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DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

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RIN 1076-AF28

Title Evidence for Trust Land Acquisitions

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This rule deletes the requirement for fee-to-trust applicants to furnish title evidence that meets the "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States" issued by the U.S. Department of Justice (DOJ), and replaces the requirement with a more targeted requirement for title evidence, because adherence to the DOJ standards is not required for acquisitions of land in trust for individual Indians or Indian tribes.

DATES: This rule becomes effective on May 16, 2016.

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Director, Office of Regulatory Affairs and Collaborative Action, Office of the Assistant Secretary – Indian Affairs; telephone (202) 273-4680, elizabeth.appel@bia.gov.

SUPPLEMENTARY INFORMATION:

I. Overview of Rule

This rule replaces the "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States" issued by DOJ (DOJ standards) with a more targeted title evidence standard. Under the new standard, applicants must furnish a deed evidencing that the applicant has ownership, or a written sales contract or written statement from the transferor that the applicant will have ownership. Applicants must also submit either (1) a current title insurance commitment; or (2) the policy of title insurance issued at the time of the applicant's or current owner's acquisition of the interest and an abstract dating from the time the interest was acquired. This rule does not preclude applicants from having title confirmed pursuant to all

requirements of DOJ standards (as those standards apply in the land-into-trust context) if the applicant so chooses.

The rule continues the current requirement that title evidence must be submitted and reviewed by the Department of the Interior (Department) before title is transferred. The rule continues to provide that the Secretary has discretion to require the elimination of any liens, encumbrances, or infirmities prior to acceptance in trust. The rule also continues the practice of requiring the elimination of any legal claims, including but not limited to liens, mortgages, and taxes, determined by the Secretary to make title unmarketable, prior to acceptance in trust.

II. Background

Section 5 of the Indian Reorganization Act (IRA) is the primary authority providing the Secretary of the Interior (Secretary) with discretion to acquire land in trust for individual Indians or Indian tribes. *See* 25 U.S.C. 465. Congress has also enacted other statutes that authorize the discretionary acquisition of lands for specific tribes. The Department's regulations at 25 CFR part 151 establish the process for discretionary trust acquisitions pursuant to section 465 and other statutory authority. Section 151.13 of the regulations published in 1980 required the applicant to furnish title evidence meeting the DOJ standards if the Secretary determines to approve a fee-to-trust application.

On March 1, 2016, BIA published an interim final rule deleting the requirement for the applicant to furnish title evidence meeting DOJ standards because those standards are not required for acquisitions of land in trust for individual Indians or Indian tribes. *See* 81 FR 10477. On April 15, 2016, BIA delayed the effective date of the rule to May 16, 2016 to

allow BIA time to publish technical revisions. *See* 81 FR 22183. This rule provides those technical revisions.

III. Comments on the Interim Final Rule

The BIA received 13 comments in response to the interim final rule, most asking questions seeking clarification of the regulatory text. Several commenters supported the rule, but requested clarification. Commenters who opposed the rule stated that the current DOJ standards are necessary to protect the public, including adjoining landowners and other third parties, and protect against conflicts of interest, and that DOJ standards are more reliable and less costly.

After careful consideration of the comments and applying its own experience in reviewing fee-to-trust applications and title evidence, BIA has determined that the final rule provides sufficient standards to protect the United States. The purpose of title evidence requirements is to ensure that the Tribe has marketable title to convey to the United States, thereby protecting the United States. *See Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 216 (2015). The rule revisions allow for a less costly alternative to providing a title insurance policy under DOJ standards, while still ensuring sufficient evidence of good title. The following are summaries of the substantive points made in these comments, and the Department's responses.

A. "Written Evidence"

Several commenters requested clarification of what "written evidence" is required by paragraphs (a)(1) and (a)(2) of the interim final rule. In paragraph (a)(1), the interim final rule required "written evidence of the applicant's title or that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust." In paragraph (a)(2), the

interim final rule required "written evidence of how title was acquired by the applicant or current owner." Commenters stated that it appeared the same evidence may satisfy both (a)(1) and (a)(2), in the form of the applicant's deed. To clarify, the final rule specifies that the written evidence must be a deed or other conveyance instrument providing evidence of the applicant's title. The final rule also specifies that if the applicant does not yet have title, the written evidence must be: (1) a deed or other conveyance instrument providing evidence of the transferor's title; and (2) a written agreement or affidavit from the transferor demonstrating that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust.

