IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

THE STATE OF MICHIGAN, Plaintiff, vs. THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, et al., Defendants.	)	Case No. 1:12-cv-00962-RJJ Hon. Robert J. Jonker **[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF STATE OF MICHIGAN'S RESPONSE TO MOTION TO DISMISS, COUNTS 1-3**

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DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Amicus Curiae Nottawaseppi Huron Band of Potawatomi Indians is a federally-recognized Indian tribe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

I. INTRODUCTION

A. Identity of Amicus Curiae and Interest in the Case

Amicus curiae Nottawaseppi Huron Band of Potawatomi Indians ("NHBPI") is a federally-recognized Indian tribe located in Calhoun County, and a signatory to the Michigan Tribal-State Gaming Compact. The State of Michigan has 12 tribal-state gaming compacts with Indian tribes (including with NHBPI and Defendant Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe") containing virtually identical Section 9 language addressing off-reservation gaming. NHBPI has an interest in implementation of the Section 9 agreement as well as upholding Section 17 of its own tribal-state compact. The NHBPI currently operates a single casino located in Calhoun County. Section 17 of the Tribal-State gaming between NHBPI and the State of Michigan provides that in exchange for NHBPI revenue sharing with the State of Michigan from the proceeds of the NHBPI casino operation, the State provides NHBPI with exclusive gaming opportunities in Ingham and Eaton Counties where the City of Lansing is located. Therefore, a casino in the City of Lansing would violate NHBPI's exclusive gaming agreement with the State of Michigan, thereby creating a cause of action for breach of contract between NHBPI and the State of Michigan. NHBPI has not and would not agree to a Section 9 revenue sharing agreement for a casino in Lansing and, thereby, give up its exclusive gaming rights.

In support of the State's position that any fee-to-trust application is subject to Section 9 (regardless whether the fee-to-trust application is eligible for an exception under Section 2719**{** TA \l "25 U.S.C. § 2719" \s "25 U.S.C. § 2719 (IGRA)" \c 2 **}** of the Indian Gaming Regulatory Act ("IGRA")), NHBPI also argues that an application to take land into trust by Sault Ste. Marie, regardless of whether it is deemed mandatory or discretionary, is still subject to a Section 9

revenue sharing agreement requirement as a condition precedent for a fee-to-trust application. NHBPI's interests are central to the disposition of this case. On the other hand, if Sault Ste. Marie is correct that the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. No. 105-143, 111 Stat. 2652 (1997)**{** TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" **}**, meets the conditions of IGRA § 2719**{** TA \s "25 U.S.C. § 2719 (IGRA)" **}**(b)(1)(B)(iii), then NHBPI is profoundly impacted by breach of contract/compact under Section 17 of its Tribal-State Gaming Compact regarding its exclusive gaming area in the State of Michigan.

B. Source of Authority to File

By separate motion, the Nottawaseppi Huron Band of Potawatomi Indians ("NHBPI") sought leave of the court to file an *amicus curiae* brief under the inherent authority of the federal district court. The motion was supported by a separate brief. Since the Western District Court rules do not contain specific directions on the procedure for filing *amici curiae* briefs, NHBPI requested that the District Court follow the Federal Rules of Appellate Procedure ("FRAP") FED. R. APP. PROC. 29**{** TA \l "FED. R. APP. PROC. 29" \s "Fed. R. App. Proc. 29" \c 4 **}**, which provides in relevant part:

> "(a) … Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. (b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."

II. ARGUMENT

A. Section 9 of the Sault Tribe Tribal-State Gaming Compact Requires a Revenue Sharing Agreement for Off-Reservation Gaming Applications Filed Under the Authority of the Michigan Indian Land Claims Settlement Act

As relevant here, the Michigan Indian Land Claims Settlement Act**{** TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" **}** provides in Section 108(f): "Any lands acquired using amounts from

interest or other income of the [Fund] shall be held in trust by the Secretary for the benefit of the tribe." MILCSA Section 108{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" }(c) provides that the "land purchases consolidate or enhance tribal land holdings." Based on these provisions, Sault Tribe maintains that MILCSA is a mandatory trust acquisition statute not subject to Section 9 of the Sault Tribe Compact. The Sault Tribe argues that "if the land meets its [consolidation or enhancement] requirements, then the Secretary must take the land into trust "regardless of the uses [gaming or otherwise] to which the land might ultimately be put." Defs.' Br. in Supp. of Mot. to Dismiss at 15. The Sault Tribe further argues that:

> [A]n application for an acquisition made mandatory by a statute must address any specific statutory conditions – but not unless the mandating statute specifies otherwise, the intended use of the land, and certainly not gaming related issues such as potential eligibility under IGRA Section 20. *See* 25 C.F.R. §§ 151{ TA \l "25 C.F.R. § 151" \s "25 C.F.R. § 151" \c 6 }.110, 151.11 (requirements apply only when "the acquisition is not mandated").

Id. at 17. In the contrary manner, the State's claims in Counts 1-3 of its Complaint is that Section 9 is unambiguous and applies to all applications to take land into trust for gaming purposes.

Section 9 does require a revenue sharing agreement for all applications to take land into trust regardless of whether the application is done under 25 U.S.C. § 465{ TA \l "25 U.S.C. § 465" \s "25 U.S.C. § 465" \c 2 } (which provides for the Secretary to accept land into trust pursuant to his discretionary authority) or under some other federal statute, such as, allegedly, MILCSA, because each application for trust is not submitted under the authority of IGRA. However, the scope of Section 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } of IGRA does provide the parties' intent when entering into the contract/compact. Section 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } is not authority to take land into trust; its impact, if any, is post-trust. Section 9 of the Tribal-State Compact is a pre-trust contractual compact commandment to obtain a revenue sharing

agreement, regardless of whether the application is under the authority of 25 U.S.C. § 465{ TA \s "25 U.S.C. § 465" }, discretionary, or under the authority of a mandatory congressional statute. Discretionary or mandatory fee-to-trust applications are both applications under Section 9. The purpose for a mandatory trust application must be consistent with the purpose of the authorizing mandatory Act, not the purpose of § 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" }. In this case, the allegedly authorizing Act, MILCSA{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" }, requires that the land subject to the application "consolidate or enhance" the investments of the Tribe as determined by the board of directors of the Sault Tribe. The board of directors have clearly determined that the "enhancement" for the Lansing mandatory trust acquisition is for gaming purposes. The Secretary of Interior will look to MILCSA to determine whether the trust acquisition is mandatory or discretionary.

