understands the policy reasons for the requested change. However, the process for determining the “original boundary” could add significant complexity and time to the acquisition process. Because the intent behind this rulemaking is to provide a more efficient process, the Department declines to make this change.

Comment: Another Tribe suggested the Department should give greater weight to the presumptions in proposed sections 151.10(c) and 151.10(d) when evaluating state and local comments for impacts to their regulatory jurisdiction, real property taxes, and special assessments.

- *Response:* The final rule already provides for a presumption in favor of approval in § 151.10(c) and a presumption that the Tribe will benefit from the acquisition in § 151.10(d). No additional weight is necessary to facilitate the intent of the rulemaking.

Comment: A Tribe also suggested that the Department should clarify that state and local comments alone are insufficient to “overcome a decision to approve a trust acquisition”.

- *Response:* The Department agrees that state and local governments do not have veto authority over the decisions to acquire land in trust contemplated by

this part. The Secretary will consider comments received on pending applications consistent with this part.

Comment: This same Tribe also suggested technical edits to harmonize proposed Section 151.10(b) with the proposed changes to section 151.3(b)(3).

- *Response:* The final rule was revised to harmonize the purposes for acquiring land into trust listed in §§ 151.10(b) and 151.3(b)(3).

Comment: Another Tribe stated that the Department should not even solicit state and local government comments, which they assert is consistent with the process described for on-reservation acquisitions.

- *Response:* It is appropriate for the Secretary to consider comments received from state and local governments for acquisitions evaluated under this part. The Department also notes that the final rule has been revised to provide an opportunity for state and local governments to provide comments for acquisition within reservation boundaries. The Secretary’s consideration of comments received on pending applications ensures they have a complete view of the complexities surrounding an acquisition. It also provides an opportunity for the applicant to address concerns raised as part of the process, thereby reducing the likelihood of legal challenges when those concerns are considered prior to the acquisition.

Comment: One Tribe suggested that when the Department receives and reviews state and local government comments, it should be both mindful and give great weight to the fact that the local Tribe and the Department “are already providing services to the contiguous parcel.”

- *Response:* As with the existing regulation, the Secretary will consider all factors relevant to understanding the potential impact on regulatory jurisdiction, real property taxes, special assessment and services to a particular parcel as identified by the commenting state or local government. While the final rule does not give a specific weight to comments and concerns raised by local governments or states, it is not true that it gives them no weight. The Secretary will consider any and all comments and concerns raised by local communities or states in making a decision to acquire land in trust for a tribe.

Comment: One Tribe opposed the proposed changes to section 151.10(a)(3), stating that allowing the Secretary to evaluate the purposes for which a Tribe will use its own land within its own reservation is inconsistent with self-determination policy.

- *Response:* The Secretary needs to know the purpose for which the land is to be used to determine the appropriate level of environmental review to comply with NEPA. NEPA requires federal agencies to examine the environmental effects of proposed actions before making a decision. The Department's NEPA process requires the BIA to examine environmental and related social and economic effects. In some instances, they also require the Department to seek public comment. We do not agree that this undermines Tribal self-governance. In conducting an analysis under NEPA, the Department is not rejecting a Tribes reason for wanting the Department to accept the land in trust. But rather, it is reviewing the impacts of such an acquisition.

Comment: Additionally, the same Tribe opposed proposed section 151.10(a)(4), stating that it is “outdated and perpetuates a callous and abusive federal policy discarded decades ago because of its moral bankruptcy.”

- *Response:* Acquisitions under section 5 of the IRA are discretionary and have been subject to federal resource considerations since the IRA was first enacted. When the United States takes land into trust, it exercises trust responsibilities as to those lands and extends federal programs and services to those lands. Therefore, in exercising her discretion, the Secretary must decide whether BIA is equipped to assume these fiduciary obligations and discharge the additional responsibilities associated with the acquisition. Section 151.10(a)(4) is a legitimate consideration as part of the acquisition process. The Department declines to make the suggested revision.

Comment: Another Tribe submitted comments seeking a specific tax exemption under the regulations to address a longstanding fee-to-trust issue they have been dealing with.

- *Response:* The purpose of the regulations is to detail the process the Secretary will use in acquiring lands in trust. It is beyond the scope of these regulations to grant substantive rights without statutory authority.

Comment: Another Tribe requested a time frame for when BIA must provide the Tribal applicant a copy of any comments received from state or local governments (suggesting a 10-day window to provide such copies to the Tribal applicant). Another Tribe requested that other affected Tribes be included in the notice for comment sent to state and local governments.

- *Response:* The BIA is in the process of updating the FTT Handbook to reflect the changes made by this final rule. The FTT Handbook is a more appropriate location to include any intermediate time frames designed to ensure compliance with the broader 120-day time frame to issue a decision on a complete acquisition package.

Comment: One Tribe suggested a new category of “adjacent” lands be added to the “contiguous” acquisition analysis to account for that category of lands that are currently “off-reservation” lands, but that should be afforded greater weight as lands that are “closely connected or intrinsically linked to lands held in trust” for the applicant Tribe.

- *Response:* The Department acknowledges that lands adjacent to a reservation may be closely connected to or linked to lands held in trust; however, the definition of contiguous provides sufficient clarity to determine the appropriate criteria to use to evaluate the application. The Department also notes that establishing a standard for what constitutes “adjacent” would be difficult considering the differences in geography between Tribal land holdings. Applying such a standard would also add a layer of complexity and time to the fee-to-trust process, which would undercut the purpose of this rulemaking to make the process more efficient.

Comment: Another Tribe suggested that the Department clarify that “contiguous” acquisitions are also “contiguous” for gaming purposes under 25 C.F.R. 292.2 (the Tribe offered draft edits for consideration).

- *Response:* The definition of contiguous is consistent with the part 292 definition, and in general should result in a similar analysis; however, part 151 and part 292 determinations are separate and rely on different statutory authority.

Comment: Several Tribes also suggested edits to proposed section 151.10(b) that account for Tribes with rights tied to executive orders or other federal laws.

- *Response:* The final rule does not relieve the Department of its obligations to adhere to any relevant executive order or any other federal laws. The final rule provides sufficient clarity, and thus no additional language is necessary.

Comment: One Tribe commented that while it welcomed a presumption in favor of approval for requests for acquisition of land within and contiguous to reservation boundaries, the proposed presumption in sections 151.9 and 151.10 should be further clarified as they believe it is not clear which of the criteria in these sections an applicant Tribe would no longer need to affirmatively prove, and what an opposing party would need to produce or persuade to overcome the presumption. The Tribe consequently proposed the following change to proposed section 151.10: “When reviewing a Tribe’s request for land within the boundaries of an Indian reservation, the Secretary presumes that the acquisition will further the Tribal interests described above in subsection (b), and adverse impacts to local governments’ regulatory jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.”

- *Response:* This language has been incorporated into §§ 151.9(c), 151.10(c) and 151.12(c).

Comment: Several state and local governments opposed the proposed changes in section 151.10 and expressed concern about whether the new presumptions for acquiring land, when coupled with the removal of the consideration of jurisdictional problems, potential conflicts of land use, and the expressed needs of Tribal applicants for additional land, are lawful. Commenters' specific legal concerns include that "BIA will also not consider as a factor possible jurisdictional and land use conflicts that may arise between local governments and the Tribes" which may "lead to costly and time-consuming litigation for both Tribes and local governments on jurisdictional and land use issues"; that the removal of the consideration of jurisdictional problems "would have the effect of obfuscating the legitimate function and role of county governments, which are responsible for land use planning and the provision of important local services"; and would generate "conflicts that go straight to the heart of the considerations Congress intended the Department to weight in exercising its judgment under the Indian Reorganization Act of 1934 (IRA) to approve or deny a request to take land into trust."

- *Response:* We disagree with the premise that including presumptions would make the acquisitions unlawful. Congress has provided the Secretary with the authority to acquire land into trust for Tribes. *See* Act of June 18, 1934, Pub. L. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. 5101 through 5129). Congress enacted the IRA to "establish machinery whereby Indian Tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1972). Restoration of Tribal homelands through trust acquisition is pivotal to achieving the Tribal self-government, self-determination, and economic goals

of the statute. *See, e.g., Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 226 (2012) (describing section 5 as the “capstone” of the Indian Reorganization Act’s land provisions). The addition of a presumption in favor of acquisitions within reservation boundaries is thus consistent with the goals of the IRA of Tribal land restoration and consolidation. The statute does not include any presumption; however, it is within the Secretary’s discretion to include one that supports the overall goals of the statute. Commentors, including state and local governments, may submit comments and evidence for the Secretary’s consideration seeking to rebut the presumption. Upon receipt of a comment from any interested party, including a state or local government, the Department would then be positioned to consider any jurisdictional and land use conflicts that may arise, to consider function and role of county governments as they relate to a putative acquisition, and to consider all viewpoints in exercising its delegated authority under the Indian Reorganization Act.

Comment: They also expressed concerns about the 30-day comment period being too short to meaningfully comment on acquisitions, as well as the need for criteria defining how notice will be provided to state and local governments.

- *Response:* We disagree. In the Department’s experience, 30 days is sufficient time to provide comments on pending applications. The 30-day comment period was codified in the 1995 part 151 regulations. The preamble to that regulation noted that the timeframe was based on BIA’s past experience with informal consultation. *See* 60 FR 32874, 32877 (June 23, 1995). The

Department continues to believe, based on its experience, that 30 days is sufficient. Indeed, the information requested by the Secretary is more likely retrievable within 30 days using current information technology and electronic means.

Comment: Separately, several of these commenters noted that state and local comments are not afforded “great weight” and assert that they should be.

- *Response:* The Department considers all comments but declines to accept the proposal which would specify the weight that must be given to these comments. Through the IRA and other federal statutes authorizing trust acquisitions, Congress has authorized the Secretary to acquire land in trust for Indian Tribes and individual Indians, subject to the requirements set forth in the statutes. The regulations contemplate that the Secretary will consider comments submitted by state and local governments on pending applications as part of the decision-making process. The Department declines to expand or elevate the role of state or local governments in this process.

Comment: Additionally, a State Attorney General proposed language for section 151.10(d) that prescribes a process for providing notice to state and local governments and what that notice should include.

