2016 TITLE EVIDENCE REGULATION UPDATE

PIA CONFERENCE

Alex Dyste,
Attorney-Adviser,
Office of the Field Solicitor

WHY PUT LAND INTO TRUST?

- "[T]o reverse the destructive assimilation policies of the General Allotment Act, . . . In order to promote tribal self-determination and economic development, Congress authorized the Secretary to place land into trust for Indian tribes. This fundamental component remains the primary means by which the Department implements the Indian Reorganization Act's 'overriding purpose' of ensuring that 'Indian tribes would be able to assume a greater degree of self-government, both politically and economically.' Nearly eighty years later, self-determination and self-governance have proven to be the right federal policy."

  — *Executive Branch Standards for Land-in-Trust Decisions for Gaming Purposes: Oversight Hearing Before the Subcomm. on Indian and Alaska Native Affairs*, 113th Cong. (2013)(statement of Kevin Washburn, Asst. Sec'y Indian Affairs).

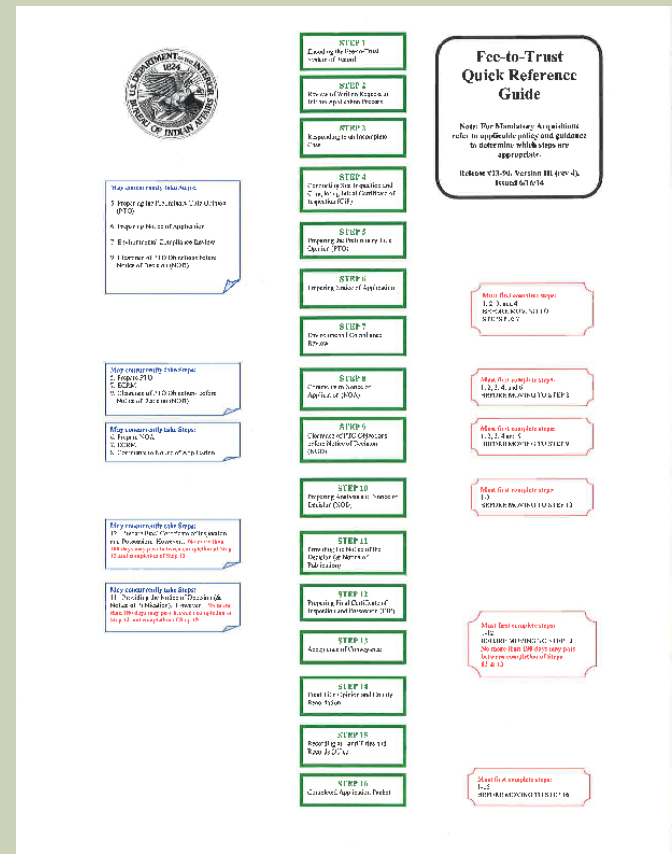
- "Restoring tribal homelands provides benefits to tribes as well as surrounding communities. As a result, tribes have greater jurisdiction and safer communities. It also promotes economic development."

  — Larry Roberts, Acting Ass't. Sec'y Indian Affairs (Mary Annette Pember, *Isleta Pueblo Score Largest Parcel of Trust Land in Single Application*, INDIAN COUNTRY TODAY (Jan. 20, 2016)

- "Having fee simple lands transferred into federal trust status is a powerful tool for making reservations whole and protecting Indian lands for future generations. When fee lands are returned to trust, Indian nations and people begin to eliminate the checkerboard pattern of trust and fee lands and regain control of lands on the reservation." *Fee-to-Trust Transfer*, INDIAN LAND TENURE FOUNDATION (last visited June 22, 2016).

FEE TO TRUST PROCESS

- Today’s presentation will focus primarily on the Preliminary Title Opinion (PTO) process.
- The PTO process may take place concurrently with preparation of the NOA and Environmental Compliance Review.