A few commenters also noted that (a)(1) and (a)(2) appeared to impose redundant requirements. The final rule addresses this comment by deleting (a)(2), because the specified written evidence required by (a)(1) will necessarily also serve as evidence of how the applicant or current owner acquired title.

B. Alternatives to a Title Insurance Policy

A commenter requested clarification of paragraph (b)'s requirement for a "current title insurance commitment" to confirm that no title insurance policy needs to be purchased in the name of the U.S. in trust for the applicant. The commenter is correct that no title insurance policy needs to be purchased if the applicant provides a current title insurance commitment. Also, if the applicant or current owner already obtained a title insurance policy when they acquired the land, the applicant need not purchase a new title insurance policy if they provide the previously issued policy and an abstract of title dating from the time the land was acquired by the applicant or current owner to the present. No clarification to the rule was made in response to

this comment because the rule already states the alternatives to purchasing a title insurance policy.

Another commenter noted that, because the rule requires only the commitment to issue title insurance rather than an actual title insurance policy, that title companies may stop issuing commitments without a final title policy. For BIA's purposes, the title commitment is sufficient evidence and, in recognition that there is an extra cost imposed for obtaining the actual title insurance policy, the rule requires only the title commitment. Currently, title companies generally will issue a commitment without requiring the purchase of an actual policy; the possibility that title companies may require the purchase of an actual policy in the future does not provide a basis for BIA to require the policy. An insurance policy is not required if the applicant is proceeding with a title commitment, but applicants may choose to purchase a policy if they so desire; the rule does not prevent them from doing so.

C. Previously Issued Title Insurance Policy

A commenter requested clarification of the requirement for "the policy of title insurance issued at the time of the applicant's or current owner's acquisition of the land and an abstract of title dating from the time the land was acquired by the applicant or current owner." This commenter stated that an existing title insurance policy may not have been issued at the time of the acquisition, and suggested revising the provision to simply state "the policy of title insurance issued to the applicant or current owner." The final rule incorporates this suggestion and clarifies that the abstract must address the time period beginning when the insurance policy was issued to the applicant or current owner.

One commenter asked whether BIA, and the Office of the Solicitor, will still require a current title commitment, even when the applicant provides the previously issued policy and abstract. Upon the effective date of the rule, the BIA and Office of the Solicitor will require only the title evidence listed in the rule.

D. Abstract of Title

A commenter requested clarification as to whether the requirement for an abstract of title is intended to address title going forward rather than backward, and if so, that it would not be a title abstract in the traditional sense because the abstract would reflect only the current owner. The final rule clarifies that the requirement is intended to address title going forward, by adding "to the present." The commenter is correct that the abstract of title will be straightforward, and may only reflect the current owner, but the abstract will serve the purpose of confirming the current owner's ownership and showing whether any liens, encumbrances, or infirmities have been placed on title prior to acceptance in trust, in lieu of requiring the applicant to purchase a new title commitment.

E. Marketability and Exceptions to the Title Insurance Policy

A commenter requested clarification on what "marketability" means. The commenter also asked how BIA will address reversionary clauses and defeasible title issues and their effect on marketability. The final rule makes no substantive change to the provision allowing BIA to require the elimination of any such liens, encumbrances, or infirmities if BIA determines they make title to the land unmarketable. Likewise, the final rule makes no substantive change to the meaning of "unmarketable."

A commenter suggested the rule explain that the deed will not be recorded until exceptions to the title insurance policy are satisfied. The final rule does not include this explanation because it is inaccurate. There is no requirement that all exceptions be eliminated. The Department reviews and makes a determination on each exception as to whether it must be eliminated, and does not require the elimination of exceptions that do not affect the title to the land.