- *Response:* The specific manner for providing notice and seeking comment from third parties is better suited to internal guidance documents such as the BIA’s Fee-To-Trust Handbook. The process proposed by the commenter would have the effect of slowing down the processing of applications and greatly expand the role of States and municipalities far beyond what is in the

current regulations. The Department therefore declines to make the suggested revision in the proposed regulation. The Department will consider this proposed language as internal guidance documents are revised, including the Fee-To-Trust Handbook.

Comment: One state commented that they believed the “presumption that contiguous lands be approved” is unclear, i.e., there is “no description of the weight of the presumption.” The state also noted that it is unclear whether the presumption is rebuttable and - if so - how is it rebutted?

- *Response:* Section 151.10(c) clarifies that the Secretary will presume that the acquisition “will further the Tribal interests described above in § 151.10(b), and adverse impacts to local governments’ regulatory jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.” The revised language clarifies which factors the presumption applies to and when the Secretary presumes an acquisition will be approved. Presumptions are rebuttable by providing evidence that does more than simply support an alternative conclusion. Commentors, including state and local governments, may submit comments and evidence for the Secretary’s consideration seeking to rebut the presumption. The Secretary will consider such evidence in making a decision on the Tribe’s application.

§ 151.11 How will the Secretary evaluate a request involving land outside the boundaries of an Indian reservation?

Comment: One Tribe suggested that the Department give “great weight” to off-reservation acquisitions “within the aboriginal or ‘ceded’ lands of the Tribal applicant.” One Tribe proposed that the Secretary consider the community benefits and give the greatest weight to the interests and concerns of Tribes with aboriginal ties to the proposed location.”

- *Response:* Determining the location and extent of a Tribe’s aboriginal lands often requires a lengthy review of applicable law and fact. Such a change is inconsistent with the intent to streamline the fee-to-trust process.

Comment: Several Tribes suggested that local Tribal governments receive notice of a Tribe’s application and be given an opportunity to provide comments.

- *Response:* Given the differences in geography between all Tribal land holdings, it would be difficult to establish a national regulatory standard that defines “local Tribal governments” in a consistent and equitable manner, therefore the Department declines to define “local Tribal governments” for the purpose of notice and comment. Tribes may, however, submit comments to the Department on an application that will be considered by the Department as part of the application review process.

Comment: A Tribal consortium suggested that “given Alaska’s unique history, land acquisitions within Alaska Native Village Statistical Areas should be treated as ‘on-reservation acquisitions’ and not off-reservation acquisitions.”

- *Response:* Initial trust acquisitions in Alaska will be analyzed under § 151.12 if they are the first trust acquisition for an Alaska Tribe. Because very little land is held in trust for Alaska Tribes, this likely will be the standard for

almost all initial acquisitions for Alaska Tribes. After the initial acquisition, however, Alaska acquisitions will be evaluated using the criteria articulated in this final rule. This supports a uniform application of the land acquisition process in Alaska and the lower 48 States.

Comment: One Tribe suggested that the Department clarify that state and local government comments alone are insufficient to overcome a decision to approve a trust acquisition.

- *Response:* State and local comments opposing an off-reservation acquisition do not serve as a veto.

Comment: Several Tribes expressed support for retaining the 30-day comment period, requiring that those comments be provided to Tribal governments for rebuttal, and that states and local governments be limited to commenting only on impacts to their regulatory jurisdiction, real property taxes, and special assessments. One Tribe requested that a timeframe be included for when BIA must provide a Tribal applicant with a copy of any comments received from state or local governments (suggesting a 10-day window).

- *Response:* We decline to limit the subject areas any party may comment on regarding a specific application. We also believe that timelines for providing a Tribal applicant a copy of any comments received are better addressed in the BIA Fee-To-Trust Handbook.

Comment: Several Tribes suggested edits to proposed section 151.11(b) that account for Tribes with rights tied to executive orders or other federal laws.

- *Response:* The final rule does not relieve the Department of its obligations to adhere to any relevant executive order or any other federal laws.

Comment: Several state, local and Tribal governments opposed the removal of the current section 151.11(b), which they assert increases scrutiny the further from a reservation the land is while giving greater weight to state and local government concerns. In a related comment, one Tribe suggested adding a presumption of approval for land located outside of and noncontiguous to an Indian reservation.

- *Response:* In enacting the IRA, Congress did not limit trust acquisitions to within a certain distance from a Tribe’s reservation. The Department recognizes, however, that off-reservation acquisitions may present different issues than on-reservation or contiguous acquisitions. The existing section 151.11(b) unnecessarily applies heightened scrutiny to off-reservation acquisitions based on distance alone. There are numerous factors other than distance from a Tribe’s existing reservation that should be considered as part of an off-reservation acquisition. Therefore, the Secretary will not presume that an off-reservation application will be approved but will consider the location of the land along with the other criteria in § 151.11 before issuing a decision. In addition, this sentence was edited for clarity and succinctness: “[t]he Secretary presumes that the Tribal community will benefit from the acquisition without regard to distance of the land from a Tribe’s reservation boundaries or trust lands,” to “[t]he Secretary presumes that the Tribe will benefit from the acquisition.”

Comment: Several commenters found the proposed language “in reviewing such comments, the Secretary will consider the location of the land” in section 151.11(c) vague. A local county stated that “that there are far greater considerations than location to consider, such as the financial impact on local governments, local taxing authorities and local taxpayers as lands are proposed for acquisition as trust lands.” A county opposed the purported removal of consideration of “jurisdiction problems and potential conflicts of land use” from consideration.

- *Response:* The sentence was edited for clarity to: “[i]n reviewing such comments, the Secretary will consider the location of the land and potential conflicts of land use.” The Secretary will consider potential conflicts of land use for proposed trust acquisition located outside of and non-contiguous to a Tribe’s reservation or trust land. Consideration of an acquisition’s potential impact on regulatory jurisdiction, real property taxes, and special assessments is already included in this section. Consideration of “jurisdiction problems and potential conflicts of land use” is retained for §§ 151.11(c) and 151.12(c).

Comment: One non-Tribal commenter suggested a gaming carve-out, which would apply the current section 151.11(b) equivalent to acquisitions where gaming will be conducted. There are concerns from non-Tribal entities that Tribes can conceivably acquire land across the United States, and these concerns are also expressed as gaming concerns in certain comments.

- *Response:* This final rule applies to all fee-to-trust acquisitions. Where a fee-to-trust application is for the purpose of conducting Indian gaming, a determination whether the land is eligible for gaming is required by the IGRA

and its implementing regulations at 25 CFR part 292. Thus, there is no need for this rule to address gaming matters.

Comment: Several commenting state and local governments oppose the removal of the requirement that Tribal applicants submit business plans for review, suggesting it would eliminate a source of information used to evaluate local impacts of the putative acquisition.

- *Response:* Requiring a Tribal applicant to disclose its business plan is inconsistent with Tribal self-determination. Tribes and state and local governments may share information to evaluate local impacts even without a requirement and Tribal applicants and state and local governments are encouraged to discuss issues of common concern.

Comment: They also expressed concerns that the 30-day comment period was too short to provide meaningful comments, as well as the need for criteria defining how notice will be provided to state and local governments.

- *Response:* In the Department's experience 30 days is sufficient time to provide the type of comments that will inform the Secretary's decision. The 30-day comment period was codified in the 1995 part 151 regulations. The preamble to that regulation noted that the timeframe was based on BIA's past experience with informal consultation. *See* 60 FR 32874, 32877 (June 23, 1995). The Department continues to believe, based on its experience, that 30 days is sufficient. Indeed, the information requested by the Secretary is more likely retrievable within 30 days using current electronic means.

Comment: A State Attorney General suggested revisions for proposed section 151.11(d) that would prescribe a process for providing notice to state and local governments and what that notice would include.

- *Response:* The specific manner for providing notice and seeking comment from third parties is better suited to internal guidance documents such as the Fee-To-Trust Handbook. The regulations provide a timeframe in which states and local governments can submit comments on an application. Therefore, we do not see why it would be necessary to put a deadline on when the BIA sends notification of an application to states or local governments. The Department therefore declines to make the suggested revision.

Comment: A town expressed skepticism regarding the blanket presumption of community benefits for off-reservation acquisitions and noted that it is unclear how this presumption can be rebutted.

- *Response:* Where a Tribe takes land into trust off-reservation, that land nearly always serves an important economic, cultural, self-determination, or sovereignty purpose that supports Tribal welfare. Tribal governments are rational actors that make acquisition decisions carefully based on available resources, planning, and purposes valued by the Tribe.

Comment: A local jurisdiction commented that while the proposed rule would give “great weight” to Tribal concerns, it would give no weight to the comments or concerns of the local community or to the state in the decision-making process. Several

commenters noted that state and local comments are not afforded “great weight” and asserted that they should be.

- *Response:* Through the IRA, Congress has authorized the Secretary to acquire land in trust for Tribes and individual Indians, subject to the requirements set forth in the statute. The regulations contemplate that the Secretary will consider comments submitted by state and local governments on pending applications as part of the decision-making process. The Department declines to expand or elevate the role of state or local governments in this process coequal to Tribal concerns because the IRA sets forth an explicit "purpose of providing land for Indians" and includes no such purpose for state or local governments.

Comment: One Tribe recommend that Tribes with dispersed trust lands be accommodated by adding a provision that if the proposed acquisition is within five miles of a Tribe’s existing trust land, that the application will be considered a contiguous application.

- *Response:* It would be difficult to establish a national regulatory standard to accommodate all Tribes with dispersed lands considering the differences in geography between all Tribal land holdings.

§ 151.12 How will the Secretary evaluate a request involving land for an initial Indian acquisition?

Comment: Most commenting Tribes expressed general support for the proposed changes to section 151.12. One Tribe appreciated the addition of “economic development and Indian housing” and “self-determination,” as reflected in the proposed

changes to 151.12(b). They also supported the “presumption of community benefits in 151.12.” However, some Tribes suggested that the Department’s presumption of community benefits should only apply where the initial acquisition is within the Tribal applicant’s “aboriginal territory.” Another Tribe would like this section expanded beyond an “initial Indian acquisition” to include acquisitions for “a modest or minimal homeland.”

- *Response:* Determining the location and extent of a Tribe’s aboriginal lands often requires a lengthy review of applicable law and fact. Such a change is inconsistent with the intent to streamline the fee-to-trust process.