PRELIMINARY TITLE OPINION

- Purpose of a title review— A thorough review of title is necessary prior to the closing of a real estate transaction because it discloses variances and conditions that affect ownership and the right to use a property. In other words, it is an examination of the ownership of a piece of land.
- What does the title review process entail?— The process entails an examination of a property's title commitment or chain of title (abstract), the encumbrances, liens, and judgments affecting a property, as well as a review of documents required by regulations or DOI policies.
- By reviewing title, the Solicitor's Office is able to determine whether there are any "clouds" on title affecting ownership.

TITLE EVIDENCE-RELATED DOCUMENTS TO BE INCLUDED IN THE APPLICATION

- Title evidence meeting the requirements of 25 C.F.R § 151.13; however, the evidence need not be submitted at the time of the initial application. (Title evidence will be required to be submitted before a complete review of the application can take place, though).
  - The new regulation continues the former requirement that title evidence must be submitted and reviewed by DOI before title is transferred to the U.S.
- Deed or other conveyance instrument providing evidence of the applicant's title.
  - If the applicant does not yet have title, please submit the deed providing evidence of the transferor's title and a written agreement or affidavit (sworn statement) from the transferor that title will be transferred to the United States on behalf of the applicant.

NEW TITLE EVIDENCE REGULATIONS

- 25 C.F.R Part 151
- Effective May 16, 2016
- Summary:
  - Eliminates the requirement for applicants to submit title evidence in conformance with the DOJ Title Standards 2001 because those standards do not apply in the fee-to-trust context, and it introduces a new targeted requirement for title evidence.
- The purpose of the new title evidence regulations is to make the title evidence requirement of the application easier for applicants, reduce the applicant’s costs, and ideally speed up title review at the Solicitor’s Office.

25 C.F.R § 151.13

- (a) If the Secretary determines that she will approve a request for the acquisition of land from unrestricted fee status to trust status, she <u>shall</u> require the applicant to furnish title evidence 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; and
  - (2) Either:
    - (i) A current title insurance commitment; <u>or</u>
    - (ii) The policy of title insurance issued to the applicant or current owner <u>and</u> an abstract of title dating from the time the policy of title insurance was issued to the applicant or current owner to the present.
  - (3) The applicant may choose to provide title evidence meeting the title standards issued by the U.S. DOJ, in lieu of the evidence required by paragraph (a)(2) of this section.

25 C.F.R § 151.13

- (a)(2) Either:
  - (i) A current title insurance commitment;

- Title insurance commitment:
  - From an approved title insurance provider— *See* 1994 DOJ list of Approved Attorneys, Abstracters, and Title Companies.
    - If there is a provider you would like to use that is not on this list, please contact the BIA for instructions on the approval process to become an authorized provider.
  - A title insurance commitment is a commitment to issue an insurance policy for the property after closing. A commitment will reflect exclusions (i.e., exceptions) from coverage that will be included in the insurance policy, if a title insurance policy is purchased. The insurance policy will not protect the insured from defects arising from the exclusions.
  - If the applicant ultimately purchases a title insurance policy, the insurance policy issued upon closing must be on the most recently approved ALTA form.

TITLE COMMITMENTS

- Why does SOL review the title commitment?
  - We carefully review the title commitment because it informs us of what the title company will not be responsible for if an issue arises. If during the time the U.S. owns the property, in trust, a problem arises from one of these excluded items, we cannot turn to the title company for help.
  - The title company will only help if an issue arises that is a surprise.

- When does an insurance exception become a title opinion's objection?
  - Two types of title exceptions:
    - (1) Those that refer to an outstanding interest that is merely a limitation on the use of land (e.g., easements, leases, roads).
    - (2)Those that refer to an outstanding interest that could result in the loss of title to the property (e.g., mortgages, liens, rights of adverse possession).
  - As to the first type, SOL determines that the interest will not interfere with the proposed acquisition. We require a certification that the interest won't interfere with the applicant's contemplated use of the property (known as a statement of non-interference).
  - As to the second type, the exception must be eliminated from the policy.

- Why are these types of exceptions treated differently?
  - 25 C.F.R. §151.13(b)
    - The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and
    - She shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable.
      - Generally, the liens, encumbrances, infirmities, claims (e.g., liens or taxes), or outstanding rights which, if not eliminated, may possibly defeat or adversely affect title or cause losses to the U.S. must be eliminated.