F. Standards to be Used in Place of DOJ Standards

A few commenters requested more specifics as to what title standards the Department will apply in lieu of the DOJ standards. For example, one commenter asked whether the Department will still require applicants to use the American Land Title Association (ALTA) U.S. policy form in those cases in which the applicant chooses to obtain title insurance. The BIA has updated the fee-to-trust handbook to ensure it is consistent with this final rule. The revised version of the fee-to-trust handbook specifies that, if the applicant chooses to submit title insurance, it should use the most current version of the ALTA U.S. policy form. A commenter also asked how the Department will determine who is qualified to provide title evidence, in lieu of the DOJ standards. The revised fee-to-trust handbook specifies that the Department will look to the appropriate licensing authority for qualifications. A commenter also asked what type of deed will be required to convey title to the U.S. on behalf of the applicant. The Department will continue the approach it has taken in the past (requiring a warranty deed in nearly all instances), specified in the revised fee-to-trust handbook.

A commenter asked whether the Department will look to State laws for guidance. The Department relies on national standards, as set out in the rule and revised fee-to-trust handbook, rather than State laws, with regard to the Department's decision whether to approve title.

G. Timing and Timelines

One commenter requested stating that the applicant need not provide title evidence until after the Secretary makes the decision to take the land into trust. The final rule only addresses what title evidence is required, it is not intended to change the Department's process or timing.

One commenter suggested imposing timelines on the Department's issuance of preliminary and final title opinions. The final rule does not incorporate this suggestion because there are too many variables to establish a definitive timeframe for preparation of these documents.

H. Other Comments

A few commenters suggested edits that were beyond the scope of the interim final rule. One Tribal commenter noted the difficulty in obtaining title insurance policies in California and suggested actions the Department could take to educate title insurance companies. Another commenter suggested adding a requirement to obtain State approval to transfer jurisdiction of land being taken into trust. These comments are outside the scope of this rulemaking.

A commenter also stated that the revision is not appropriate for an interim final rule. The Department disagrees because the rule is a targeted, procedural improvement.

IV. Changes from Interim Final Rule to Final Rule

As described above, the final rule includes edits to the interim final rule for clarification. The edits are summarized in the table below:

Former Rule	Interim Final Rule	New Rule (Effective May 16, 2016)
The Secretary will require title evidence meeting the DOJ standards.	Requires the following in lieu of the DOJ standards: (1) written evidence of the applicant's title or that title will be transferred to the United States on behalf of the applicant to complete the trust acquisition; and (2) written evidence of how the applicant or current owner acquired title; and (3) either: (i) a current title insurance commitment; or (ii) a previously issued title insurance policy and abstract dating from the time the land was acquired to the present.	Clarifies "written evidence" to be: (1) Applicant's deed; or (2) If the applicant does not yet have title, the transferor's deed and a written statement from the transferee that it will transfer title to the United States on behalf of the applicant. Deletes the requirement for written evidence of how the applicant or current owner acquired title. Clarifies that the abstract must cover the time period beginning when the land was acquired by the applicant or current owner up to the present. Allows applicant to choose to provide evidence meeting the DOJ standards in lieu of the current title commitment or policy and abstract.
The Secretary will notify the applicant of any liens, encumbrances, or infirmities which may exist.	Adds that the Secretary may seek additional information from the applicant if needed to address the issues.	No change from interim final rule.
The Secretary may require elimination of liens, encumbrances, infirmities prior to taking final approval action on the acquisition.	No procedural change.	No change from interim final rule.
The Secretary shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land	No procedural change.	No change from interim final rule.

unmarketable.		

V. Applicability of New Rule

As the preamble to the interim final rule stated, this rule will apply to all trust applications submitted after the effective date. This rule will also apply to trust applications that are pending and for which the Preliminary Title Opinion has not yet been prepared by the Office of the Solicitor as of the effective date. However, if applicants have already submitted evidence meeting the DOJ standards, they need not re-submit evidence pursuant to this rule. This rule will not apply to trust applications that are pending and for which the Preliminary Title Opinion has already been prepared by the Office of the Solicitor as of the effective date.

BIA has updated its fee-to-trust handbook to incorporate changes required by the new rule. The handbook is available at: http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf.