Comment: One Tribe suggested that the Department clarify that the receipt of state and local comments alone is insufficient to “overcome a decision to approve a trust acquisition.” Tribes also expressed support for retaining the 30-day comment period, requiring that those comments be provided to Tribes for rebuttal, and that states and local governments be limited to commenting only on impacts to their regulatory jurisdiction, real property taxes, and special assessments.

- *Response:* In the Department’s experience, 30 days is adequate for the purposes of implementing the IRA. The solicitation of comments from state and local governments is to assist the Secretary in assessing the regulatory criteria. The Department agrees that state and local governments do not have veto authority over the decisions to acquire land in trust contemplated by this part. The Secretary will consider comments received on pending applications consistent with this part.

Comment: Several Tribes suggested edits to proposed section 151.12(b) that account for Tribes with rights tied to executive orders or other federal laws.

- *Response:* The final rule does not relieve the Department of its obligations to adhere to any relevant executive order or any other federal laws.

Comment: One Tribe provided edits it believed would better harmonize proposed section 151.12(b) with proposed section 151.3(b)(3).

- *Response:* Edits have been incorporated to harmonize the purposes for accepting land into trust listed in §§ 151.12(b) and 151.3(b)(3).

Comment: Several state and local governments expressed concerns about the 30-day comment period being too short to allow them to provide meaningful comments, as well as the need for criteria defining how notice will be provided to state and local governments. Separately, several commenters noted that state and local comments are not afforded “great weight” and asserted that they should be.

- *Response:* In the Department’s experience, 30 days is sufficient time to provide the type of comments that will inform the Secretary’s decision. The 30-day comment period was codified in the 1995 part 151 regulations. The preamble to that regulation noted that the timeframe was based on BIA’s past experience. *See* 60 FR 32874, 32877 (June 23, 1995). The Department continues to believe, based on its experience, that 30 days is sufficient. Indeed, the information requested by the Secretary is more likely retrievable within 30 days using current electronic means.

Through the IRA and other federal statutes authorizing trust acquisitions, Congress has authorized the Secretary to acquire land in trust for

Tribes and individual Indians, subject to the requirements set forth in the statutes. The regulations contemplate that the Secretary will consider comments submitted by state and local governments on pending applications as part of the decision-making process. The Department declines to expand or elevate the role of state or local governments in this process.

§ 151.13 How will the Secretary act on requests?

Comment: One Tribe requested that the definition of interested party also match the definition of interested party in the part 2 regulations. They also requested that interested parties be required to obtain a bond.

- *Response:* The Department declines the proposed additions. The part 151 *interested party* definition closely resembles proposed 25 CFR part 2 regulation, wherein interested party is defined as “a person or entity whose legally protected interests are adversely affected by the decision on appeal or may be adversely affected by the decision of the reviewing official.” *See Proposed Rule, Appeals from Administrative Actions*, 87 Fed. Reg. 73688 (Dec. 1, 2022). The part 2 regulation further defines those entities adversely affected by a decision. As set forth above, for purposes of part 151, it is not necessary for an interested party to be adversely affected but instead that they have a legally protected interest affected by a decision. We note that it is possible for a party to satisfy the definition of *Interested party* yet have no right to appeal a decision i.e., have no standing to do so. The Department also notes that providing notice to a party does not confer legal standing to bring a

challenge. Bonding requirements related to administrative appeals under part 2 is outside the scope of these regulations.

Comment: Several Tribes expressed concern about the definition of *interested party* and one expressed concern about the standing requirements for interested parties, suggesting that purely economic interests should not be sufficient.

- *Response:* As explained herein, the definition of *interested party* tracks the definition of “interested party” in part 2—the regulations which govern the appeals process, except that for part 151 purposes, a person or entity may be an *interested party* and thus entitled to notice of the decision if they make themselves known in writing to the BIA in advance of the decision, even if they are not “adversely affected” by a potential decision. We note that it is possible for a party to satisfy the definition of *interested party* in part 151 yet have no right to appeal a decision i.e., have no standing to do so. The Department also notes that providing notice to a party does not confer legal standing to bring a challenge. The standing requirements to pursue an administrative appeal are outside the scope of these regulations.

Comment: One Tribe and an individual commenter both requested that subsection (d) be removed.

Response: The Department declines to remove § 151.13(d). A decision made by a BIA Regional Director or other BIA official does not represent the consummation of the agency’s decision-making process until either administrative remedies have been exhausted or the appeal period has expired. Furthermore, eliminating § 151.13 (d) would require the Assistant Secretary – Indian Affairs to sign each fee-to-trust decision, a

responsibility that has been delegated to BIA regional directors to increase efficiency in the process. The majority of fee-to-trust decisions are not challenged, and if the responsibility to decide every application rested on Assistant Secretary – Indian Affairs, it would put a burden on the process and create further backlog of applications.

Comment: One Tribe requested that digital publication be accepted for notification along with written publication in § 151.13 (d)(2)(iii).

- Response: The final rule includes the requirement that written notice be sent to ensure receipt. The final rule does not foreclose using email as an additional form of notification. The Fee-to-Trust Handbook will include discussion of instances when email notice can be provided as a courtesy. The Department declines to digitally publish notice of a decision and the right of interested parties to file an appeal in addition to written notification in the local newspaper. The Department believes that digital publication on the BIA website is unnecessary given that written notice will be provided. Under §151.13(d)(2)(ii), the Department provides direct written notice of the decision and the opportunity to appeal to interested parties who have made themselves known in writing to the BIA in advance of the decision and state and local governments with regulatory jurisdiction over the land. The Department believes that these direct notices in addition to publication in the local newspaper to notify other potentially interested parties is sufficient notice.

Comment: One Tribal commenter expressed strong support for the provision in 151.13(c)(iii) to immediately acquire land into trust status.

- *Response:* Per these regulations, land will be immediately acquired into trust when the requirements of part 151 have been met. If the decision to take land into trust is made by a BIA official, then the appeal period must expire, or administrative remedies must be exhausted before the land is accepted into trust.

Comment: An association of counties expressed concern that the proposed changes to section 151.13 would limit their ability to fully participate in the comment process.

- *Response:* Under the final rule counties can participate in the process through submission of comments.

§ 151.14 How will the Secretary review the title?

Comment: One Tribe commented that proposed section 151.14, as written, seems to require applicants to submit title evidence only after “the Secretary approves a request for the acquisition of land” and requested further clarification.

- *Response:* Pursuant to § 151.8(a)(6), title evidence as described under § 151.14 must be submitted as part of an acquisition package in order for the Department to consider the acquisition package complete and ready for review. Additionally, pursuant to § 151.8(a)(6)(i), an acquisition package is not complete until the Secretary completes a PTO based on the title evidence submitted. The Department amended § 151.14 to reflect that title evidence must be submitted as part of the complete acquisition package described in § 151.8.

Comment: Two Tribes requested that DOI clarify the standards for title evidence. One Tribe specifically asked that DOI include reference to Department of Justice (DOJ) title standards.

- *Response:* The Department understands these requests to be seeking confirmation that the DOJ title standards will be included in §151.14. Section 151.14(a)(3) aligns with these requests because § 151.14(a)(3) includes reference to DOJ's title standards.

Comment: One Tribe requested that PTOs be shared directly with the applicant Tribe. Additionally, the Tribe requested an additional change to proposed section 151.14 to prevent continued practices that do not align with accepted real estate best practices. Finally, the Tribe requested that qualified Tribal officials be permitted to complete the Certifications of Inspection.

Response: The PTO is a lawyer client privileged document. To the extent any issues are identified in the PTO those issues are shared with the applicant so that they can be addressed. It is the policy of the BIA to ensure compliance with all applicable real estate service regulation, requirements, and standards, and to promote sustainable practices. *See* 52 IAM 1.3. Additionally, based on years of experience in trust transactions, the procedures found in § 151.14 are consistent with accepted real estate best practices. To ensure full compliance with this regulation, BIA will retain responsibilities to complete Certificates of Inspection.

Comment: One Tribe suggested a new section regarding indemnification agreements: If a Tribe is willing to accept an encumbrance, liens, or infirmity, the

Department will accept the Tribe's judgment and allow the application to proceed, provided (a) the Tribe enters an indemnification agreement in favor of the BIA with respect to the issue, (b) the risk of liability is low or the magnitude of the liability is low, and (c) the Tribe agrees it can use the property for its intended purpose while the encumbrance remains.

- *Response:* In certain instances, the Department can accept into trust land with an encumbrance, lien or infirmity when the Tribe agrees to enter into an indemnification agreement in favor of the BIA. While not expressly written into the regulations, the ability exists with the Department on a case-by-case basis.

Comment: One Tribe suggested that clarification is still needed on what documents of title evidence are sufficient for the acquisition package and whether they are the same as those required if the request for acquisition is approved.

- *Response:* Sufficient documents of title evidence are listed in §151.14. Section 151.8(a)(6) now explicitly refers to including title evidence listed in § 151.14. The Department understands that the documentation available to satisfy the criteria under §151.14(a)(2)(ii) can vary by title company and what type of title document it is willing to issue. For that reason, we have included the term "or equivalent" to provide discretion in determining whether the documentation provided is sufficient to ensure marketable title. Additionally, the Department removed the requirement that the policy of title insurance be less than five (5) years old because the intent is to ensure marketable title

which will require an individualized analysis rather than a bright line time limit on the issuance of the policy of title insurance.

§ 151.15 How will the Secretary conduct a review of environmental conditions?

Comment: One county requested that a socio-economic impact report be included as part of the NEPA environmental impact analysis.

- *Response:* In determining the information to be analyzed in an environmental impact analysis, the Secretary shall comply with the requirements of NEPA (43 U.S.C. 4321 *et seq.*), applicable Council on Environmental Quality regulations (40 CFR parts 1500 – 1508), and Department regulations (43 CFR part 46) and guidance.

Comment: Several Tribes recommended that the Department clarify that Phase I environmental site assessments would not need to be updated except when an evaluation of the pre-acquisition determines environmental conditions exist.

- *Response:* The Department declines to adopt the proposal. The final rule sets forth criteria for Phase I environmental site assessments that aim to simplify such review consistent with the requirements of Departmental Manual 602 DM 2. The Phase I environmental site assessment is the tool the Department uses to identify any environmental liabilities that may be a barrier to acquisition of real property. In many instances the site assessment will need to be updated to account for any remediation completed since the first site assessment or to confirm that no new environmental liabilities are evident on the property.

