



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 05 2017

Memorandum

To: Regional Solicitors
Field Solicitors
SOL-Division of Indian Affairs

From: Solicitor Hilary C. Tompkins

Subject: Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Checklist)

The Solicitor's Office (SOL) performs a critical role in the fee-to-trust (FTT) process by ensuring full legal compliance with applicable statutory and regulatory requirements as well as with the mandates of recent legal precedent. The backdrop of this work is the importance of upholding the Federal trust responsibility to Tribal nations, providing uniform treatment to all Tribes, and facilitating the restoration of Tribal homelands. Taking land into trust is one of the most important functions that the Department of the Interior (Department) undertakes on behalf of Indian Tribes and individual Indians. Restoring Tribal lands to trust status is essential to ensure cultural preservation, self-determination and self-governance. Accordingly, we must perform our work without creating or imposing unnecessary and costly procedural or substantive burdens internally and externally.

To this end, I am directing all attorneys within SOL to follow a uniform process and undertake our legal review of FTT applications in a consistent manner. As your offices are undertaking FTT application reviews, please abide by the following requirements.¹

GENERAL PRINCIPLES.

1. SOL attorneys conducting FTT application review and processing must not require information from applicants or the Assistant Secretary-Indian Affairs (AS--IA)/Bureau of Indian Affairs (BIA) beyond what is required by applicable statutes and regulations, guidance memoranda identified herein, and this Checklist.
2. SOL attorneys must provide Tribal attorneys with timely and courteous requests for information in the event SOL needs additional information from Tribal applicants to conduct legal review of pending FTT applications.
3. Title work for acquisitions under 25 C.F.R. Part 151 must meet the requirements of 25 C.F.R. § 151.13. Compliance with the Department of Justice Title Standards 2001 (DOJ Standards)

¹ This checklist replaces the memorandum issued on March 7, 2014. On May 16, 2016, the Bureau of Indian Affairs revised its regulations governing the submission of title evidence, therefore necessitating changes to the original checklist.

is not required for acquisitions of land in trust for individual Indians or Indian Tribes. However, § 151.13 allows an applicant to elect to submit title evidence that meets DOJ Standards. In that event, the entirety of the DOJ Standards should be applied to the title review. Further instructions on title work for mandatory and discretionary acquisitions are provided below.

4. SOL is discouraged from recommending the use of indemnification agreements to the BIA to facilitate the processing of FTT applications. However, in a limited number of cases, an indemnification agreement between the BIA and a Tribal applicant² 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 FTT application. Concurrence of the SOL-Division of Indian Affairs (DIA) Associate Solicitor or his designee must be secured for the indemnification agreement before it can be recommended to the BIA and used in processing the FTT application.

GAMING OR NON-GAMING ACQUISITION.

1. Gaming Acquisition. If AS-IA states that the purpose for which the land will be used is gaming, SOL-DIA will generally be responsible for SOL review of the application, except for title work. SOL-DIA will prepare an analysis of the statutory authority for the acquisition, review documents prepared in compliance with the National Environmental Policy Act, as applicable, review the draft decision document, and provide counsel on any additional legal issues that arise during AS-IA/Office of Indian Gaming (OIG) review of the application. SOL-DIA will also conduct all needed legal work concerning whether the land is eligible for gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. and 25 C.F.R. Part 292. The reviewing SOL-DIA attorney shall work with OIG as needed in that process.³ Regional and Field Office attorneys are responsible for completing title work associated with gaming applications.
2. Non-Gaming Acquisition. As a general matter, all legal work associated with FTT applications that are not for gaming will be processed by attorneys in our Regional and Field offices. However, unless a statutory authority opinion has already been completed for a previous acquisition for a Tribe, Regional and Field offices must consult with SOL-DIA regarding the analysis of the statutory authority for the acquisition.

MANDATORY ACQUISITIONS.

If the legal authority for the proposed acquisition specifies a mandatory acquisition (e.g., pursuant to statute or judicial decree), then SOL review must be consistent with the BIA's Updated Guidance on Processing of Mandatory Trust Acquisitions (as Supplemented on

² Note that multiple Tribes may submit a joint application for land into trust. The use of the words "Tribe" or "applicant" in the singular in this Checklist does not preclude the submission of an application from multiple Tribal applicants.