INSURANCE POLICY + ABSTRACT

- (a)(2)
  - (ii) The policy of title insurance issued to the applicant or current owner <u>and</u> an abstract of title dating from the time the policy of title insurance was issued to the applicant or current owner to the present.

- "The policy of title insurance issued to the applicant or current owner"
  - This is the current insurance policy insuring the parcel from when the land was acquired in fee. Reviewing this document will allow SOL to view what was recorded against the property <u>prior</u> to the time the insurance policy was issued to the applicant or current owner.

- “an abstract of title dating from the time the policy of title insurance was issued to the applicant or current owner to the present.”
  - Abstract of title—
    - “A concise statement, usu. prepared for a mortgagee or purchaser of real property, summarizing the history of a piece of land, including all conveyances, interests, liens, and encumbrances that affect title to real property.” Black’s Law Dictionary 4 (4th ed. 2011).
    - “An abstract of title means a compilation of all instruments of public record which in any manner affect title to the parcel of real property.” BIA Fee-to-Trust Handbook, Version IV (rev. 1), Issued: 6/28/16
    - “to the present” means a date as close as possible to the date SOL reviews the abstract.
    - These can be obtained through an abstract company or real estate attorney, but the provider must have the appropriate certification to do abstract work. The cost of an abstract and the length of time it takes to prepare depends on the complexity of title, the time period the abstract is covering, etc. In some states, an abstracter’s rates are governed by statute.

ABSTRACT OF TITLE

- The abstract of title will reflect the time period between the time the applicant or current owner acquired the property to the present. Therefore, the abstract may only reflect the current owner.
- What is the purpose of requiring an abstract?
  - Confirm the current owner of the property and
  - Indicate whether any liens, encumbrances, or infirmities have been placed on title prior to acceptance in trust.
  - The applicant is able to obtain an abstract in lieu of a title commitment, though both methods serve the same purpose.
- The abstract must be updated through closing. This means that an abstract will be provided to the BIA at the beginning of the fee-to-trust process <u>as well as</u> after the deed has been accepted.

- 25 C.F.R. § 151.13(a)(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.
    - This provision provides that an applicant can obtain a title commitment AND a title insurance policy.
    - The new rule still allows applicants to opt to continue to submit title evidence in the same way it has been done previously.
  - As a reminder, DOJ Title Standards do not apply in the fee-to-trust context. However, should an applicant opt to submit title evidence that meets the DOJ Title Standards, then the applicant must comply with all of the requirements of that process.

TITLE EVIDENCE AT THE FTO STAGE

- The type of "updated" title evidence necessary at the FTO stage depends on the form of title evidence initially submitted:
  - If the applicant submitted a title commitment, then the applicant may submit a title insurance policy issued on or subsequent to the date of closing (i.e., the date the warranty deed is recorded in the county).
  - If the applicant submitted a title commitment, then the applicant may submit an updated title commitment issued on or subsequent to the date of closing.
  - If the applicant submitted an owner's title insurance policy and an abstract, then the applicant must submit an updated abstract issued on or subsequent to the date of closing.

APPLICABILITY OF NEW RULE

- The new rule applies to all trust applications submitted after May 16, 2016.
- The new rule also applies to all trust applications that are pending and for which the PTO has not yet been prepared.
  - If the applicant has already submitted title evidence that meets the former regulation (i.e., a title commitment), then the applicant will not be required to resubmit title evidence that meets the new rule.
  - BIA will not be contacting tribes that have already submitted applications that conform to the former rule because it assumes that a tribe would not want to duplicate its efforts by submitting new title evidence.
- The new rule does not apply to trust applications that are pending and for which the PTO has already been issued.

WHAT ELSE DOES SOL USE IN OUR TITLE REVIEW AT PTO STAGE?