Comment: A Tribal consortium requested additional flexibility around environmental issues, specifically requesting that Tribes be able to assume liability for environmental issues on lands taken into trust.

- *Response:* Nothing in the regulations prohibits a Tribe from assuming liabilities on lands to be taken into trust.

Comment: An association of counties and others requested that NEPA analyses be submitted as part of a “complete application.”

- *Response:* The regulation states that an acquisition package is not complete until the public review period for a final EIS or EA has concluded, or the categorical exclusion documentation is completed.

Comment: One Tribe requested various clarifications to proposed section 151.15, including why environmental assessments “end load” review of a Phase I environmental site assessment rather than requiring it as a component of a complete application required in section 151.8.

- *Response:* Section 151.8 requires that a complete application include information that allows the Secretary to comply with NEPA and 602 DM 2. Section 151.15(b), however, provides that the Secretary may require the applicant to provide information updating a prior pre-acquisition environmental site assessment (i.e., a Phase I environmental site assessment). This is not an end loading of the process but instead a recognition that certain environmental documents may need to be updated prior to formalizing acceptance of title.

§ 151.16 How is a formalization of acceptance and trust status attained?

Comment: A private individual requested that the entirety of proposed section 151.16 be redone and include the six-year statute of limitation timeframes in line with the APA.

- *Response:* The Department respectfully disagrees. Section 151.13(c) explains that the Assistant Secretary's decision constitutes a final agency action for purposes of the APA. Interior is retaining the requirement that, if the request will be approved, notice of such approval will be published in the *Federal Register*. Such publication makes clear that a final agency action has occurred. The Department believes this provides a sufficient timeframe for any interested party to challenge the decision and that explaining the APA's statute of limitations in the proposed regulation would be unnecessary duplicative.

Comment: One Tribe requested that proposed section 151.16(b) require formal notification to the applicable Tribe, so the date of official trust status is certain.

- *Response:* While not included in the regulation, the BIA will publish updated guidance in the FTT Handbook outlining how it will provide notice of the placement of the property in trust. BIA will be updating the FTT Handbook to reflect the changes made by this final rule.

Comment: A county requested that the proposed changes to section 151.16 include a final step that all land conveyance documents must be recorded in the county's land records for the conveyance to be officially recognized.

- *Response:* The final rule does not address recordation in the county records because fee-to-trust is an inherently federal process. The BIA Division of

Land Title Records is responsible for and serves as the office of record for all trust land and restricted land titles for Indian Tribes and individuals.

Therefore, the primary requirement under § 151.16 is to record the trust deed with the appropriate Land Title Records Office (LTRO). BIA recognizes that recordation in the county can be beneficial and will publish a handbook outlining how title will be recorded. BIA will be updating the FTT Handbook to reflect the changes made by this final rule.

§ 151.17 What effect does this part have on pending requests and final agency decisions already issued?

Comment: Numerous Tribes expressed concern that under proposed section 151.17, Tribes who submitted prior to the new rules would not benefit from the 120-day time frame. One Tribe also requested that Tribes who previously submitted should have a mechanism to benefit from timely processing.

- *Response:* This is addressed in § 151.17. While the 120-day time frame does not apply to applications submitted prior to this final rule, the Department strives to process pending applications as quickly and efficiently as possible. Also, with the existing backlog, placing all applications on the 120-day timeline at once would present an enormous, if not impossible challenge for the Department.

Comment: One Tribe expressed concerned that the language in proposed section 151.17(b) is unclear as to whether presently pending matters in the IBIA will need to start over based on new requirements.

- *Response:* Section 151.17(b) makes it clear that this part does not alter BIA decisions currently on appeal on the effective date of this part. Thus, matters pending in the IBIA will not be affected.

Comment: One Tribe requested that Tribes who have pending applications be afforded a choice between the now-in-place rule and the draft rule, should the draft rule be adopted.

- *Response:* Section 151.17(a), addresses how applications pending at the time the final rule is promulgated are affected by the final rule.

Comment: A state requested that all interested parties be required to consent before Tribes with pending applications can proceed under the new regulations. The State also requested that a pending application processed under the new regulations be reopened for comment.

- *Response:* The Department declines to accept the proposal. The Tribal applicant is best positioned to determine whether it wants its application to be evaluated under prior regulations or the final rule. Proceeding under the final rule does not limit the ability of state and local governments to submit comments on the application. Moreover, reopening the comment period is unwarranted as the final rule contemplates that state and local governments will submit comments on the same topics enumerated under the existing regulations, i.e., “the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.” 25 CFR 151.10 (2022).

Comments On General Issues

Comment: One state commented that the proposed rule does not comply with Federal laws intended to allow states and local governments meaningful and timely input because the BIA allowed Tribes to comment on a draft prior to the draft being published for public comment. Specifically, the comment alleges that the BIA failed to comply with the Unfunded Mandates Reform Act and Executive Order 13132 which requires federal agencies to have a process to meaningfully engage with State and local officials on action that have federalism implications.

- Response: The process used in formulating the regulation did not deprive states or local governments the ability to comment on the proposed regulation. Executive Order 13175 requires the BIA to consult with Tribes prior to taking any action that would have an impact on tribal governments. The BIA's consultation sessions with Tribes complied with that executive order. There is no requirement that the BIA engage in a similar process with states or local governments. Regardless, the BIA published a proposed notice of rulemaking in the *Federal Register* that provided a reasonable time for the submission of comments from the public. Many states and local governments, including the commenter, availed themselves of this opportunity and the BIA considered all submitted comments. Because the proposed changes to the rule are largely procedural and do not expand the authority granted to the Secretary under the statute, they would not have a substantial direct effect or impose substantial compliance costs on States or local governments. Therefore, the proposed changes would not implicate the types of federalism concerns contemplated by Executive Order 13132.

Comment: A state government commented that the proposed rule eliminates the requirement that the Secretary consider the distance of the acquisition by removing the requirement that the Secretary give greater weight to the concerns” raised for off-reservation acquisitions as the distance increases.

- *Response:* The rule does not eliminate the Secretary ability to consider distance in any decision. The rule only eliminates the requirement that the Secretary must give greater weight to concerns raised for those acquisitions that are off-reservation.

Comment: A state government commented that the IRA raises serious concerns under the nondelegation doctrine and that several lower court judges have expressed concern that the IRA is an unconstitutional delegation.

- *Response:* Numerous courts have considered and rejected the argument that the IRA violates principles of nondelegation, reasoning that the statute places “adequate limits” on the Secretary’s discretion and that it is “possible to ascertain whether the will of Congress has been obeyed.” *South Dakota v. U.S. Dep’t of Interior*, 423 F.3rd 790 (8th Cir. 2005) (quotations marks omitted); *see also Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30 (D.C. Cir. 2008), *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev’d on other grounds, Carcieri v. Salazar*, 555 U.S. 379 (2009), *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 698 (9th Cir. 1997) (stated in dicta that the land into trust power is a valid delegation). We are not aware of

any court decision holding that the IRA is an unconstitutional delegation of authority.

Comment: A state government provided a detailed process for notification of new applications to state and local governments as well as for receiving and responding to comments on the application. This proposed process includes notification to states and local governments of an application, requires providing a those governments with a copy of the application along with unspecified other information the BIA may possess, notification to state and local governments that an applicant's package is complete and then provide that package to them within 10 calendar days upon request, requires the Secretary to consider any and all written comments by state or local governments regardless of the location of the land, and provide the applicant a reasonable time frame in which to respond to the state or local government comments.

- *Response:* We reject the proposed process because it would add to the timeline for action on an application beyond even the current regulations. One of the goals of revising these regulations is to shorten the timeline for processing applications. We believe that the process for notifying states and local governments and the timeline for receiving response from them is adequate for the Secretary to receive relevant information and to make an informed decision. Further, the final rule does not limit the Secretary's ability to consider any comments on any issues submitted by a state or local government.

Comment: One town expressed concerns that if a specific group of Indians became federally recognized and then were allowed to take land into trust in the town, that would result in severe consequences for the town.

- *Response:* These regulations do not provide a process for federal recognition of any tribal group. The regulations only apply to already recognized Indian Tribes. Further, the final rule clarifies that if a Tribe is recognized under the part 83 process, that any historical evidence submitted during that process demonstrating that they were under federal jurisdiction in 1934 may be used to determine whether the Secretary has authority to take land into trust for a particular tribe.

Comment: One town commented that while the regulations give “great weight” to tribal concerns they do not give any weight to the comments or concerns of a local community or State in the decision-making process.

- *Response:* The final rule provides that the Secretary will give great weight if the acquisition was for specific stated purposes. While the final rule does not give a specific weight to comments and concerns raised by local governments or states it is not true that it gives them no weight. The Secretary will consider any and all comments and concerns raised by local communities or states in making a decision to acquire land in trust for a tribe.

Comment: One Tribe suggested that “interested parties,” like state and local governments, be afforded notice and an opportunity to comment on acquisitions because the lack of that accommodation for “interested parties” often ensures that they ultimately file a formal appeal of a favorable decision.

- *Response:* The Department declines to adopt this proposal. In the Department's experience, most trust acquisition decisions issued by BIA officials are not challenged by any party. Given the changes in regulatory jurisdiction that occur as a result of acquiring land into trust, notice to state and local governments and consideration of comments received from them inform the Secretary's review of applications. Private individuals or entities have no regulatory jurisdiction over land and thus the same considerations are not present with respect to private parties. Such private parties can nevertheless submit comments on pending applications to the extent they want to.

Comment: Many counties, states, and local governments expressed general and broad opposition to the proposed regulations. One commenter asked that the Regulations include a citation to Constitutional provisions that provide authority for Congress to acquire lands for Indians. Another suggested the proposed rule would be invalid due to uncertainties regarding constitutional and statutory authority for the United States to take land into trust. That same commenter expressed significant concerns about federalism implications of the proposed rule. A separate commenter expressed concern that the proposed rule would unravel NEPA because it may result in decreased communication and cooperation between Tribes and local governments. Finally, a state commented that the proposed rule is unlawful under the APA because the Department must consider impacts on state and local governments.

- *Response:* We disagree with comments suggesting the final rule violates the APA or raises federalism concerns. The rulemaking complies with the APA.

