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Indian Tribes and the Base Realignment and Closure Act: Recommendations for Future Trust Land Acquisitions

Geoffrey D. Strommer

Craig A. Jacobson

INDIAN TRIBES AND THE BASE REALIGNMENT AND CLOSURE ACT: RECOMMENDATIONS FOR FUTURE TRUST LAND ACQUISITIONS

GEOFFREY D. STROMMER* AND CRAIG A. JACOBSON**

Since the end of the Cold War, the United States Department of Defense has been engaged in a process of downsizing the military bases it uses to support defense objectives.[1] This process is controlled by the Base Realignment and Closure Act (BRAC) and has already resulted in the closure of a large number of bases in the United States through BRAC 88, BRAC 91, BRAC 93, and BRAC 95.

The authorizing legislation for the BRAC process has been amended several times to address different social, economic and environmental problems, such as future economic development, homelessness, local economic diversification, and transfer of property prior to completion of all environmental remediation efforts. To date, however, BRAC authorizing legislation has not been amended to address specifically Indian interests, both in the BRAC process generally and more specifically in acquiring the real property dispersed through the BRAC process, referred to as BRAC real property.[2]

Indian tribes[3] may play an important role in the BRAC process, but the transfer process for base real property to Indian tribes can be complicated. Tribes may seek to acquire base real property at both the excess (federal agency) and the surplus (general public) levels. In each case, different acquisition regulations and standards apply. Further, tribes may retain title to BRAC real property in fee simple status or may seek to acquire it in trust; again, different regulations and standards apply to each case.

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* Geoffrey D. Strommer, a member of the Arizona and Oregon State Bars, is a partner in the Portland, Oregon office of Hobbs, Straus, Dean & Walker, LLP where he practices primarily in the area of federal Indian law.

** Craig A. Jacobson, a member of the Oregon and Washington State Bars, is an associate in the Portland, Oregon office of Hobbs, Straus, Dean & Walker, LLP where he practices primarily in the areas of environmental and federal Indian law.

1. BASE REUSE IMPLEMENTATION MANUAL (BRIM) 1-3 (1997).

2. The BRIM, however briefly, discusses "Native American Indian Interests" in BRAC real property, summarizing that their interests may be addressed either through BIA excess transfers or tribal participation in the Local Redevelopment Authority (LRA), discussed *infra* Part II.B. BRIM, *supra* note 1, at 3-7.

3. Numerous Alaska Native villages are considered federally recognized Indian tribes by the Department of Interior. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 63 Fed. Reg. 71,941 (1998). Issues related to eligibility of Alaska Native villages to acquire and place BRAC real property in trust are beyond the scope of this article.

This Article discusses legal issues associated with involvement of Indian tribes in the BRAC process, particularly excess property transfers and trust land acquisition. The Article also briefly discusses the issues of surplus acquisition of BRAC real property and tribal acquisition of real property in fee simple status. Part I gives a brief overview of the BRAC process for base closure and property disposal. Part II provides an overview of the fee-to-trust process administered by the Bureau of Indian Affairs (BIA). Part III briefly examines how these two processes intersect under the current regulations and recommends that both the BRAC and fee-to-trust regulations be revised to make future trust acquisition of BRAC real property less complicated and time-consuming for Indian tribes.

I. OVERVIEW OF BASE CLOSURE PROCESS

The Department of Defense (DOD) has been, and continues to be, in the process of downsizing the number of military installations needed for defense operations.[4] As it does so, however, the DOD recognizes that bases play a pivotal economic role in local communities and are a significant source of employment, meaning that base closure without an economic recovery plan may cause undue hardship on local economies.[5] Therefore, it is important for non-military entities interested in the BRAC process, including Indian tribes, to understand that BRAC is not simply a land giveaway; it is a process aimed at achieving tangible economic benefits for local communities. The following discussion provides an overview of this process, beginning with base selection.

A. BASE SELECTION

The Defense Base Closure and Realignment Act of 1990 (DBCRA) established a Defense Base Closure and Realignment Commission (Commission).[6] The Secretary of Defense forwards recommendations for base closure to the Commission.[7] Utilizing specific criteria, the Commission then holds public hearings on the Secretary's recommendations. After reviewing its findings, the Commission forwards them to the President for approval or disapproval, summarized in a report to Congress.[8] Congress then considers the report under very specific guidelines and

4. Base Closure Community Assistance Act (BCCAA), Pub. L. No. 103-160, § 2901(1), 107 Stat. 1909, 1909 (1993).

5. BCCAA, § 2901(2)-(4).

6. Defense Base Closure and Realignment Act of 1990 (DBCRA), Pub. L. No. 101-510, § 2902, 104 Stat. 1808, 1808-10 (1990).