- Written request from the tribe or individual seeking to have the property taken into trust— SOL Checklist 12(c)(ii)(1), Handbook at Step 2.1
- Title evidence documents— SOL Checklist at 12(c)(ii)(2)Handbook at Step 2.5(b)(2)
- Copies of any agreements applicable to the parcel (e.g., a lease)— SOL Checklist at 12(c)(ii)(3), Handbook at Step 5.2(f)
- Property boundary and maps— SOL Checklist at 12(c)(ii)(4), Handbook at Step 2.5(a)
- Draft deed— SOL Checklist at 12(c)(ii)(5), Handbook at Step 2.5(c)
- Land Description Review (LDR)— SOL Checklist at 12(c)(iii), Handbook at Step 2.5(e)
- Initial CIP (recommended)— Handbook at Step 4
- Fee deed conveying the property to the applicant– Handbook at Step 2.5(b)(1)

PERFORMANCE OF SITE INSPECTION AND PREPARATION OF CIP

- Purpose of CIP: The two critical components of a CIP, which include a physical inspection of the land and inquiry of the landowner as to any third party rights in the land, can reveal evidence of possible claims of use or ownership.
- Who may perform a CIP? *See* Handbook at Step 4.3(a)
  - (1) A duly authorized BIA or other Federal employee; or
  - (2) A tribal employee (whether or not performing a contracted/compacted BIA realty function) provided:
    - The tribal employee is not an employee of the landowner (the applicant tribe) <u>AND</u> the CIP is approved by the BIA or other Federal employee.
      - E.g., a Tribe may have a contract with the BIA to perform realty services for *other tribes* in the region.
  - "Other federal employee" includes, for example, the Bureau of Land Management or an individual approved through CFEDs.
  - Even if a tribe has a contract/compact for realty purposes, the tribal employee performing the CIP cannot be employed through the landowner/Grantor tribe. This is in order to avoid the appearance of a conflict of interest.
  - Applies to on and off-reservation acquisitions.

ANTI-DEFICIENCY ACT

- Codified at 31 U.S.C. § 1341
- Generally, the Act prohibits government employees from making expenditures or incurring obligations in excess of available appropriations or in advance of appropriations. *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997).
- "In excess of" 31 U.S.C. § 1341(a)(1)(A)
- "In advance of" 31 U.S.C. § 1341 (a)(1)(B)
- Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

HOW DOES THE ANTI-DEFICIENCY ACT AFFECT TITLE REVIEW?

- While potential violations of the Act do not affect ownership of the land, they may subject the U.S. to financial obligations in the future, which could result in violations of the Act. Therefore, we will require terms, conditions, or provisions of agreements that could trigger violations of the Act to be resolved prior to taking a property into trust.
- Why do we care?
  - Federal employees who violate the Act may be subject to administrative and criminal penalties.

ANTI-DEFICIENCY ACT VIOLATIONS

- Maintenance obligations
- Cost-sharing agreements
- Agreements in which the Grantor agrees to reimburse the Grantee for damages
- Mutual indemnification clauses
  - Grantor (Tribe/Tribe's successor in interest) and Grantee (Third party) agree to indemnify each other.
- Binding arbitration clauses
- Agreements to pay attorney fees
- "Grantor (Tribe) shall be responsible for any and all costs associated with moving or removing its subsurface utilities should they interfere with the current *or future* granted uses by Grantee (County)."

SOLUTIONS FOR POTENTIAL ANTI-DEFICIENCY ACT VIOLATIONS

- There is no "one size fits all" solution to resolving potential Anti-Deficiency Act violations. These will have to be resolved on a case by case basis.
- Possible solutions include, but are not limited to:
  - (1) Amending an agreement so that it is no longer binding on the successors of the parties to the original agreement or
  - (2) Amending the agreement to remove the problematic terms or
  - (3) Terminating the agreement
- Indemnification agreements (in which a Tribe indemnifies the U.S.) are heavily disfavored.

ENCROACHMENTS

- (1) An infringement of another's rights. (2) An interference with or intrusion onto another's property. Black's Law Dictionary 226 (4th ed. 2011).
- We care about encroachments because they can lead to litigation and financial liability. In most cases, we cannot acquire land when we know that an applicant is encroaching onto a neighboring property or vice versa.
- Encroachments will be resolved on a case by case basis.
- Sometimes an applicant does not care if their neighbor is encroaching onto their property. While this position will be taken into consideration, that does not mean that SOL will view the encroachment as a non-issue.