Notice of the proposed rulemaking provided an accurate picture of the Department's reasoning and provided interested parties an opportunity to meaningfully comment upon the proposed rule. The Department has considered potential impacts to state and local governments, including those raised in comments, and this Notice memorializes that consideration. Section 5 of the IRA does not violate principles of federalism because the Indian Commerce Clause grants Congress the power "[t]o regulate commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has consistently interpreted Congress' authority to legislate in matters involving Indian affairs broadly. *See, e.g., United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). The Secretary's exercise of their discretionary land into fee-to-trust authority under section 5 of the IRA is a valid exercise of the power delegated to Congress by the Constitution. Under Department regulations, the promulgation of regulations is categorically excluded from NEPA. *See* 43 CFR 46.210(i) and Environmental Statement Memorandum 13-4, Use of Departmental Categorical Exclusion for Policies, Directives, Regulations, and Guidelines, Michaela E. Noble, Director Office of Environmental Policy and Compliance (Sept. 24, 2018). Furthermore, the proposed rule does not modify the procedural requirements of NEPA.

Comment: Some state and local governments argued that the presumptions unlawfully strip the Secretary of the case-by-case discretion required under the IRA.

- *Response:* The policy presumptions in the final rule cannot divest the Secretary's statutory discretion as authorized in the IRA. As explained herein,

the presumptions adopted through the final rule are consistent with the purposes of the IRA and the policy goals of Tribal self-determination, self-government, and economic development reflected in that statute and other laws authorizing trust acquisitions. The Secretary retains statutory discretion to approve or deny an application after a holistic review of trust acquisition applications, supporting materials, and comments submitted on applications, which of course may demonstrate that a particular presumption should be rebutted.

Comment: A Tribal consortium expressed concern over how the process would work in Alaska, the need to account for the Alaska Native Claims Settlement Act, as well as other unique issues surrounding land in Alaska. It was also suggested that the expedited timelines in the proposed rule might be too short to allow the Department to effectively exercise fee-to-trust trust authorities in Alaska.

- *Response:* The Department is working with the BIA Alaska Regional Office to ensure it has all the necessary skills and equipment to process fee-to-trust applications in Alaska. In November 2022, the Department approved the first land into trust acquisition in Alaska in five years, and the second fee-to-trust acquisition in Alaska since the passage of the Alaska Native Claims Settlement Act in 1971. The Department anticipates further applications may be filed for land into trust in Alaska and the BIA will continue to provide resources to the Region for assistance with processing applications consistent with this final rule, Sol. Op. M-37076, and *Akiachak Native Community v.*

Jewell, 935 F. Supp. 2d 195 (D.D.C. 2013), *vacated as moot*, 827 F.3d 100 (D.C. Cir. 2016).

Comment: A former attorney general submitted comments expressing disapproval of the removal of BIA consideration of “jurisdictional problems and potential conflicts of land use.” These concerns are rooted in law enforcement jurisdiction issues, which they assert are complicated in Indian country and the proposed changes would affect these issues.

- *Response:* The Secretary must consider “jurisdictional problems and potential conflicts of land use” when state and local governments raise these issues in comments submitted under §§ 151.11 (c) and 151.12 (d). The Secretary will carefully consider the potential conflicts and any associated impact on public safety and law enforcement jurisdiction.

Comment: Many Tribes suggested that an electronic filing system would be helpful in providing a streamlined platform for reviewing applications and following where applications are in the process.

- *Response:* The Department is mindful that improving the technologies used to implement these regulations is key to meeting the goal of improving efficiency and reducing the time it takes to process an application. The BIA is working to improve the current system—TAAMS—used to track fee-to-trust applications, and ensure it is up to date, and will continue to explore technological improvements including electronic filing systems to improve efficiency and applicant customer service.

Comment: Some comments identified minor grammatical or punctuation errors.

- *Response:* The Department made minor non-substantive corrections identified by commenters.

Comment: Several comments were received that were not directly responsive to the proposed regulations.

- *Response:* The Department has reviewed all comments received in response to the part 151 Notice of Proposed Rulemaking. Comments not directly responsive to the proposed regulations were not considered as part of the rulemaking and are not responded to here.

VI. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant under E.O. 12866 section 3(f), but not significant under section 3(f)(1).

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas.

The Department and BIA developed this final rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The final rule would not change current funding requirements and would not impose any economic effects on small governmental entities because it makes no change to the status quo. The final rule codifies longstanding Departmental policies and interpretation of case law.

Tribal governments and individual Indians seeking to have fee-lands placed in trust by the United States for the benefit of Tribal governments and individual Indians will be able rely on the substantive provisions in the final rule for guidance on what may or may not be included in a land acquisition request package. Both § 151.9, which addresses on-reservation acquisitions, and § 151.10, which addresses acquisition of lands contiguous to reservation boundaries, are consistent with existing case law and are presumed to further Tribal interests and the adverse impacts to local governments and small entities are presumed to be minimal. Local governments, after receiving notice from the BIA that a Tribal government or individual Indian submitted a land acquisition request package, are free to provide written comments, within 30 calendar days, to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments.

Furthermore, under both § 151.1, acquisition of lands outside of or noncontiguous to reservation boundaries, and § 151.12, an initial Indian acquisition, the Secretary will

presume that the Tribal government will benefit from the lands acquisition. However, under both § 151.11 and § 151.12, the Secretary is required to provide notice to state and local governments to submit written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments.

C. Congressional Review Act (CRA)

This final rule does not meet the criteria in 5 U.S.C. 804(2). Specifically, it:

(a) Would not have an annual effect on the economy of \$100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, federal, State, or local government agencies, or geographic regions.

(c) Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement analyzing and estimating anticipated costs and benefits before issuing any rule that may result in the expenditure by state, local, and Tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. *See* 2 U.S.C. 1532. The Act further requires that the agency publish a summary of such a statement with the agency's proposed and final rules.

This final rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The final rule would not have a significant or unique effect on State, local, or Tribal governments or the private sector because this final rule affects only individual Indians and Tribal

governments that petition the Department to take land into trust for their benefit. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule would not affect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this final rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This final rule complies with the requirements of E.O. 12988. Specifically, this final rule: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this final rule under the Department's consultation policy and under the criteria in E.O. 13175 and have hosted extensive consultation with federally recognized Indian Tribes in preparation of this final rule, including through a Dear Tribal Leader letter delivered to

every federally recognized Tribe in the country, and through three consultation sessions held on May 9, 13, and 23, 2022.

The Department also held three Tribal consultation sessions during the public comment period. The first Tribal consultation was held in person on January 13, 2023, at the Bureau of Land Management Training Center in Phoenix, Arizona. The next two Tribal consultations were conducted virtually on Zoom. They occurred on January 19, 2023, and January 30, 2023. Following the consultation sessions, the Department accepted written comments until March 1, 2023.

I. Paperwork Reduction Act

This final rule does not contain any new collection of information that requires approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with the acquisition of lands through purchase, relinquishment, gift, exchange, or assignment within or without existing reservations for the purpose of providing land for Indian Tribes and assigned OMB Control Number 1076-0100, which expires January 31, 2024). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

J. National Environmental Policy Act (NEPA)

This final rule would not constitute a major federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information *see* 43 CFR 46.210(i)). We have also determined that the final rule would not involve any of the

extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Energy Effects (E.O. 13211)

This final rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

L. Clarity of This Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

M. Small Business Regulatory Enforcement Fairness Act

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This final rule:

- (a) Does not have an annual effect on the economy of \$100 million or more because the funding available through JOM does not approach this amount.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, Tribal or local government agencies, or geographic regions because this rule affects only certain education contracts.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because this rule affects only certain education contracts.

N. Regulatory Impact Analysis

Summary: This final rule is intended to make the fee-to-trust process less burdensome and more cost-efficient. In addition, the Department seeks to improve the fee-to-trust process because of the many benefits afforded to Tribal governments and their citizens, such as heightened regulatory jurisdiction over the lands, exemptions from state and local taxation, and restoration of Tribal homelands. This final rule also addresses delays in the current land acquisition process. The average length of time to receive a final fee-to-trust decision is approximately 985 days. Currently, there are 941 cases pending approval by the Department – the majority of which are for non-controversial, on-reservation acquisitions. This final rule will reduce the time it takes BIA to process fee-to-trust applications going forward and address the existing backlog.

Benefits: The anticipated benefits of the final rule include making the fee-to-trust process less burdensome and more cost-efficient and improve agency processing by:

- Reducing uncertainty and Tribal expenses by codifying standards that implement *Carciere v. Salazar*, 555 U.S. 379 (2009), to increase clarity and certainty in determining the Secretary’s authority to take land in trust for Tribes. Tribes will benefit by having the standards in the regulations and not having to ascertain these standards from existing case law, Departmental guidance, and previous determinations, and not risking lengthy litigation on the standards the Department considers.

- Reducing processing time and uncertainty by identifying the documents needed for a complete application, after which the BIA will issue a decision within 120 days.
- Increasing efficiency for Tribes and the Department by analyzing applications as either on-reservation, contiguous to a reservation, an initial acquisition for landless Tribes, or off-reservation, recognizing that each category requires specific criteria for an appropriate analysis.
- Reducing expense for Tribes by clarifying when environmental studies and reports are to be updated, thus, eliminating the need to maintain the current status of studies and reports when a decision date is not known by the Tribe.

Anticipated Impact: Transfers between Tribes and state and local jurisdictions.

To the extent the final rule accelerates the fee-to-trust process, Tribes may receive tax exemptions sooner. If land remains taxable for a shorter period of time, there may be a reduction in taxes collected from Tribes by state and local jurisdictions. The anticipated costs of implementing the final rules are negligible:

- Tribes will see reduced expenses in the application process from clear standards and timelines.
- States and local jurisdictions will see little, if any, additional expense because the final rule's provisions for providing comments on regulatory jurisdiction, real property taxes, and special assessments remain the same. In some cases, states or local governments may incur additional expense if they wish to provide information to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments.

- BIA will see increased efficiencies in the application process, such as fewer hours spent processing applications and communicating with applicants on missing documents, because applications will be more thorough.