³ Gaming eligibility determinations made in connection with a trust application must also comply with the terms of any Memorandum of Understanding between SOL and the National Indian Gaming Commission Office of General Counsel that is effective at the time the application is being reviewed by SOL-DIA.

January 14, 2014) (Mandatory Acquisition Memo) and the legal authority requiring the trust acquisition.

1. SOL is responsible for the determination of whether a legal authority specifies either a mandatory or discretionary acquisition.
2. SOL must confirm that AS-IA/BIA has evidence to demonstrate that the property to be acquired meets all required criteria of the authorizing legal authority.
3. An acquisition requested pursuant to Section 217(c) of the Indian Lands Consolidation Act, 25 U.S.C. § 2216(c) will be processed as a mandatory acquisition.
4. Consistent with the Mandatory Acquisition Memo, SOL need not conduct any title work in connection with a mandatory acquisition unless required by the legal authority mandating the acquisition.

DISCRETIONARY ACQUISITIONS.

If the legal authority for the proposed acquisition is discretionary (e.g., pursuant to Section 5 of the Indian Reorganization Act (IRA) (“The Secretary of the Interior is hereby authorized, in his discretion . . . ”)), then SOL provides legal advice to the AS-IA/BIA in processing the application pursuant to the IRA, 25 C.F.R. Part 151, this Checklist, and the most recent version of the BIA’s Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (Handbook).

When a Tribe elects to submit title evidence meeting the DOJ Standards, those standards apply as a whole to the title review process. Apply all relevant DOJ Standards, all relevant provisions from the Handbook, and any applicable state statutes concerning title work.

1. Contiguity. If the issue is raised, confirm whether the parcel is contiguous to the Tribal applicant's reservation.
 - a. A request for an on-reservation acquisition (parcel located within or contiguous to a reservation) must be evaluated pursuant to the criteria listed in 25 C.F.R. § 151.10.
 - b. A request for an off-reservation acquisition (parcel located outside of and noncontiguous to a reservation) must be evaluated pursuant to the criteria listed in 25 C.F.R. § 151.11.
2. National Environmental Policy Act (NEPA) Review. NEPA compliance is required for federal actions to accept discretionary trust applications. When requested by AS-IA/BIA, the reviewing SOL attorney will review both the draft and final versions of NEPA documents, including categorical exclusions, environmental assessments, findings of no significant impact, and environmental impact statements prepared by AS-IA/BIA to ensure compliance with NEPA. *See* 516 DM 2-4, 10.

3. Carcieri Analysis (Statutory Authority Opinion). For every Tribal FTT application submitted pursuant to the first definition of “Indian” under the IRA (25 U.S.C. § 5129 – “any recognized Indian tribe now under Federal jurisdiction”), the reviewing SOL attorney must ascertain whether the applicant Tribe was “under Federal jurisdiction” in 1934 as required by the U.S. Supreme Court’s holding in *Carcieri v. Salazar*, 555 U.S. 379 (2009). SOL statutory authority opinions on whether a Tribe was under federal jurisdiction must follow the framework set forth in M-Opinion 37029, “*The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act*” (March 12, 2014) (M-37029).
 - a. This requirement is met and no further analysis is needed if:
 - i. SOL analysis has already been performed;⁴ or
 - ii. The Tribal applicant voted in an election under Section 18 of the IRA on whether to accept the IRA and there are no unique factors that warrant further analysis to ensure the defensibility of the decision.⁵
 - b. If the *Carcieri* analysis requirement is not met under subpart 3.a. above, then the reviewing SOL attorney will prepare a *Carcieri* analysis consistent with M-37029 and the legal opinions concerning the Secretary’s FTT acquisition authority that SOL has issued since *Carcieri v. Salazar*. Any *Carcieri* analysis prepared pursuant to this paragraph must be reviewed and approved by the SOL-DIA Associate Solicitor or his designee.
 - c. If there are any questions about the analysis that needs to be undertaken as part of reviewing a particular FTT application, consult the SOL-DIA Branch of Environment and Lands.

Statutory authority opinions under the second or third definitions of “Indian” under the IRA, or other specific statutory authority such as a Restoration or Settlement Act, must also be reviewed and approved by the SOL-DIA Associate Solicitor or his designee.