The mandatory trust statute scope, and indeed whether it is in fact mandatory, is a flexible determination made on a case-by-case basis depending on the statutory language that authorizes the Secretary to take land into trust. Under this view, 25 U.S.C. § 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" }'s effect, if any, is not determined until the land is in trust. However, the effect of Section 9 of the Tribal-State Gaming Compact is determined prior to the land going into trust. Section 9 is a pre-trust application requirement; Section 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } is a post-trust determination by the Secretary of the Interior or the National Indian Gaming Commission, or a judicial determination.

As a general proposition, all gaming off-reservation is prohibited after October 17, 1988 by 25 U.S.C. § 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } unless it qualifies for an exception. The qualification of an exception is different from the qualification for whether the land can go into trust.

The determination of whether land is eligible for an exception is made by the Department of the Interior ("DOI"). In *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001){ TA \l "*Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001)" \s "Sac & Fox v. Norton" \c 1 }, the Tenth Circuit ruled that the Secretary of Interior should not be accorded *Chevron* deference,[1] in the Secretary's Indian lands determination. The Tenth Circuit was reversed by Congress in Related Agencies Appropriations Act, Pub.L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001){ TA \l "Pub.L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001)" \s "Pub.L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001)" \c 3 }, which directed that:

> "The authority to determine whether a specific area of land is a "reservation" for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988: Provided, That nothing in this section shall be construed to permit gaming under the Indian Gaming Regulatory Act on the lands described in section 123 of Public Law 106-291 or any lands contiguous to such lands that have not been taken into trust by the Secretary of the Interior."

As relevant here, after the land is in trust, the Secretary of Interior determines the Section 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } post-trust effect on whether the land is reservation. The Secretary has in addition implemented specific regulations governing on the scope of Section 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" }. *See* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354 (May 20, 2008){ TA \l "73 Fed. Reg. 29,354 (May 20, 2008)" \s "73 Fed. Reg. 29,354 (May 20, 2008)" \c 3 }, implementing 25 C.F.R. § 292{ TA \l "25 C.F.R. § 292" \s "25 C.F.R. § 292" \c 6 } — Gaming on Lands Acquired After October 17, 1988.

The issue of whether MILCSA is a settlement of a land claim is an independent issue that has not yet been determined, nor litigated, briefed and argued to any degree at all. Informal Solicitor Opinions exist holding that MILCSA is not a mandatory trust statute. *See* Letter from

[1] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984){ TA \l "*Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)" \s "Chevron v. NRDC" \c 1 }.

Larry Morrin, Regional Director, Bureau of Indian Affairs, to L. John Lufkins, President, Bay Mills Indian Community (September 10, 2002) (the "Morrin Letter"), attached hereto as Exhibit 1.

1. Section 9 of the Tribal State Gaming Compact applies to both mandatory and fee-to-trust applications

Defendants further allege that the Department of Interior has a mandatory obligation to take the land into trust under the MILCSA.{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" }. Defs.' Br. in Supp. of Mot. To Dismiss at 16. That determination is subject to an internal review by DOI under the provisions of 25 CFR § 151{ TA \s "25 C.F.R. § 151" } — Land Acquisitions. Part 151.3{ TA \s "25 C.F.R. § 151" } provides that an acquisition can be authorized by an act of Congress; in the event that Congress authorizes a trust acquisition, then the federal regulations on fee-to-trust do not apply. The Sault Tribe argues that the current 25 C.F.R. §§ 151.10 and 151.11{ TA \s "25 C.F.R. § 151" } support its interpretation that MILCSA is a mandatory statute. Defs.' Br. in Supp. of Mot. To Dismiss at 16. In support of this contention, Defendants argue that regulations published in June of 1995 provide the statutory interpretation relevant to the intent of the parties—the State and the tribes—in 1993. In 1993, the fee-to-trust regulations utilized by the parties were published in 1980. Land Acquisitions, 45 Fed. Reg. 62,034 (September 18, 1980){ TA \l "45 Fed. Reg. 62,034 (September 18, 1980)" \s "45 Fed. Reg. 62,034 (September 18, 1980)" \c 3 } which provided in relevant part at section 120A .110. "Factors to be considered in evaluating requests to [fee-to-trust applications] in evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors: (a) "The existence of statutory authority for the acquisition and any limitations contained in such authority." The 1980 regulations do not contain the word mandatory trust. The 1995 Regulations, initially proposed in 1991, 60 Fed. Reg. 32,874-32879 (1991),{ TA \l "60 Fed. Reg.