VI. Procedural Requirements

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

Executive Order 12866 provides that the Office of Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends.

The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. 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. We have developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department of the Interior 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.). It does not change current funding requirements or regulate small entities.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. The rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will this rule have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises. This rule removes the requirement for title evidence to comply with DOJ standards and replaces this requirement with a more targeted requirement for title evidence; it will not result in additional expenditures by any entity.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. 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)

Under the criteria in Executive Order 12630, this rule does not affect individual property rights protected by the Fifth Amendment nor does it involve a compensable "taking." A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule removes the requirement for title evidence to comply with DOJ standards and replaces this requirement with a more targeted requirement for title evidence; it does not affect States or the relationship with States in any way.

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

This rule complies with the requirements of Executive Order 12988. Specifically, this rule has been reviewed to eliminate errors and ambiguity and written to minimize litigation; and is written in clear language and contains clear legal standards.

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

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," Executive Order 13175 (59 FR 22951, November 6, 2000), and 512 DM 2, we have evaluated the potential effects on federally recognized Indian Tribes and Indian trust assets and have determined there is no "substantial direct effect" on Tribes, on the relationship between the Federal Government and Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The rule will affect Tribes who apply to take land into trust, in that the rule removes unnecessary submissions of documentation. However, the rule does not have a substantial direct effect on Tribes because Tribes can still submit evidence meeting the DOJ title standards should they so choose and allowing the option of submitting a past title insurance policy and an abstract of title is intended to be less burdensome than the existing rule. The Department is committed to meaningful consultation with Tribes on substantive matters that have a substantial direct effect on Tribes, in accordance with E.O. 13175 and the Department of the Interior Policy on Consultation with Indian Tribes.

I. Paperwork Reduction Act

This information collection for trust land applications is authorized by OMB Control Number 1076-0100, with an expiration of 08/31/16. The elimination of the requirement to comply with DOJ standards is not expected to have a quantifiable effect on the hour burden estimate for the information collection, but BIA will review whether its current estimates are affected by this change at the next renewal.

J. National Environmental Policy Act

This rule does 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 the rule is covered by a categorical exclusion. This rule is excluded from the requirement to prepare a detailed statement because it is a regulation of an administrative nature. (For further information, see 43 CFR 46.210(i).) We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Information Quality Act

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106-554).

L. Effects on the Energy Supply (E.O. 13211)

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

M. Administrative Procedure Act

We published an interim final rule with a request for comment without prior notice and comment, as allowed under 5 U.S.C. 553(b)(B). Under section 553(b)(B), we find that prior notice and comment are unnecessary because this is a minor, technical action that eliminates an unnecessary requirement. This rule removes the unnecessary requirement that the title evidence the applicant submits must comply with DOJ standards for title evidence. Delay in publishing this rule would unnecessarily continue imposing the unnecessary requirement on applicants and would therefore be contrary to the public interest. We stated that we would review comments

and initiate a proposed rulemaking, revise, or withdraw the rule. Because the comments we received were primarily seeking clarifications, we have chosen to revise the rule with requested clarifications.

List of Subjects in 25 CFR Part 151

Indians – lands, Reporting and recordkeeping requirements.

For the reasons given in the preamble, the interim rule amending 25 CFR part 151 which was published at 81 FR 10477 on March 1, 2016, is adopted as a final rule with the following change:

PART 151 – LAND ACQUISITIONS

1. The authority citation for part 151 continues to read as follows:

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat.1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

2. Revise § 151.13 to read as follows:

§ 151.13 Title review.

(a) If the Secretary determines that she will approve a request for the acquisition of land from unrestricted fee status to trust status, she shall 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; or

(ii) The policy of title insurance issued to the applicant or current owner and 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. Department of Justice, in lieu of the evidence required by paragraph (a)(2) of this section.

(b) After reviewing submitted title evidence, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities that the Secretary identified and may seek additional information from the applicant needed to address such issues. 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.

Dated: May 11, 2016

Lawrence S. Roberts,
Acting Assistant Secretary – Indian Affairs.
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