4. Review of Draft Decision. Upon request by BIA or when deemed necessary by SOL, including when a decision is likely to be challenged, the reviewing SOL attorney shall review the draft decision for legal sufficiency. Reviewing SOL attorneys will conduct their review in a timely manner and keep AS-IA/BIA apprised of progress and the likely completion date for any legal review.
5. Patchak Patch. In response to the U.S. Supreme Court’s ruling in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), the Department has

⁴ A list of issued *Carcieri* analyses are on the SOL Portal Indian Affairs page under the “*Carcieri* Opinions” folder of the “Division’s Legal Opinions”. If an analysis has already been completed, the Department’s decision document for the proposed FTT acquisition must still state whether the Tribal applicant was “under federal jurisdiction” in 1934, and may incorporate by reference the *Carcieri* analysis previously completed by SOL.

⁵ M-37029 at 20-21.

issued a final rule revising 25 C.F.R. § 151.12, which now requires the Department to acquire land in trust immediately upon:

- a. approval of the trust application, when the approval is made by the Secretary or the Assistant Secretary; or
- b. exhaustion of administrative remedies following approval of the trust application, when the approval is made by a BIA official.

Reviewing SOL attorneys must complete their responsibilities relating to the processing of such applications under § 151.13 and any other Departmental requirements in a timely manner to ensure that trust acquisitions can be finalized as now required by § 151.12, and will work closely with the AS-IA/BIA and SOL-DIA to ensure compliance.

6. Title Opinions. SOL is responsible for preliminary title opinion (PTO) and final title opinion (FTO) work associated with discretionary trust acquisitions. Title examinations for discretionary acquisitions must comply with § 151.13, the Handbook, DOJ Standards when a Tribe elects to submit title evidence meeting DOJ Standards, and any applicable state law.

In preparing a PTO or FTO, SOL attorneys will adhere to the guidance below and will not require additional information beyond the regulations, Handbook requirements, DOJ Standards (if applicable), and any applicable state law without obtaining written approval from the SOL-DIA Associate Solicitor or his designee.

25 C.F.R. § 151.13 provides that the Secretary shall require the elimination of liens, encumbrances, or infirmities that make title to the land unmarketable. See Appendix 1 for a definition of the term “unmarketable title.” In addition, the Secretary may require the elimination of any liens, encumbrances, or infirmities prior to taking final approval action on an acquisition.

- a. Preliminary Title Opinion. SOL attorneys should follow the following steps in preparing a PTO:
 - i. Obtain a written request from AS-IA/BIA for a PTO. The request should include:
 1. A short summary of the proposed acquisition (on/off-reservation; authority for the acquisition; important relationships to other parcels; intended use of the property by the applicant; acreage involved).
 2. A single copy of title evidence meeting the requirements of 25 C.F.R. § 151.13.
 3. Draft deed in trust to the United States, conforming to local statutory recording requirements and/or Draft Acceptance of Conveyance.
 4. Parcel boundary and location maps, if applicable.
 5. An Initial Certificate of Inspection and Possession (CIP), if one has been completed.
 6. A written request for approval of the acquisition which adequately demonstrates it has been duly authorized by the Tribe. A Tribal

applicant need not include a Tribal council resolution or other enactment as long as the written request adequately demonstrates that it has been duly authorized by the Tribe.

7. A copy of any agreement (such as a lease or right-of-way) currently applicable to the property and a copy of any instrument that creates an encumbrance on title.
 8. If the parcel is identified as a lot in a subdivision, a copy of the plat (which often contains restrictions) and, if there are any deed restrictions, a copy of each document that creates a restriction.
 9. If the Tribal applicant has submitted evidence meeting the DOJ Standards, any other document required by the DOJ Standards⁶ and the Handbook.
 10. Following consultation with BIA, SOL may request additional documentation not provided for above if such additional documentation will eliminate impediments to the acquisition.
- ii. Land Description Review. As part of preparing a PTO, check that AS-IA/BIA has provided a review of the legal description of the parcel, including acreage, from: (1) a BLM Indian Land Surveyor (BILS); or (2) in the event a BILS review is unavailable, other appropriate source as identified by the Regional BIA Director for the region where the parcel is located.
 - iii. A PTO should be issued upon completion of SOL's preliminary title work.
 - iv. When deemed necessary, SOL will prepare a curative opinion if the PTO identifies objection(s) that must be remedied and a question is raised whether the applicant's proposed remedy cures the objection(s).
 - v. Sample PTOs will be provided in the future.
- b. Final Title Opinion. SOL attorneys should follow the steps below in preparing an FTO:
- i. Obtain a written request from AS-IA/BIA for an FTO. This request should include:
 1. An explanation of: anything out of the ordinary concerning the request; anything that is not obvious from the documents attached to the request; and anything that is a change from the circumstances at the time the PTO work was completed.
 2. The Environmental Compliance Review Memorandum required by the Handbook.
 3. A single copy of the executed, recorded deed in trust to the United