32,874-32879 (1991)," \s "60 Fed. Reg. 32,874-32879 (1991)," \c 3 } do contain the word "mandatory" trust in response to suggested comments. "Response: the introductory paragraph to both 25 CFR 151{ TA \s "25 C.F.R. § 151" }.10 and the new 25 CFR 151.11{ TA \s "25 C.F.R. § 151" } exempts such legally mandated acquisitions." Land Acquisitions (Nongaming), 60 Fed. Reg. 32,874 – 01{ TA \s "60 Fed. Reg. 32,874-32879 (1991)," }. See also Land Acquisitions, 62 Fed. Reg. 1,057 (January 8 1997){ TA \l "62 Fed. Reg. 1,057 (January 8 1997)" \s "62 Fed. Reg. 1,057 (January 8 1997)" \c 3 } (correcting amendment taking out the designation (Nongaming). The relevant fee-to-trust regulations at the time of the compact execution and ratification were the 1980 regulations, which did not mention "mandatory" or "discretionary" dichotomy urged by the Sault Tribe. Although the 1995 regulations introduced the terms "mandatory" and "discretionary," it should be a factual issue on the regulations utilized by the parties in executing the 1993 compact. At a minimum then, the relevant regulations to determine the intent of the parties are the 1980 regulations, not the 1995 regulations. Whatever the utility the discretionary and mandatory dichotomy have for the Secretary as explained in the DOI Handbook, (Defs.' Br. in Supp. of Mot. to Dismiss, at 4, 16) it is not controlling law for the compact contract between the parties. *See Grand Traverse Band of Ottawa and Chippewa Indians v United States Attorney for the Western District and State of Michigan*, 198 F.Supp.2d 920, 923 (2002){ TA \l "*Grand Traverse Band of Ottawa and Chippewa Indians v United States Attorney for the Western District and State of Michigan*, 198 F.Supp.2d 920, 923 (2002)" \s "Grand Traverse v US Atty" \c 1 } (summarizing Michigan law on contract intention of the parties in compact interpretations). Without citations to authority, Defendants argue that MILCSA{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" } is a mandatory trust acquisition statute, without geographic limit, for taking land into trust for any purpose, including gaming, and that the Sault Tribe is not bound by the terms of

Section 9. The text of Section 9 is surprisingly clear in its contractual intent of the parties. Moreover, Section 9 does not "dovetail" (Defs.' Br. in Supp. of Mot. to Dismiss at 17) with only the Secretary's authority for "discretionary applications" under § 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" }.

The Assistant Secretary-Indian Affairs has issued an updated guidance memorandum on processing of mandatory fee-to-trust attached hereto as Exhibit 2, dated April 6, 2012. As relevant here, the guidance memorandum uses the example that the statute "might require that the parcel be located within a specified geographic area or that certain funds be used for the acquisition." Memorandum from Larry Echo Hawk, Asst. Sec'y-Indian Affairs, to Michael S. Black, Director, Bureau of Indian Affairs, at 2 (April 6, 2012). Section 102 of MILCSA{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" }, congressional findings and purpose, does provide a geographic limitation for the Chippewa Tribes to the Upper Peninsula of the State of Michigan.

Even in those cases where a tribe had a historical nexus to the area, the settlement of a land claim standard has been severely restricted. *See Wyandotte Nation v. Salazar*, 825 F.Supp.2d 261 (D.D.C. 2011){ TA \l "*Wyandotte Nation v. Salazar*, 825 F.Supp.2d 261 (D.D.C. 2011)" \s "Wyandotte v. Salazar" \c 1 }; and *Confederated Salish v. U.S. Ex Rel. Norton*, 343 F.3d 1193 (9th Cir. 2003){ TA \l "*Confederated Salish v. U.S. Ex Rel. Norton*, 343 F.3d 1193 (9th Cir. 2003)" \s "Confederated Salish v. U.S. Ex Rel. Norton" \c 1 } where "mandatory trust language" was interpreted by the BIA to be discretionary under 25 CFR Part 150{ TA \l "25 CFR Part 150" \s "25 CFR Part 150" \c 6 }.10. In like manner here, the mandatory trust language alleged to exist in Michigan Indian Land Claims Settlement Act is in fact a discretionary standard on behalf of DOI. *See* Ex. 1, Morrin Letter (where the Regional Director in conjunction with the Solicitor analyzed in detail P.L. 105-143{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" } and concluded P.L.

105-143{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" } was not a mandatory statute). Admittedly, the Morrin Letter, like the Sault Tribe's citation to the DOI handbook at Motion to Dismiss, pages 4 and 16, is not subject to final agency action nor does it have the force of law. *See United States v. Stevenson*, 676 F.3d 557 (6th Cir. 2012).{ TA \l "*United States v. Stevenson*, 676 F.3d 557 (6th Cir. 2012)" \s "US v. Stevenson" \c 1 } Since this informal opinion established a discretionary standard for fee-to-trust applications under MILCSA, the Sault Ste. Marie Tribe can only apply for a trust application under the authority of 25 U.S.C. § 465{ TA \s "25 U.S.C. § 465" } with its parallel post-trust effect of 25 U.S.C. § 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } on whether the trust land is eligible for an exception under Section 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" } for gaming on Indian lands after October 17, 1988.

In any event, the pre-trust fee-to-trust application requires a revenue sharing agreement to comply with Section 9 of a Tribal-State Compact that is in effect. The revenue sharing agreement may subsequently be dismissed on a finding that the trust land is eligible for an exception under 25 U.S.C. § 2719{ TA \s "25 U.S.C. § 2719 (IGRA)" }, but that is not the issue before the Court today. An Indian Lands Opinion under 25 CFR Part 293{ TA \l "25 CFR Part 293" \s "25 CFR Part 293" \c 6 }(b) is not required as a condition precedent to a discretionary trust application or an alleged mandatory trust application. IGRA does not contain statutory mandates for an Indian Lands Opinion that gaming is authorized on the proposed fee-to-trust application. *Cf. N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009).{ TA \l "*N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009)." \s "N. County Cmty. Alliance, Inc. v. Salazar" \c 1 } The absence of a requirement for an Indian Lands Opinion under the IGRA, however, does not relieve the Sault Ste. Marie Tribe of its contractual obligation to comply with Section 9 of the Tribal-State Gaming Compact; and this contractual obligation has

been statutorily recognized under 25 U.S.C. § 2710{ TA \l "25 U.S.C. § 2710" \s "25 U.S.C. § 2710" \c 2 }(d)(1)(C), for gaming that is "conducted in conformance with a Tribal- State Compact entered into by the Indian Tribe and the State under paragraph (3) that is in effect." Section 9 is a contractual obligation under the Tribal-State Gaming Compact that is in effect and therefore a revenue sharing agreement is required for any application submitted for purposes of gaming. Admittedly, the Sault Ste. Marie Tribe does not have to establish its purpose under MILCSA{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" } other than that the application "consolidates or enhances" investments as determined by the board of directors, for its fee-to-trust application.