Alternative Policy Approaches: An alternative policy approach would be to maintain the existing regulations; however, this would result in:

- Continued lack of clarity and certainty for Tribes and need to hire outside counsel to meet *Carciere* requirements and prepare applications, and continued litigation over *Carciere* requirements and part 151 standards. Tribes would have to continue to incur costs to hire outside counsel.
- Continued lack of a policy to acquire land in trust for establishing a Tribal land base or protecting Tribal homelands, protecting sacred sites or cultural resources and practices, establishing or maintaining conservation or environmental mitigation areas, consolidating land ownership, reducing checkerboarding, acquiring land lost through allotment, protecting treaty or subsistence rights, or facilitating Tribal self-determination, economic development, Indian housing. This policy recognizes purposes for which Tribes acquire land in trust, many of which were not contemplated in the existing regulation, thus, reducing additional justification for the acquisition.

Conclusion: Therefore, maintaining the current regulation likely would increase legal costs for applicant Tribes as compared to final rule and its measures to promote cost efficiency. Maintaining the current regulation could also limit certainty about the Secretary's authority due to the *Carciere* decision and omit information that could streamline Tribal applications, including the absence of land acquisition policy to support

Tribal self-determination and sovereignty, no list of documents needed for a complete application, no guidance on the weight accorded to certain Tribal land uses, and criteria enabling certain presumptions.

List of Subjects in 25 CFR part 151

- Administrative practice and procedure
- Indians-land acquisition.

For the reasons set forth in the preamble, the Department of the Interior, Bureau of Indian Affairs, revises 25 CFR part 151 to read as follows:

PART 151 – LAND ACQUISITIONS

Sec.

151.1 What is the purpose of this part?

151.2 How are key terms defined?

151.3 What is the Secretary's land acquisition policy?

151.4 How will the Secretary determine that statutory authority exists to acquire land in trust status?

151.5 May the Secretary acquire land in trust status by exchange?

151.6 May the Secretary approve acquisition of a fractional interest?

151.7 Is Tribal consent required for nonmember acquisitions?

151.8 What documentation is included in a trust acquisition package?

151.9 How will the Secretary evaluate a request involving land within the boundaries of an Indian reservation?

151.10 How will the Secretary evaluate a request involving land contiguous to the boundaries of an Indian reservation?

151.11 How will the Secretary evaluate a request involving land outside of and noncontiguous to the boundaries of an Indian reservation?

151.11 How will the Secretary evaluate a request involving land outside of and noncontiguous to the boundaries of an Indian reservation?

151.12 How will the Secretary evaluate a request involving land for an initial Indian acquisition?

151.13 How will the Secretary act on requests?

151.14 How will the Secretary review title?

151.15 How will the Secretary conduct a review of environmental conditions?

151.16 How are formalization of acceptance and trust status attained?

151.17 What effect does this part have on pending requests and final agency decisions already issued?

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 403a–2, 409a, 1466, 1495, 5107, 5108, 5136, 5138, 5201, 5202, 5322, 5341; Pub. L. 71-780, 46 Stat. 1471, amended by Pub. L. 72-231, 47 Stat. 474; Pub. L. 74-816, 49 Stat. 1967, amended by Sec. 10, Pub. L. 80-336, 61 Stat. 734; Secs. 3, 4, 6, Pub. L. 76-238, 53 Stat. 1129, 1130; Sec. 7, Pub. L. 79-706, 60 Stat. 969, amended by Pub. L. 91-627, 84 Stat. 1874; Pub. L. 81-226, 63 Stat. 605; Pub. L. 84-188, 69 Stat. 392, amended by Pub. L. 88-540, 78 Stat. 747, amended by Sec. 213, Pub. L. 100-581, 102 Stat. 2941, amended by Sec. 1, Pub. L. 101-301, 104 Stat. 206; Pub. L. 84-592, 70 Stat. 290, amended by Pub. L. 91-274, 84 Stat. 301; Pub. L. 84-772, 70 Stat. 626; Sec. 10, Pub. L. 87-231, 75 Stat. 505; Pub. L. 88-196, 77 Stat. 349; Pub. L. 88-418, 78 Stat. 389; Pub. L. 90-335, 82 Stat. 174, amended by Pub. L. 93-286, 88 Stat. 142; Pub. L. 90-534, 82 Stat. 884; Pub. L. 92-312, 86 Stat. 216; Pub. L. 92-377, 86 Stat. 530; Pub. L. 92-443, 86 Stat. 744; Sec. 11, Pub. L. 93-531, 88 Stat. 1716, amended by Sec. 4, Pub. L. 96-305, 94 Stat. 930, amended by Sec. 106, 98-603, 98 Stat. 3157, amended by Secs. 4(b), 8, Pub. L. 100-666, 102 Stat. 3930, 3933.

§ 151.1 What is the purpose of this part?

This part sets forth the authorities, policies, and procedures governing the acquisition of land by the United States in trust status for individual Indians and Tribes.

This part does not cover acquisition of land by individual Indians and Tribes in fee simple status even though such land may, by operation of law, be held in restricted status following acquisition; acquisition of land mandated by federal law; acquisition of land in trust status by inheritance or escheat; or transfers of land into restricted fee status unless required by federal law.

§ 151.2 How are key terms defined?

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Fee interest means an interest in land that is owned in unrestricted fee simple status and is, thus, freely alienable by the fee owner.

Fractionated tract means a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein.

Indian land means any tract in which any interest is held by a Tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and Tribal land.

Indian landowner means a Tribe or individual Indian who owns an interest in Indian land.

Indian reservation or Tribe's reservation means, unless another definition is required by federal law authorizing a particular trust acquisition, that area of land over which the Tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma wherever historic reservations have not yet been reaffirmed, or where there has been a final judicial determination that a reservation has

been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the Tribe as defined by the Secretary.

Individual Indian means:

- (1) Any person who is an enrolled member of a Tribe;
- (2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation; or
- (3) Any other person possessing a total of one-half or more degree Indian blood of a Tribe.

Initial Indian acquisition means an acquisition of land in trust status for the benefit of a Tribe that currently has no land held in trust status.

Interested party means a person or other entity whose legally protected interests would be affected by a decision.

Land means real property or any interest therein.

Marketable title means title that a reasonable buyer would accept because it appears to lack substantial defect and that covers the entire property that the seller has purported to sell.

Preliminary Title Opinion means an opinion issued by the Office of the Solicitor that reviews the existing status of title, examining both record and non-record title evidence and any encumbrances or liens against the land, and sets forth requirements to be met before acquiring land in trust status.

Preliminary title report means a report prepared by a title company prior to issuing a policy of title insurance that shows the ownership of a specific parcel of land together with the liens and encumbrances thereon.

Restricted land or land in restricted status means land the title to which is held by an individual Indian or a Tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary due to limitations contained in the conveyance instrument pursuant to federal law or because a federal law directly imposes such limitations.

Secretary means the Secretary of the Interior or authorized representative.

Tribe means any Indian Tribe listed under § 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130). For purposes of acquisitions made under the authority of 25 U.S.C. 5136 and 5138, or other statutory authority which specifically authorizes trust acquisitions for such corporations, *Tribe* also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 5124) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 5203).

Trust land or land in trust status means land the title to which is held in trust by the United States for an individual Indian or a Tribe.

Undivided interest means a fractional share of ownership in an estate of Indian land where the estate is owned in common with other Indian landowners or fee owners.

§ 151.3 What is the Secretary's land acquisition policy?

It is the Secretary's policy to acquire land in trust status through direct acquisition or transfer for individual Indians and Tribes to strengthen self-determination and sovereignty, ensure that every Tribe has protected homelands where its citizens can maintain their Tribal existence and way of life, and consolidate land ownership to strengthen Tribal governance over reservation lands and reduce checkerboarding. The Secretary retains discretion whether to acquire land in trust status where discretion is

granted under federal law. Land not held in trust or restricted status may only be acquired for an individual Indian or a Tribe in trust status when the acquisition is authorized by federal law. No acquisition of land in trust status under these regulations, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(b) Subject to the provisions of federal law authorizing trust land acquisitions, the Secretary may acquire land for a Tribe in trust status:

(1) When the land is located within the exterior boundaries of the Tribe's reservation or contiguous thereto;

(2) When the Tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land will further Tribal interests by establishing a Tribal land base or protecting Tribal homelands, protecting sacred sites or cultural resources and practices, establishing or maintaining conservation or environmental mitigation areas, consolidating land ownership, reducing checkerboarding, acquiring land lost through allotment, protecting treaty or subsistence rights, or facilitating Tribal self-determination, economic development, Indian housing, or for other reasons the Secretary determines will support Tribal welfare.

(c) Subject to the provisions contained in federal law which authorize land acquisitions or holding land in trust or restricted status, the Secretary may acquire land in trust status for an individual Indian:

(1) When the land is located within the exterior boundaries of an Indian reservation, or contiguous thereto; or

(2) When the land is already in trust or restricted status.

§ 151.4 How will the Secretary determine that statutory authority exists to acquire land in trust status?

When a Tribe's application relies on the first definition of "Indian" in the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 5101 *et seq.*) (IRA) to establish statutory authority for the proposed acquisition, the Secretary will apply the following criteria to determine whether the Tribe was under federal jurisdiction in 1934.

(a) In determining whether a Tribe was "under Federal jurisdiction" in 1934 within the meaning of section 19 of the IRA (48 Stat. 988; 25 U.S.C. 5129), the Secretary shall consider evidence of federal jurisdiction in the manner provided in paragraphs (1) through (5).

(1) Conclusive evidence establishes in and of itself both that a Tribe was placed under federal jurisdiction and that this jurisdiction remained intact in 1934. If such evidence exists, no further analysis under this section is needed. The following is conclusive evidence that a Tribe was under federal jurisdiction in 1934:

(i) A vote under section 18 of the IRA (48 Stat. 988; 25 U.S.C. 5125) to accept or reject the IRA as recorded in *Ten Years of Tribal Government Under I.R.A.*, Theodore Haas, United States Indian Service (Jan. 1947) (Haas List) or other federal government document;

(ii) Land held in trust by the United States for the Tribe in 1934.