7. DBCRA, § 2903(c), 104 Stat. at 1811.

8. DBCRA, § 2903(d), (e), 104 Stat. at 1811.

decides whether to authorize the Secretary, through legislation, to carry out base closure activities at specific sites.[9]

B. BASE-WIDE REUSE PLANNING

Once a base has been selected for closure, an on-site Base Transition Coordinator (BTC) is assigned.[10] A Local Redevelopment Authority (LRA) is then created through consultation between the military and local government and other interested parties.[11] The LRA has the opportunity to receive funding from the Department of Defense Office of Economic Adjustment (OEA) to pay for its planning activities.[12] The LRA has many responsibilities, including identifying and pursuing interested parties in base real property; holding public meetings and identifying local needs that must be addressed through the base closure process; examining its own interest in acquiring base property; considering environmental remediation efforts in redevelopment planning; and guiding land-use planning efforts for the base, including creation of a comprehensive redevelopment plan.[13]

The last of these roles, creation of the base-wide redevelopment plan, is perhaps the most important. The LRA submits its plan to the DOD as part of a larger application forwarded to the Secretary of Housing and Urban Development (HUD).[14] The plan also serves as a road map for the Military Department's disposal decisions. Finally, the Military Department's environmental analysis for the base, including necessary National Environmental Policy Act (NEPA) documentation, takes into account the proposed land uses in the LRA's plan, just as the LRA's proposed land uses take into account the environmental condition of the base.[15]

The Military Department, the BTC and the LRA work closely together during this planning phase of the BRAC process. Concurrently with the LRA's planning activities, the Military Department is responsible for completing the following tasks: identifying and making available to other federal agencies base property excess to DOD's needs; identifying property surplus to the federal government's needs to be made available for reuse; inventorying personal property and consulting with the LRA on its reuse; creating a BRAC Cleanup Team (BCT) to conduct

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9. DBCRA, § 2908, 104 Stat. at 1816-18.
10. BRIM, *supra* note 1, at 2-2.
11. BRIM, *supra* note 1, at 1-2.
12. BRIM, *supra* note 1, at 2-4.
13. BRIM, *supra* note 1, at 2-4, -5.
14. BRIM, *supra* note 1, at 2-12.
15. *See* DOD GUIDANCE ON ACCELERATING THE NEPA ANALYSIS PROCESS FOR BASE DISPOSAL DECISIONS, *in* BRIM, *supra* note 1, at F-9 to -11.

and oversee all environmental documentation and remediation efforts; conducting NEPA analysis (including consideration of natural and cultural resource impacts) and an environmental baseline survey (EBS) to identify uncontaminated base property available for disposal; providing copies of environmental analyses to the LRA; and assisting the LRA with the redevelopment plan.[16]

Indian tribes that are impacted by, or interested in, a BRAC facility closure should pay special attention to all stages in the base closure process.[17] In particular, Indian tribes should be involved in the creation of, and seek to be a part of, the LRA; this will ensure that tribal interests are properly protected during all base closure activities. [18]

As mentioned earlier, Indian tribes may acquire BRAC property at both the surplus and excess levels. In the case of surplus property, the LRA largely guides the disposal process for property the Military Department has made available to federal agencies, although the Military Department has the ultimate authority for making all disposal decisions.[19] While Indian tribes may acquire BRAC property through this process, they also can acquire it as federal excess property before it is made available to the LRA for disposal as surplus property. Acquiring BRAC property at this early stage requires that tribes pay close attention to applicable timelines and are fully aware of their legal duties and options. The balance of this article focuses on the most important legal issues of which Indian tribes should be aware if they wish to acquire BRAC property as federal excess property.