Assuming that MILCSA is a mandatory trust statute (which is unlikely) its pre-trust fee-to-trust application obligations under MILCSA{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" } still clearly require a revenue sharing agreement. The revenue sharing agreement is not a document in the fee-to-trust application for mandatory trust; it is a document in the pre-trust requirements to submitting a fee-to-trust application under § 2710{ TA \s "25 U.S.C. § 2710" }(d)(1)(C) for a compact that is in effect. The absence of the Section 9 revenue-sharing agreement is therefore a violation of the Tribal-State Gaming Compact.

III. CONCLUSION

In this instance, the State has argued a claim that can withstand an FED. R. CIV. P. 12{ TA \l "FED. R. CIV. P. 12" \s "Fed. R. Civ. P. 12" \c 4 }(b)(1) motion to dismiss for failure to state a claim. The State has alleged contested factual issues on the following points: (1) that an application to take land into trust under MILCSA{ TA \s "P.L. 105-143, 111 Stat., 2652 (1997)" } is subject to Section 9 of the Tribal-State Gaming Compact; (2) that MILCSA, even if a mandatory trust statute, is still subject to a fee-to-trust application process; (3) that the fee-to-trust application requires a revenue sharing agreement to be in compliance with Section 9 of the

Tribal-State Compact and § 2710{ TA \s "25 U.S.C. § 2710" }(d)(1)(C); and (4) that Section 9 is a pre-trust obligation that applies to both mandatory and discretionary fee-to-trust applications.

For the reasons set forth herein, NHBPI respectfully request that this Court dismiss Defendants' Motion to Dismiss.

DATED: December 21, 2012

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2012, a copy of the foregoing was served via the Court's Electronic Case Filing System to:

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SEP 10 2002

Mr. L. John Lufkins, President
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Dear Mr. Lufkins:

We are in receipt of your letter of July 9, 2002, as to the status of a request by the Bay Mills Indian Community to accept title in trust 235 acres of land in Superior Township, Chippewa County, Michigan.

We apologize for the delay in formally responding to your Tribe's request on whether or not lands acquired under Public 105-143, the Michigan Indian Land Claims Settlement Act (MILCSA) Section 107 (a)(3) provides mandatory acquisitions under 25 C.F.R. Part 151. We wish to advise that there was an informal response provided by this office to your predecessor Mr. Jeff Parker.

In general, the Community must comply with 25 C.F.R. § 151.10 for on-reservation acquisitions and 25 C.F.R. § 151.11 for off-reservation unless the acquisition, either on or off reservation, is mandatory. If the acquisition is "mandatory" the notice requesting comments from the state and local governments need not be given, because it is for the purpose of providing information to assist the BIA decision maker in the exercise of his or her discretion whether to acquire the land in trust. However, even if the acquisition is mandatory, the decision maker must still issue written notice of the decision to interested parties. In those instances in which the decision maker is the Superintendent or Regional Director, the notice must provide appeals rights of the decision in order to exhaust administrative appeals and reach a final decision for the Department. When the decision is final for the Department, a decision is issued pursuant to 25 C.F.R. § 151.12 and notice is provided "that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." Even a "mandatory" acquisition requires notice and the opportunity for administrative and judicial challenges to the Secretary's determination that the acquisition is mandatory.

Therefore, the real question is not whether 25 C.F.R. § 151.3 (a)(2) is the only requirement for acceptance of the land into trust, but rather, does the MILSCA provide mandatory acquisition authority for the Bay Mills Indian Community.

Background

According to the information received from the Michigan Agency, all of the trust land, approximately 3,700 acres at Bay Mills is tribal trust land, and all of it is located in Chippewa County. It is against this current pattern of land holdings that the MILCSA and the acquisitions from the funds established by it must be viewed.

By way of background, the MILCSA's stated purpose is "to provide for the fair and equitable division of the judgment funds among the beneficiaries and to provide the opportunity for the tribes to develop plans for the use or distribution of their share of the funds." The judgments at issued were Indian Claims Commission dockets 18-E, 58 and 364 for the Ottawa and Chippewa Indians of Michigan and docket number 18-R for the Sault Ste. Marie Band of Chippewa Indians. MILCSA at Section 107 established a "Land Trust" from the proceeds of the Act for the Bay Mills Community. Section 107 (3) provides that:

> The earnings generated by the Land Trust shall be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal land holdings through purchase or exchange. Any land acquired with funds from the Land Trust shall be held as Indian lands are held.

In order to answer the question whether this section contains mandatory authority for the Secretary to acquire land in trust for the Community, the following phrases contained in Section 107 (3) must be considered.

1. **"Shall be used exclusively for" limits the use of the funds from the Land Trust**

With the language "shall be used exclusively for," the Act specifically limits the possible uses of the earnings generated by the Land Trust to improvements on tribal land or the consolidation and enhancement of tribal land holdings. The limitation is on how these particular funds may be used, not the Secretary's discretion to acquire land for the Community.

The Act does not mandate that any of the earnings from the Land Trust be used to acquire land. It is possible that all of the earnings could be used for improvements on existing tribal land. Beyond improvements on trust lands, the earnings may also be used to consolidate *and* enhance tribal land holdings through either purchase or exchange. However, the language of Section 107 neither identifies any particular lands to be acquired nor identifies a consolidation area.

2. **"As Indian lands are held" may be read to provide for trust authority.**

The use of the language, "Any land acquired with funds from the Land Trust shall be held as Indian lands are held" is not a clear statement that the acquired lands are to be held in trust, or more particularly that the acquisition authority is mandatory. Indian

lands may be held in a variety of ways, including, in trust by the United States, subject to restrictions on alienation, or owned in fee by the Indian Tribe. Certainly the language does not provide clear mandatory acquisition authority.