(iii) Secretarial approval of a Tribal constitution under section 16 of the IRA as recorded in the Haas List or other federal government document;

(iv) Secretarial approval of a charter of incorporation issued to a Tribe under section 17 of the IRA as recorded in the Haas List or other federal government document;

- (v) An Executive Order for a specific Tribe that was still in effect in 1934;
 - (vi) Treaties to which a Tribe is a party, ratified by the United States and still in effect as to that party in 1934;
 - (vii) Continuing existence in 1934 or later of treaty rights guaranteed by a treaty ratified by the United States; or
 - (viii) Other evidence that the Secretary determines is conclusive in a particular case.
- (2) Presumptive evidence is indicative that a Tribe was placed under federal jurisdiction in or before 1934 and may indicate that such jurisdiction remained intact in 1934. In the absence of evidence indicating that federal jurisdiction did not exist or did not exist in 1934, presumptive evidence satisfies the analysis under this section. The following is presumptive evidence that a Tribe was under federal jurisdiction in 1934:
- (i) Evidence of treaty negotiations or evidence a Tribe signed a treaty with the United States whether or not such treaty was ratified by Congress;
 - (ii) Listing of a Tribe in the Department of the Interior's 1934 Indian Population Report;
 - (iii) Evidence that the United States took efforts to acquire lands on behalf of a Tribe in the years leading up to the passage of the IRA;
 - (iv) Inclusion in Volume V of Charles J. Kappler's *Indian Affairs, Laws and Treaties*;
 - (v) Federal legislation for a specific Tribe, including land claim settlements and termination legislation enacted after 1934, which acknowledges the existence of a government-to-government relationship with a Tribe in or before 1934; or

(vi) Satisfaction of the criterion for federal acknowledgment now located at 25 CFR 83.11(a) and previously located at 25 CFR 83.7(a), requiring that a Tribe “has been identified as an American Indian entity on a substantially continuous basis,” through evidence that brought the Tribe under federal jurisdiction in or before 1934; or

(vii) Other evidence that the Secretary determines is presumptive in a particular case.

(3) In the absence of evidence identified above as conclusive or presumptive evidence, the Secretary may find that a Tribe was under federal jurisdiction in 1934 when the United States in 1934 or at some point in the Tribe’s history prior to 1934, took an action or series of actions that, when viewed in concert through a course of dealings or other relevant acts on behalf of a Tribe, or in some instances Tribal members, establishes or generally reflects federal obligations, or duties, responsibility for or authority over the Tribe, and that such jurisdictional status remained intact in 1934.

(i) Examples of federal actions that exhibit probative evidence of federal jurisdiction may include but are not limited to, the Department’s acquisition of land for a Tribe in implementing the Indian Reorganization Act of 1934, efforts by the federal government to conduct a vote under section 18 of the IRA to accept or reject the IRA where no vote was held, the attendance of Tribal members at Bureau of Indian Affairs operated schools, federal decisions regarding whether to remove or not remove a Tribe from its homelands, the inclusion of a Tribe in federal reports and surveys, the inclusion of a Tribe or Tribal members in federal census records prepared by the Office of Indian Affairs, the approval of contracts between a Tribe and non-Indians; enforcement of the

Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions), and the provision of health and social services to a Tribe or Tribal members.

(4) When a Tribe is recognized under the 25 CFR part 83 process, the Secretary may rely on any evidence within the part 83 record that the Tribe was under federal jurisdiction in or before 1934, consistent with §§ 151.4(a)(2) and (3).

(5) Evidence of executive officials disavowing federal jurisdiction over a Tribe in certain instances is not conclusive evidence of a Tribe's federal jurisdictional status. This is because such disavowals cannot themselves revoke federal jurisdiction over a Tribe.

(b) For some Tribes, Congress enacted legislation after 1934 making the IRA applicable to the Tribe. The existence of such legislation making the IRA and its trust acquisition provisions applicable to a Tribe eliminates the need to determine whether a Tribe was under federal jurisdiction in 1934.

(c) In order to be eligible for trust acquisitions under section 5 of the IRA, no additional "under federal jurisdiction" analysis is required under this part for Tribes for which the Department has previously issued an analysis finding the Tribe was under federal jurisdiction.

(d) Land may be acquired in trust status for an individual Indian or a Tribe in the State of Oklahoma under section 5 of the IRA if the acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

(e) The Secretary may also acquire land in trust status for an individual Indian or a Tribe under this part when specifically authorized by federal law other than section 5 of the IRA, subject to any limitations contained in that federal law.

§ 151.5 May the Secretary acquire land in trust status by exchange?

The Secretary may acquire land in trust status on behalf of an individual Indian or Tribe by exchange under this part if authorized by federal law and within the terms of this part. The disposal aspects of an exchange are governed by part 152 of this title.

§ 151.6 May the Secretary approve acquisition of a fractional interest?

Where the mandatory acquisition process provided under 25 U.S.C. 2216(c) is not applicable to a fractional interest acquisition, e.g., where the acquisition proposed is off-reservation, the following section applies to discretionary acquisitions of fractional interests. The Secretary may approve the acquisition of a fractional interest in a fractionated tract in trust status by an individual Indian or a Tribe including when:

- (a) The applicant already owns a fractional interest in the same parcel of land;
- (b) The interest being acquired by the applicant is in fee status;
- (c) The applicant offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value;
- (d) There is a specific law which grants to the applicant the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all such interests; or
- (e) The owner or owners of more than fifty percent of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the applicant.

§ 151.7 Is Tribal consent required for nonmember acquisitions?

An individual Indian or Tribe may acquire land in trust status on an Indian reservation other than its own only when the governing body of the Tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that

such consent shall not be required if the individual Indian or the Tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

§ 151.8 What documentation is included in a trust acquisition package?

An individual Indian or Tribe seeking to acquire land in trust status must file a written request, *i.e.*, application, with the Secretary. The request need not be in any special form but must set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition fulfills the requirements of this part. The Secretary will prepare the acquisition package using information provided by the applicant and analysis developed by the Secretary, as described below:

(a) A complete acquisition package consists of the following:

(1) The applicant must submit a request that the land be acquired in trust, as follows:

(i) If the applicant is an Indian Tribe, the Tribe's written request must be a signed Tribal letter for trust acquisition supported by a Tribal resolution or other act of the governing body of the Tribe;

(ii) If the applicant is an individual Indian, the individual's written request must be a signed letter requesting trust status;

(2) The applicant must submit documentation providing the information evaluated by the Secretary under §§ 151.9(a)(2) and (3), §§ 151.10(a)(2) and (3), §§ 151.11(a)(2) and (3), or §§ 151.12(a)(2) and (3) depending on which section applies to the application;

(3) The applicant must submit a statement identifying the existence of statutory authority for the acquisition including, if applicable, any supporting evidence that the Tribe was under federal jurisdiction in 1934 pursuant to § 151.4.

(4) The applicant must submit a description of the land as follows:

(i) An aliquot part, government lot, parcel identified on a Government Land Office or Bureau of Land Management official survey plat, or lot block subdivision (LBS) legal description of the land and a map from the applicant, including a statement of the estate to be acquired, *e.g.*, all surface and mineral rights, surface rights only, surface rights and a portion of the mineral rights, etc.; or

(ii) A metes and bounds land description and survey if the land cannot be described by the methods listed in § 151,8 (4)(i), including a statement of the estate to be acquired. The survey may be completed by a land surveyor registered in the jurisdiction in which the land is located when the land being acquired is fee simple land; and

(iii) An application package is not complete until the Secretary determines that the legal description or survey is sufficient.

(5) The applicant must submit information that allows the Secretary to comply with the National Environmental Policy Act (NEPA) and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations pursuant to § 151.15; and

(i) An acquisition package is not complete until the public review period of a final environmental impact statement or, where appropriate, the final environmental assessment has concluded, or the categorical exclusion documentation is complete.

(ii) An acquisition package is not complete until a pre-acquisition Phase I environmental site assessment, and if necessary, a Phase II environmental site assessment completed pursuant to 602 DM 2 is determined to be sufficient by the Secretary.

(6) The applicant must submit title evidence pursuant to § 151.14.

(i) An acquisition package is not complete until the Secretary completes a Preliminary Title Opinion based on such evidence;

(7) The Secretary shall send notification letters pursuant to § 151.9, § 151.10, § 151.11, or § 151.12.

(8) The applicant must submit a statement that any existing covenants, easements, or restrictions of record will not interfere with the applicant's intended use of the land; and

(9) The applicant must submit any additional information or action requested by the Secretary, in writing, if warranted by the specific application.

(b) After the Bureau of Indian Affairs is in possession of a complete acquisition package, the Secretary shall: (1) Notify the applicant within 30 calendar days in writing that the acquisition package is complete; and (2) Issue a decision on a request within 120 calendar days after issuance of the notice of a complete acquisition package.

§ 151.9 How will the Secretary evaluate a request involving land within the boundaries of an Indian reservation?

(a) The Secretary shall consider the criteria in this section when evaluating requests for the acquisition of land in trust status when the land is located within the boundaries of an Indian reservation.

(1) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(2) If the applicant is an individual Indian, the need for additional land, the amount of trust or restricted land already owned by or for that individual, and the degree to which the individual needs assistance in handling their affairs;

(3) The purposes for which the land will be used; and

(4) 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.

(b) The Secretary shall give great weight to acquiring land that serves any of the following purposes, in accordance with § 151.3:

(1) Furthers Tribal interests by establishing a Tribal land base or protects Tribal homelands;

(2) Protects sacred sites or cultural resources and practices;

(3) Establishes or maintains conservation or environmental mitigation areas;

(4) Consolidates land ownership;

(5) Reduces checkerboarding;

(6) Acquires land lost through allotment;

(7) Protects treaty or subsistence rights; or

(8) Facilitates Tribal self-determination, economic development, or Indian housing.

(c) When reviewing a Tribe's request for land within the boundaries of an Indian reservation, the Secretary presumes that the acquisition will further the Tribal interests

described above in subsection (b), and adverse impacts to local governments' regulatory jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.

(d) Upon receipt of a written request to have land acquired in trust within the boundaries of an Indian reservation the Secretary shall notify the state and local governments with regulatory jurisdiction over the land to be acquired of the applicant's request. The notice will inform the state or local government that each will be given 30 calendar days in which to provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments. If the state or local government responds within 30 calendar days, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply, if they choose to do so in their discretion, or request that the Secretary issue a decision. In considering such comments, the Secretary presumes that the Tribal community will benefit from the acquisition.

§ 151.10 How will the Secretary evaluate a request involving land contiguous to the boundaries of an Indian reservation?