C. EXCESS PROPERTY ACQUISITION

Under BRAC, the Military Department has nine methods available to dispose of property: 1) federal agency excess property transfers; 2) public purpose benefit conveyances; 3) homeless assistance conveyances; 4) negotiated sales; 5) advertised public sales; 6) Economic Development Conveyances (EDCs); 7) conveyances for the cost of environmental remediation; 8) depository institution facilities; and 9) leaseback conveyances.[20] The first of these, federal excess property

16. BRIM, *supra* note 1, at 2-5.

17. For example, as a part of BRAC-required NEPA compliance, Military Departments must analyze impacts of disposal/reuse on cultural resources. BRIM, *supra* note 1, at 2-6. Indian tribes concerned about cultural resource issues on BRAC bases therefore have an increased incentive to get involved in BRAC decisionmaking through consultation with the Military Department, LRA participation or both.

18. Such a role for a BRAC-impacted Indian tribe on the LRA is supported by the DOD-published Native American policy. *See* DEPARTMENT OF DEFENSE NATIVE AMERICAN POLICY (1998).

19. *See* BRIM, *supra* note 1, at § 3.3.

20. For a more detailed discussion of each of these types of conveyances, see *Identifying Interests in Real Property and Reuse Planning, in* BRIM, *supra* note 1, at 3-1 to -25.

transfers, is one of the first considerations of the Military Department; they occur early in the BRAC process and on a specific timeline.[21] Indian tribes have the unique ability to step into the shoes of a federal agency and acquire BRAC property as federal excess property, thereby putting them in a priority position. The following sections review how tribes may acquire property in this fashion.

1. *General Requirements for Tribal Acquisition of BRAC Real Property as Surplus Property*

BRAC real property may be acquired at the surplus level by Indian tribes[22] in a relatively straightforward manner. After the Military Department completes all disposal decisions at the excess (federal agency) level, discussed more fully below, the LRA plays the primary role in surplus property disposal decisionmaking. The LRA is responsible for soliciting interest in the base real property and for creating a base-wide redevelopment plan that summarizes how the LRA has decided property disposal decisions can best meet local economic needs.[23]

An Indian tribe interested in acquiring BRAC property at the surplus level must respond to the LRA's solicitation of "notices of interest" on the same basis as other parties; presumably, the tribe would also be required to pay for the property on the same basis as other parties.[24] The LRA would then consider the tribal request in its formulation of the redevelopment plan.[25] Following the completion of the redevelopment plan, the Military Department completes its final environmental impact analysis, resolves any disputes resulting from competing proposals for property and generally disposes of property in line with the LRA's redevelopment plan.[26]

2. *General Requirements for Federal Agencies to Acquire BRAC Property as Excess Federal Property*

When the President recommends to Congress a base for closure or realignment, the Military Department at the base is required to send a notice to other DOD components and federal agencies informing them

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21. 32 C.F.R. § 175.7(a)(1) (1998).

22. Both Indian tribes and tribal organizations have the right to acquire federal excess and surplus property under the Indian Self-Determination and Education Assistance Act. *See* 25 C.F.R. § 900.97 (1999). While a tribal organization may acquire BRAC property, it may not have the capacity to place BRAC real property into trust status. *See* 25 C.F.R. § 151.2(b) (1999) (defining "tribe" for purpose of fee-to-trust regulations).

23. BRIM, *supra* note 1, at 3-11 to -15.

24. BRIM, *supra* note 1, at 3-11 to -15.

25. BRIM, *supra* note 1, at 3-4.

26. BRIM, *supra* note 1, at 3-4 to -5.

that property may be available and describing such property.[27] Within a week after Congress approves the closure, the Military Department is to issue a formal notice of availability (NOA) to other DOD components and federal agencies.[28] Within thirty days of the NOA, an interested federal agency must provide to the Military Department a written expression of interest in the buildings or property, including its intended use of the property and its corresponding requirement for the property.[29]

The next step for any federal agency expressing an interest in buildings or property is to submit an application to the Military Department within sixty days of the NOA.[30] As set forth in BRIM, the application must include the following:

- A completed General Services Administration (GSA) Form 1334, "Request for Transfer of Excess Real and Related Personal Property" (for requests from other DOD Components a DD Form 1354 is required). This must be signed by the head of the component of the Department or Agency requesting the property. If the authority to acquire property has been delegated, a copy of the delegation must accompany the form.
- A statement from the head of the requesting component or Agency that the request does not establish a new program (i.e., one that has never been reflected in a previous budget submission or Congressional action).
- A statement that the requester has reviewed its real property holdings and cannot satisfy its requirement with existing property. This review must include all property under the requester's accountability, including permits to other Federal Agencies and outleases to other organizations.
- A statement certifying that the requested property would provide greater long-term economic benefits than acquisition of a new facility or other property for the program.
- A statement that the program for which the property is requested has long-term viability.
- A statement that considerations of design, layout, geographic location, age, state of repair, and expected maintenance costs of the requested property clearly demonstrate that the transfer will prove more economical over a sustained period of time than acquiring a new facility.