An earlier version of the Act under consideration as of July 15, 1997, the date of a letter from the Assistant Secretary – Indian Affairs to Chairman Young of the Committee on Resources, contained the more usual language, "Any land so acquired shall be held in trust by the United States for the Bay Mills Indian Community." (A copy is attached for your information.) The purpose of the letter was to request that Section 7 (a) (3) "[b]e clarified that the Secretary retains discretion under existing regulations (25 C.F.R. § 151) and that this section does not repeal the limitation in Section 20 of the Indian Gaming Regulatory Act." The intent of the change in language was to retain the Secretary's discretion to acquire land in trust, not to change how the land acquired with the funds from the Land Trust would be held. The change does not foreclose the Secretary's authority to hold the land in trust after it has been acquired with the earnings from the Land Trust. However, the change in language, following a request from the Department to clarify the statute to retain the Secretary's discretionary authority, is an indication that the authority was not meant to be mandatory.

Further evidence of the non-mandatory nature of the acquisition authority is found if the MILCSA is read in its entirety. Other provisions of the MILCSA such as Section 108 related to the Sault Ste. Marie Self-Sufficiency Fund include references to both the phrase "as Indian lands are held," § 108 (b)(4), and the more typical phase "in trust by the Secretary for the benefit of the tribe," § 108(f). The first phase is used for lands acquired using "amounts from the Self-Sufficiency Fund" and second phase is used for lands acquired using interest or other income of the Self-Sufficiency Fund. The Bureau can reasonably interpret the phase "as Indian lands are held" as having the same meaning in both sections of the MILCSA. "The normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996). Because Congress used both the phrase "as Indian lands are held" and the phrase "in trust for the benefit of the tribe," it is reasonable to assume that Congress intended different meanings for the two different phrases in the same statute.

Further, the statute should be construed to give all of its sections meaning. "[T]he more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted laws as legislative oversight." *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544,550 (1996). In interpreting the intent the MILSCA, the Bureau should be mindful that the Supreme Court reads statutes "[w]ith the assumption that Congress intended each of its terms to have meaning." *Bailey v. United States*, 516 U.S. 137,145 (1995). Therefore, the phrase "as Indian lands are held" should be interpreted as having a distinct meaning separate from the phase "in trust for the benefit of the tribe," and may be interpreted to provide discretionary authority to hold land in trust, but should not be read as mandatory authority.

3. Requirements for the "purchase or exchange" of lands.

The Community makes the argument that if the earnings from the fund are used for the purchase or exchange or land, then the acquisition is mandatory. The section actually provides that the earnings from the Land Trust "shall be exclusively for improvements on tribal land or the consolidation and enhancement of tribal land holdings through purchase or exchange." The MILCSA provides requirements for the purchase or exchange of land. The Act requires a determination that the land to be purchased or exchanged is for the "consolidation and enhancement of tribal land holdings." That condition must be evaluated prior to the decision to a decision by the Secretary. Thus, the Secretary's decision is not merely ministerial. The Secretary must determine if the request for an acquisition or an exchange satisfies the "consolidation and enhancement requirement." Therefore, the Secretary has some discretion to exercise prior to acceptance of the land in trust. Without some definition in the legislation of "consolidation and enhancement of tribal land holding" or some geographic limits on the consolidation, the Act appears to vest discretion to be exercised by the Secretary prior to acquisition. The Secretary has to exercise her discretion and make a determination that the acquisition of land from earnings from the fund is being used for "the consolidation and enhancement of tribal land holdings."

The statute also requires that if the MILCSA is invoked for the authority for the discretionary trust acquisitions, funds from the MILCSA must be used. The 10th Circuit Court of Appeals in *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir.2001), provided information on how the Bureau should treat the requirement that lands be purchased with funds from a particular source. The Secretary's determination that funds from a particular source used to purchase real property must be supported by "substantial evidence in the record." The record in the *Sac and Fox* did not support the Secretary's conclusion and the case was remanded to the district court "for further consideration of whether Pub.L. 98-602 funds were used for the acquisition of the Shriner Tract." *Sac and Fox*, 240 F.3d at 1268. When considering trust acquisition applications using funds from the MILCSA, we the Bureau should have "substantial evidence" that the funds used by Bay Mills came from earnings generated by the Land Trust established within MILCSA if that is the authority invoked for the trust acquisition.

4. Factors to consider in mandatory v. discretionary

Current guidance from our Deputy Commissioner of Indian Affairs contained in the April 17, 2002, memorandum to all Regional Directors and Agency Superintendent states, "A determination that a statute is mandatory is made on a case by case basis.

No clear definition of a mandatory statute currently exists. However, in order for a statute to be considered mandatory, the statutory language must include some restrictions on the Secretary's discretion in addition to the word "shall".

The operative language of MILCSA does not limit or restrict the Secretary's exercise of discretion to a specific geographic region (i.e. certain counties, an approved consolidation area or a specific tract) or provide an acreage limit. The limitation or restriction, if any, is that the purchase or exchange consolidate and enhance tribal land holdings. Arguably, all acquisitions by tribes enhance tribal land holdings. Therefore, the question becomes does the phrase "consolidation... of tribal land holdings" place a sufficient restriction on the Secretary's authority to consider this legislation acquisition authority.

Each statute acquisition authority must be analyzed to determine the nature of the acquisition authority provided to the Secretary since she may exercise no greater authority than is granted to her by Congress[1]. Prior case by case decisions provide some guidance. The language in the Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, 25 U.S.C. § 1300k, is an example of language, which the Department has considered and implemented as mandatory acquisition authority. The Act states that the Secretary "shall" acquire land with two specific counties for each of the tribes if at the time of the conveyance there are no adverse legal claims on the property. The federal court affirmed that the Little Traverse Bay Bands Act mandates that the Secretary accept land into trust for the Tribe if the property is located in the two counties and there are no adverse legal claims. *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 699, 702 (D.Mich.1999). However, in the case of the Pokagon Restoration Act, 25 U.S.C. § 1300j, the use of the language, "The Secretary shall acquire real property for the Band" and such land "[s]hall be taken by the Secretary in the name of the United States in trust for the benefit of the Band..." has been determined to provide only discretionary authority. (The Pokagon Restoration Act contains no geographic or quantity limitation. A further discussion of the Pokagon Restoration Act and resulting memorandum of Understanding is at number 4 below.)