⁶ For example, when using DOJ Standards a property appraisal is not required when there will be title insurance, however, the Tribe should provide evidence to ensure that an appropriate amount is listed on the title policy, based on the reasonable value of the property. The DOJ Standards require that the title insurance policy not limit the liability of the title insurance company to a sum less than 50 percent of the reasonable value of the property. However, for acquisitions valued at more than \$100,000, the limitation of liability of the issuing title insurance company may be limited to 50 percent of the first \$50,000 and 25 percent of the value in excess of that amount.

- States, which conforms to local statutory requirements.
4. If the applicant submitted evidence in compliance with the DOJ Standards, a single copy of the final title insurance policy.
 5. Updated title evidence to date of closing including evidence of corrective actions.
 6. The land description review.
 7. A representation from the applicant that there have been no materials furnished nor repairs made that would constitute a lien against the parcel to be acquired.
 8. The final CIP.
 9. A single copy of SOL's PTO, and if applicable, curative opinion, for the application and the page(s) from the preliminary title evidence showing the Special Exceptions at the time of the PTO.
 10. Any other document required by the DOJ Standards, if applicable, and the Handbook.
- ii. An FTO should be issued upon completion of SOL's final title work.
 - iii. Sample FTOs will be provided in the future.

CONCLUSION

SOL legal review and clearance of FTT applications must be performed in a consistent and timely manner. To that end, all SOL attorneys will adhere to this memorandum when performing such functions. If there is a need for a variance from these requirements, please elevate such issues to the SOL-DIA Associate Solicitor in due course. Your cooperation and assistance in achieving efficient and orderly legal review of FTT applications is much appreciated.

APPENDIX 1 – KEY TERMS

Abstract of title. An abstract of title is a compilation of all instruments of public record which in any manner affect title to the parcel of real property. It is a condensed history of land title and has copies of all instruments that form a link in the chain of title together with any other relevant matters of public record.

Certificate of Inspection and Possession (CIP). A CIP is documentation of a physical inspection of the property to be acquired. It can independently reveal evidence of possible claims of use or ownership.

Contiguity or contiguous parcels. Parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way, including parcels that touch at a point. *See Desert Water Agency v. Acting Pacific Regional Director*, 59 IBIA 119, 137 (2014), *citing Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008). *See also State of Kansas*, 56 IBIA 220, 230 (2013) (“Parcels that share a boundary are deemed ‘contiguous.’”).

Unmarketable title. Under 25 C.F.R. § 151.13, the Solicitor’s Office assists in determining whether encumbrances or infirmities in title must be eliminated. Circumstances that may make title unmarketable include the following non-exclusive list of examples:

- the applicant’s title is not the interest attempted to be conveyed;
- the applicant holds only a partial interest and the applicant seeks to have the whole property/an entire interest acquired in trust;
- title evidence shows that a third party holds an unresolved competing claim to title;
- land use restrictions - as determined by the BIA in consultation with the Tribe - which defeat, obstruct, or impair the purposes behind the proposed transfer;
- a complete absence of right of access if access is vital to the purpose of the proposed transfer;
- a pending suit for condemnation or other nonfrivolous litigation or tax liens or undisposed interests of minors affecting title;
- confusion and/or differences in the names of prior grantors that defeat title in the applicant;
- a lack of authorization for a deed(s) in the chain of title clouds or defeats the applicant’s title;
- outstanding options to purchase or other unresolved options; or
- the applicant’s title is based on court a decree which is still subject to appellate review.