(a) The Secretary shall consider the criteria in this section when evaluating requests for the acquisition of land in trust status when the land is located contiguous to an Indian reservation:

(1) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(2) If the applicant is an individual Indian, the need for additional land, the amount of trust or restricted land already owned by or for that individual, and the degree to which the individual needs assistance in handling their affairs;

(3) The purposes for which the land will be used; and

(4) 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.

(b) The Secretary shall give great weight to acquiring land that serves any of the following purposes, in accordance with § 151.3:

(1) Furthers Tribal interests by establishing a Tribal land base or protects Tribal homelands;

(2) Protects sacred sites or cultural resources and practices;

(3) Establishes or maintains conservation or environmental mitigation areas;

(4) Consolidates land ownership;

(5) Reduces checkerboarding;

(6) Acquires land lost through allotment;

(7) Protects treaty or subsistence rights; or

(8) Facilitates Tribal self-determination, economic development, or Indian housing.

(c) When reviewing a Tribe's request for land contiguous to an Indian reservation, the Secretary presumes that the acquisition will further the Tribal interests described above in subsection (b), and adverse impacts to local governments' regulatory

jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.

(d) Upon receipt of a written request to have land contiguous to an Indian reservation acquired in trust status, the Secretary shall notify the state and local governments with regulatory jurisdiction over the land to be acquired. The notice will inform the state or local government that each will be given 30 calendar days in which to provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments. If the state or local government responds within 30 calendar days, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply, if they choose to do so in their discretion, or request that the Secretary issue a decision. In considering such comments, the Secretary presumes that the Tribal community will benefit from the acquisition.

§ 151.11 How will the Secretary evaluate a request involving land outside of and noncontiguous to the boundaries of an Indian reservation?

(a) The Secretary shall consider the criteria in this section when evaluating requests for the acquisition of land in trust status when the land is located outside of and noncontiguous to an Indian reservation:

(1) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(2) If the applicant is an individual Indian and the land is already held in trust or restricted status, the need for additional land, the amount of trust or restricted land

already owned by or for that individual, and the degree to which the individual needs assistance in handling their affairs;

(3) The purposes for which the land will be used; and

(4) 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.

(b) The Secretary shall give great weight to acquiring land that serves any of the following purposes, in accordance with § 151.3:

(1) Furthers Tribal interests by establishing a Tribal land base or protects Tribal homelands;

(2) Protects sacred sites or cultural resources and practices;

(3) Establishes or maintains conservation or environmental mitigation areas;

(4) Consolidates land ownership;

(5) Reduces checkerboarding;

(6) Acquires land lost through allotment;

(7) Protects treaty or subsistence rights; or

(8) Facilitates Tribal self-determination, economic development, or Indian housing.

(c) Upon receipt of a written request to have land outside the boundaries of an Indian reservation acquired in trust status, the Secretary shall notify the state and local governments with regulatory jurisdiction over the land to be acquired. The notice will inform the state or local government that each will be given 30 calendar days in which to provide written comments on the acquisition's potential impact on regulatory jurisdiction,

real property taxes, and special assessments. If the state or local government responds within 30 calendar days, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply, if they choose to do so in their discretion, or request that the Secretary issue a decision. In reviewing such comments, the Secretary will consider the location of the land and potential conflicts of land use. The Secretary presumes that the Tribe will benefit from the acquisition.

§ 151.12 How will the Secretary evaluate a request involving land for an initial Indian acquisition?

(a) The Secretary shall consider the criteria in this section when evaluating requests for the acquisition of land in trust status when a Tribe does not have a reservation or land held in trust.

(1) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(2) The purposes for which the land will be used; and

(3) 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.

(b) The Secretary shall give great weight to acquiring land that serves any of the following purposes, in accordance with § 151.3:

(1) Furthers Tribal interests by establishing a Tribal land base or protects Tribal homelands;

(2) Protects sacred sites or cultural resources and practices;

(3) Establishes or maintains conservation or environmental mitigation areas;

- (4) Consolidates land ownership;
- (5) Reduces checkerboarding;
- (6) Acquires land lost through allotment;
- (7) Protects treaty or subsistence rights; or
- (8) Facilitates Tribal self-determination, economic development, or Indian

housing.

(c) When reviewing a request for a Tribe that does not have a reservation or land held in trust, the Secretary presumes that the acquisition will further the Tribal interests described above in subsection (b), and adverse impacts to local governments' regulatory jurisdiction, real property taxes, and special assessments will be minimal, therefore the application should be approved.

(d) Upon receipt of a written request for land to be acquired in trust when a Tribe does not have a reservation or land held in trust, the Secretary shall notify the state and local governments with regulatory jurisdiction over the land to be acquired. The notice will inform the state or local government that each will be given 30 calendar days in which to provide written comments to rebut the presumption of minimal adverse impacts to regulatory jurisdiction, real property taxes, and special assessments. If the state or local government responds within 30 calendar days, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply, if they choose to do so in their discretion, or request that the Secretary issue a decision. In reviewing such comments, the Secretary will consider the location of the land and potential conflicts of land use. The Secretary presumes that the Tribe will benefit from the acquisition.

§ 151.13 How will the Secretary act on requests?

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Office of the Secretary or the Assistant Secretary - Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Office of the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Office of the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly publish notice in the *Federal Register* of the decision to acquire land in trust status under this part; and

(iii) Immediately acquire the land in trust status under § 151.16 after the date such decision is issued and upon fulfillment of the requirements of any other Department of the Interior requirements.

(d) A decision made by a Bureau of Indian Affairs official, rather than the Office of the Secretary or Assistant Secretary, pursuant to delegated authority, is not a final agency action of the Department of the Interior under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter and under 43 CFR part 4, subpart D, or until the time for filing a notice of appeal has expired and no administrative appeal has

been filed. Administrative appeals are governed by part 2 of this chapter and by 43 CFR part 4, subpart D.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of the right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly provide written notice, by U.S. mail or personal delivery, of the decision and the right, if any, to file an administrative appeal of such decision under part 2 of this chapter and 43 CFR part 4, subpart D to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made; and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust status under § 151.16 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this chapter and under 43 CFR part 4, subpart D, and upon the fulfillment of any other Department of the Interior requirements.

(3) The administrative appeal period begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section; or

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section, which shall be deemed the date of receipt of the decision.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2 and under 43 CFR part 4, subpart D.

§ 151.14 How will the Secretary review title?

(a) The applicant must submit title evidence as part of a complete acquisition package as described in § 151.8 as follows:

(1) The deed or other conveyance instrument providing evidence of the applicant's title or, if the applicant does not yet have title, the deed providing evidence of the transferor's title and a written agreement or affidavit from the transferor that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust status; and

(2) Either:

(i) A current title insurance commitment issued by a title company; or

(ii) The policy of title insurance issued by a title company to the applicant or current owner and an abstract of title issued by a title compact dating from the time the policy of title insurance was issued to the applicant or current owner to the present. The Secretary may accept a preliminary title report or equivalent document prepared by a title company in place of an abstract of title for purposes of this subpart (a)(2)(ii) if the

applicant provides evidence that the title company will not issue an abstract of title based on practice in the local jurisdiction, subject to the requirements of § 151.14 (b).

(3) The applicant may choose to provide title evidence meeting the title standards issued by the U.S. Department of Justice, in lieu of the evidence required by paragraph (a)(2) of this section.

(b) After reviewing title evidence, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities that the Secretary identified and may seek additional information or action from the applicant needed to address such issues. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to acceptance of the land in trust status if the Secretary determines that the liens, encumbrances, or infirmities make title to the land unmarketable.

§ 151.15 How will the Secretary conduct a review of environmental conditions?

(a) The Secretary shall comply with the requirements of the National Environmental Policy Act (NEPA) (43 U.S.C. 4321 *et seq.*), applicable Council on Environmental Quality regulations (40 CFR parts 1500 – 1508), and Department of the Interior regulations (43 CFR part 46) and guidance. The Secretary's compliance may require preparation of an environmental impact statement, an environmental assessment, a categorical exclusion, or other documentation that satisfies the requirements of NEPA.

(b) The Secretary shall comply with the terms of 602 DM 2, Land Acquisitions: Hazardous Substances Determinations, or its successor policy if replaced or renumbered, so long as such guidance remains in place and binding. If the Secretary approves a request for the acquisition of land in trust status, the Secretary may then require, before formalization of acceptance pursuant to § 151.16, that the applicant provide information

updating a prior pre-acquisition environmental site assessment conducted under 602 DM 2.

(1) If no recognized environmental conditions or other environmental issues of concern are identified in the pre-acquisition environmental site assessment or before formalization of acceptance and all other requirements of this section and §§ 151.13 and 151.14 are met, the Secretary shall acquire the land in trust.

(2) If recognized environmental conditions or other environmental issues of concern are identified in the pre-acquisition environmental site assessment or before formalization of acceptance, the Secretary shall notify the applicant and may seek additional information or action from the applicant to address such issues of concern. The Secretary may require the elimination of any such issues of concern prior to the formalization of acceptance.

§ 151.16 How are formalization of acceptance and trust status attained?

(a) The Secretary shall formalize acceptance of land in trust status by signing an instrument of conveyance. The Secretary shall sign the instrument of conveyance after the requirements of §§151.13, 151.14, and 151.15 have been met.

(b) The land will attain trust status when the Secretary signs the instrument of conveyance.

(c) The Secretary shall record the deed with LTRO pursuant to part 150 of this chapter.

§ 151.17 What effect does this part have on pending requests and final agency decisions already issued?

(a) Requests pending on the effective date of this part will continue to be processed under the previous version of this regulation unless the applicant requests in writing to proceed under this regulation.

(1) Upon receipt of such a request, the Secretary shall process the pending application under this regulation, except for § 151.8 (b)(2).

(2) The Secretary shall consider the comments of state and local governments submitted under the notice provisions of the previous version of this regulation.

(b) This part does not alter decisions of Bureau of Indian Affairs Officials under appeal on the effective date of this part or final agency decisions made before the effective date of this part.

§ 151.18 Severability.

If any provision of this subpart, or any application of a provision, is stayed or determined to be invalid by a court of competent jurisdiction, the remaining provisions or applications are severable and shall continue in effect.

Bryan Newland,

Assistant Secretary – Indian Affairs.