Another example of a specific statute which has been found to contain mandatory acquisition authority is the Isolated Tracts, Pub.L. 88-196, enacted in 1963 for the benefit of the Rosebud Sioux Tribe. The Act authorizes the sale, exchange or mortgage of isolated tracts of trust land within three counties in south central South Dakota and requires that the proceeds from the sale, exchange or mortgage be used "exclusively for the purchase of land on the reservation within land consolidation areas approved by the Secretary of the Interior..." The consolidation area of Todd and Mellette Counties was approved by the Secretary in 1965.

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1 The Interior Board of Indian Appeals has considered the mandatory, merely ministerial exercise of acquisition authority in Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, BIA, 27 IBIA 48, 55-56 (November 30, 1994) and Todd County, South Dakota v. Aberdeen Area Director, BIA, 33 IBIA 110, 116-118 (January 19, 1999). In Todd County, the IBIA identified other statutes similar to the statute in that case and noted that each would require analysis of its specific provisions to determine whether it is "mandatory" legislations under 25 § 151.10 Id at 118, fn.3.

The restriction on the Secretary's discretionary authority in the Isolated Tracts Acts is more clear and identifiable than the vague phase in the MILCSA for "the consolidation and enhancement of tribal land holdings" without a specifically defined consolidated area. Further the Isolated Tracts Acts provides for one and only one use for the funds from the sale, exchange or mortgage of isolated tracts – the acquisition of lands within the approved consolidation area. In comparison, none of the earnings from the Bay Mills Land Trust must be used for the consolidation and enhancement of tribal land holdings. All of it may be used for improvements on existing tribal land, which would not necessarily require Secretarial approval.

Given the arguably ambiguous terms used in Section 107(3) of the MILCSA, the Bureau may look to the legislative history of the MILCSA for guidance in our effort to determine the intent of Congress. According to the July 15, 1997 letter from the Assistant Secretary – Indian Affairs to Chairman Young of the Committee on Resources, previously referenced in section 2 of this letter, the Department sought to clarify this section of the Act. The Assistant Secretary requested that Section 7 (a)(3) "[b]e clarified that the Secretary retains discretion under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in Section 20 of the Indian Gaming Regulatory Act." The letter supports the position that the Assistant Secretary did not intend for the Act to contain mandatory acquisition authority, but rather intended that the Secretary's discretionary authority to acquire lands be left intact.

The Community has also focused on *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001) as a case interpreting a statue with similar language[2] in which both the Department and the court found mandatory acquisition authority. However, the Wyandotte Act state at 21 105 (b)(1), "A sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefits of such Tribe." The Wyandotte Act specifically sets a sum to be used for the purchase of property to be held in trust and it uses the language that such real property "shall be held in trust by the Secretary for the benefit of such Tribe." Therefore, the Wyandotte Act, the February 13, 1996 opinion of the Associate Solicitor regarding the Trust Acquisition of Land in Kansas City, Kansas for Wyandotte Tribal Gaming Facility, and the opinion of the 10th Circuit Court of Appeals may all be distinguished from the language at issue in the MILSCA. The MILSCA does not clearly establish mandatory authority for the trust acquisition, which may be purchased with the earnings generated by Land Trust.

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2 For example, the statute at issue in *Sac and Fox*, the Wyandotte Tribe of Oklahoma's judgment distribution act, Pub.L. 98-602 (1984) contains language like the MILCSA, which provides that the Secretary shall have no further trust responsibility for the investments, supervision, administration, or expenditure of funds provides by the act. (§ 105(e)(1) for the Wyandotte Act and § 107(b)(8) of the MILCSA.)

Summary

For the reasons discussed above, we intend to exercise discretionary authority on all acquisitions of lands under the MILSCA. Factors that support this decision are: (1) the language of the Act which says that the earnings need not be used exclusively for trust acquisitions but shall be used for improvements on tribal land or the consolidation and enhancement of tribal land holdings; (2) the lack of dollar amount, acreage or specific property limitations on the Secretary's authority; (3) use by Congress of both the phrases "as Indian lands are held" and "in trust for the benefit of the tribe" which shows different intentions for the land acquisitions in different sections of the MILCSA; and (4) the legislative history which indicates that the Secretary intended to retain discretionary authority. All of these factors lead to the conclusion that land acquisition authority in MILCSA is not mandatory.

The Secretary has to evaluate the request for trust acquisition against the language of MILCSA prior to the decision to accept the land in trust. The Secretary must exercise her discretion to determine that an acquisition or an exchange satisfies the "consolidation and enhancement requirement." The Secretary must also have "substantial evidence" that earnings generated by the Land Trust established by the MILSCA were used to purchase the property. Therefore, the Bureau should process trust applications using the earnings from the MILSCA Land Trust as discretionary trust acquisitions.

Once again, we apologize for the length of time in providing our formal written response.

Sincerely,

Regional Director

cc: Honorable Dale Kildee
Honorable Bart Stupak
Michigan Field Office

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

Memorandum

APR 06 2012

To: Regional Directors
Superintendents

Through: Michael S. Black
Director, Bureau of Indian Affairs

From: Larry Echo Hawk
Assistant Secretary – Indian Affairs

Subject: Updated Guidance on Processing of Mandatory Trust Acquisitions

In connection with the Department of the Interior's duty to acquire land in trust for Indian tribes under various mandatory acquisition statutes and ongoing efforts to streamline that process, we have reviewed the Department's prior guidance memoranda regarding processing mandatory land acquisitions.[1] For all of the reasons set forth in this memorandum, we provide clarification regarding the BIA's method of processing mandatory fee-to-trust acquisitions. This guidance memorandum replaces and supersedes all previous guidance regarding the processing of fee-to-trust acquisitions pursuant to a statute or judicial decree that mandates the acquisition of land in trust for a tribe or Indian individual. All mandatory fee-to-trust acquisitions shall now be processed as follows:

Mandatory Determinations

Statutory and Judicial Mandates[2]

A tribe or individual Indian must submit a written request to the BIA to commence the acquisition process unless a specific statute or judicial order requires the Secretary to proceed

[1] These memoranda include, but are not exclusively limited to, the April 17, 2002 memorandum regarding the "Processing of Mandatory Lands Into Trust Applications" issued by the Deputy Commissioner of Indian Affairs; the May 2, 2003 memorandum regarding the "Applicability of the Department of Justice's Title Regulations to Applications to Place Lands into Trust memorandum issued by Acting Assistant Secretary – Indian Affairs and, most recently, the guidance of November 2, 2011, entitled "Processing of Mandatory Acquisitions of Lands Into Trust for Tribes and Individual Indians" issued by the Director of the BIA.

[2] This guidance memorandum does not apply to legislative transfers of title. There is a distinction between mandatory acquisition statutes where "Congress directs the Secretary to complete the administrative process of accepting trust title" and legislative transfers of title, which occur when "Congress directly transfers land into trust status on behalf of tribes or individual Indians." 64 Fed. Reg. 17574, 17578 (April 12, 1999). When Congress legislatively transfers title into trust it "remove[s] the need for any administrative action to effectuate the title transfer." *Id.*

without the submission of a request. Acquisitions made pursuant to 25 U.S.C. § 2216(c)[3] have previously have been determined to be mandatory[4] and should be processed accordingly. In all other cases, a determination that a particular acquisition is mandatory is made on a case-by-case basis. The BIA should consult the Solicitor's Office as early as possible to request a written determination that the statute or judicial decree mandates the Secretary to acquire land into trust for a tribe or individual Indian. The BIA may rely on the Solicitor's determination that a congressional enactment is a mandatory acquisition statute or a judicial decree provides for mandatory acquisitions to process that request and to process future requests under the same mandatory authority.

Parcel Qualification

Upon determining that the statute or judicial decree mandates the acquisition, the BIA will determine whether the parcel meets any additional required criteria. For example, a statute might require that a parcel be located within a specific geographical area or that certain funds be used for the acquisition. If so, the BIA will ensure that those criteria are met in order to process the request as a mandatory acquisition. The tribe or individual Indian shall submit information demonstrating that the parcel meets these additional criteria. Questions concerning these criteria should be referred to the Solicitor's Office as early as possible to confirm that acquisition of the parcel is mandated and that the applicable criteria have been met.

Title Evidence

Our regulations provide that:

> [i]f the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.

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[3] Section 2216(c) provides that "[a]n Indian, or the recognized tribal government of a reservation, in possession of an interest in trust or restricted lands, at least a portion of which is in trust or restricted status on the date of enactment of the Indian Land Consolidation Act Amendments of 2000 [enacted Nov. 7, 2000] and located within a reservation, may request that the interest be taken into trust by the Secretary. Upon such a request, the Secretary shall forthwith take such interest into trust."

[4] Memorandum from Assistant Solicitor, Branch of Trust Responsibility, Division of Indian Affairs to the Director, Bureau of Indian Affairs, entitled "Acquisitions in Accordance with 25 U.S.C. § 2216(c)" (Aug. 30, 2011).

25 C.F.R. §151.13.

It is our reasoned interpretation that this provision does not apply to mandatory acquisitions because the regulation applies to situations where the Secretary acts on a "request" by a tribe to take land into trust, which is not the case in mandatory trust acquisitions.[5] Furthermore, the regulations authorize the Secretary to require the elimination of any liens encumbrances or infirmities prior to "taking approval action," which contemplates Secretary discretionary decisionmaking and the weighing of certain factors that are not typically found in the mandatory acquisition context. Furthermore, as a matter of sound policy, when Congress or a court mandates acquisitions of land for a tribe or individual Indian, it has done so generally to restore land to the tribe's homelands[6] or in settlement of a dispute or to address a grievance[7] or a perceived injury[8] to a tribe or individual Indian.

In this context, Congress or a court has made a determination that the tribe or Indian individual is entitled to certain lands, sometimes subject to certain additional conditions, but not subject to the standard requirements for discretionary acquisitions. Given our interpretation of 25 C.F.R. §151.13, that it only applies to situations where a tribe has requested that the Secretary exercise his/her discretion, and our policy determination that requiring full title review per DOJ Title Standards would potentially frustrate the intent of Congress or the judiciary, we conclude that that full compliance with DOJ Title Standards for mandatory acquisitions is not warranted. Nonetheless, we also conclude that having some evidence of title ownership is a wise, reasonable practice as the BIA should have an understanding of any potential liabilities or conflicts that may exist upon acquisition of the land. Thus, the BIA shall adhere to the following guidance.

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[5] Letter from Lewis Baylor, Division Counsel for Title Matters, Land Acquisition Section, DOJ to Colleen Kelley and Priscilla A. Wilfahrt, Field Solicitors, Office of the Solicitor, DOI (Dec. 20, 2002); Letter from Lewis Baylor, Division Counsel for Title Matters, Land Acquisition Section, DOJ to Robert J. McCarthy, Field Solicitor, Office of the Solicitor, DOI (Feb. 19, 2003); Letter from Edith Blackwell, Acting Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, DOI to Lewis Baylor, Division Counsel for Title Matters, Land Acquisition Section, DOJ (April 25, 2003); Letter from Patrice Kunesh, Deputy Solicitor for the Division of Indian Affairs, Office of the Solicitor, DOI to Lewis Baylor, Division Counsel for Title Matters, Land Acquisition Section, DOJ (April 6, 2012).

[6] For example, Congress mandated certain acquisitions on behalf of the Devils Lake Sioux Tribe based, in part, on Congress' determination that the "continued existence of the Devils Lake Sioux Reservation, North Dakota, as a permanent homeland of the Devils Lake Sioux Tribe and as a necessary foundation for continued self-determination requires that the Secretary of the Interior have authority to . . . consolidate and increase the trust and base in the reservation for the tribe and individual tribal members . . . [and] prevent further loss of trust land." Pub. L. No. 97-459, 96 Stat. 2515 (1983).

[7] Congress mandated acquisitions for the White Earth Band of Minnesota Chippewa as part of the White Earth Land Compensation Act which was intended to settle "claims on behalf of Indian allottees or heirs and the White Earth Band involving substantial amounts of land within the White Earth Indian Reservation in Minnesota [which were the] subject of existing and potential lawsuits involving many and diverse interests in Minnesota, and [were] creating great hardship and uncertainty for government, Indian communities, and non-Indian communities . . . ." Pub. L. No. 99-264, 100 Stat. 61 (1986). Congress intended for the Act to "settle unresolved legal uncertainties relating to th[o]se claims." *Id.*

[8] Congress mandated acquisition of certain lands for the Ponca Tribe as part of the Ponca Restoration Act which was intended to restore the Tribe's federally recognized status and remedy the effects of the government's termination and mistreatment of the tribe which resulted in loss of lands, economic hardship and cultural damage to the Tribe. 25 U.S.C. § 983b.

25 U.S.C. § 2216(c) Acquisitions

Title determinations for acquisitions of fractional interests pursuant to 25 U.S.C. § 2216(c) will adhere to the following criteria. Submissions shall include current evidence of title ownership from the tribe or individual Indian demonstrating that the fractional interest is owned by the tribe or individual Indian and how it was acquired. This information should include an abstract of title dating from the time the interest was transferred from trust ownership to partial fee ownership to the present. In the absence of an abstract of title, the BIA will accept a sworn declaration from the owner that states (a) how the owner acquired the interest, and a copy of the recorded document through which the owner's interest was acquired, and (b) that the owner has not conveyed the interest away.

All Other Mandatory Acquisitions

Title determinations for all other mandatory acquisitions shall require current evidence of title ownership from the tribe or individual Indian demonstrating that the interest is owned by the tribe or individual Indian and how it was acquired.[9] This should include an abstract of title or a title commitment dating from the time the interest was acquired in fee ownership by the current owner or the current owner's predecessor(s) in title to the present.

Notice

As a matter of practice, the Department has provided notice of its intention to take land into trust for a tribe or individual Indian or, alternatively, its refusal to complete a fee-to-trust acquisition. A notice of a decision to deny a trust acquisition also has included specific reference to a right of appeal pursuant to 25 C.F.R. Part 2 (or, if the decision is issued by the Assistant Secretary – Indian Affairs, appeal under Part 2 is unavailable, since the decision is final for the Department). The Department has followed this practice for both mandatory and discretionary acquisitions. Sound policy reasons weigh in favor of continuing to provide public notice in order to allow for judicial review prior to acquisition of lands because, once the United States acquires title, the Quiet Title Act, 28 U.S.C. § 2409a, precludes judicial review. Although the Department's regulations (specifically 25 C.F.R. § 151.12) may not explicitly require notice of mandatory acquisitions, the policy of providing notice is consistent with our regulations.

Therefore, the Bureau will continue to provide written notice of the acquisition determination to the tribe or individual Indian. In the event of a denial, notice of the right to appeal pursuant to 25 C.F.R. Part 2 shall be provided unless the decision was made by the Assistant Secretary – Indian Affairs.

Once the Department determines that it must acquire a particular parcel in trust for a tribe or an individual Indian, written notice shall be published in the *Federal Register* or in a newspaper of general circulation serving the affected area.[10] The notice will reference the applicable

[9] This requirement may also be met by submitting written evidence that title will be transferred to the tribe or individual upon acquisition in trust by the Department on behalf of the tribe or the individual Indian.

[10] Decisions from appeals under Part 2 are final upon exhaustion of administrative remedies.

mandatory authority, state that the Secretary is required to take the land into trust, and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published. If an appeal of the determination is filed in Federal Court before the 30-day notice time period expires, you should consult the Solicitor's Office prior to transferring and recording title.

Absent a judicial challenge within the 30-day period (or, if litigation has been filed, upon a final decision upholding the acquisition), the Secretary shall then issue or approve an appropriate instrument of conveyance to finalize the mandated acquisition.

Environmental Review

It is well-established that the environmental review requirements of the National Environmental Policy Act (NEPA) are not applicable to mandatory acquisitions.[11]

In addition, we find that the plain language of our regulations (25 C.F.R. §§151.10(h) and 151.11(a)) makes clear that compliance with 602 DM 2 is not a precondition to completing a mandatory fee-to-trust acquisition. In addition to the plain language of our regulations, we also find there are good policy reasons for treating mandatory acquisitions differently with regard to 602 DM 2. The Secretary has no discretion to refuse to acquire land that qualifies under the statute or decree regardless of what information might exist under a 602 DM 2 analysis. Therefore, BIA shall not require compliance with 602 DM 2 as a precondition to processing and completing mandatory acquisitions and we set aside any previous direction to the contrary.

Nevertheless, it still is important for the Department to understand any environmental hazards that might be present on the lands it must acquire or any potential legal liabilities. To do this, the BIA must conduct an initial site inspection to satisfy its due diligence requirement, however, completion of the acquisition is not conditioned upon the initial site inspection or the findings and/or results of the inspection.

Please refer any questions concerning this guidance to the Director's Office. Thank you in advance for your cooperation with this important work.

[11] For example, *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) held that NEPA only applies to discretionary agency actions.