27. 32 C.F.R. § 175.7(a)(2) (1998).
28. *Id.* § 175.7(a)(4).
29. *Id.* § 175.7(a)(5).
30. *Id.* § 175.7(a)(6).

- A statement certifying that the size and location of the property requested is consistent with the actual requirement.
- A statement that fair-market-value reimbursement to the Military Department will be made within two years of the initial request for the property, unless this obligation is waived by the Office of Management and Budget (OMB) and the Secretary of the Military Department or a statute provides for a non-reimbursable transfer.
- A statement that the requester agrees to accept the care and custody costs for the property on the date the property is available for transfer, as determined by the Military Department.[31]

BRIM further requires that the Military Department, when reviewing such an application for excess property from a federal agency, consider the following criteria from the Federal Property Management Regulations:

- The requirement upon which the request is based is both valid and appropriate.
- The proposed federal use is consistent with the highest and best use of the property.
- The requested transfer will not have an adverse impact on the transfer of any remaining portion of the base.
- The proposed transfer will not establish a new program or substantially increase the level of an Agency's existing programs.
- The application offers fair market value for the property, unless waived (i.e. through the OMB process).
- The proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Military Department.
- The proposed transfer is in the best interest of the Federal Government.[32]

The responsible Military Department must make its determinations of excess and surplus property within 100 days of the NOA and must inform the LRA of all determinations.[33] At the LRA's request, however, the Military Department may postpone its "determination for no more than six months after the date of approval of closure or realignment."[34] Further, at its discretion, the Military Department may withdraw a surplus

31. BRIM, *supra* note 1, at 3-8 to -9. *See also* 32 C.F.R. § 175.7(a)(9).
32. BRIM, *supra* note 1, at 3-9. *See also* 32 C.F.R. § 175.7(a)(10).
33. BRIM, *supra* note 1, at 3-10.
34. BRIM, *supra* note 1, at 3-10.

determination and reconsider an excess property request if it is not made in a timely fashion or if the LRA requests reconsideration.[35]

If an Indian tribe complies with the above requirements, it can obtain BRAC property at the excess rather than the surplus level. This enables tribes to obtain BRAC property earlier in the BRAC process than other parties. The ability of tribes to do so depends upon several statutes, discussed below.

3. *Rights of Tribes to Acquire Federal Excess Property*

Congress has given Indian tribes the right to step into the shoes of a federal agency and acquire excess property through the Indian Self-Determination and Education Assistance Act (ISDEAA). The ISDEAA gives tribes the right to assume funds and responsibility for operation and management of programs provided by the Department of the Interior (DOI) and the Department of Health and Human Services (DHHS) to Indians and Alaska Natives. Tribes can access these funds and responsibilities under two statutory schemes in the Act: self-determination contracting under Title I[36] and self-governance compacting under Titles III or IV.[37]

Both approaches give tribes the right to acquire excess and surplus property from the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS) and the General Services Administration (GSA).[38] Section 105(f) of Title I sets out the general statutory authority in the ISDEAA for Indian tribes to acquire surplus and excess property. It applies to both Titles III and IV: Section 403(l)[39] gives tribes negotiating Title III

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35. BRIM, *supra* note 1, at 3-10.

36. *See* 25 U.S.C. §§ 450j (1994 & Supp. 1997).

37. Congress initially enacted Title III, the Tribal Self-Governance Project, in 1988 as a demonstration project applicable only to BIA programs within the DOI. *See* Title III, Pub. L. No. 93-638, 88 Stat. 2203 (1975), as amended by Pub. L. No. 100-472, § 209, 102 Stat. 2296 (1988). Congress expanded Title III in 1990 and 1992 to all programs available to tribes from the DOI as well as from the DHHS. In 1994, Congress made Title III a permanent program within the Department of the Interior under Title IV. *See* 25 U.S.C. §§ 458aa-458hh (1994 & Supp. 1997). Self-governance remains a demonstration project within the DHHS under Title III. The general intent behind the self-determination and self-governance programs is similar: Both are designed to implement Congress' policy of transferring federal programs to Indians and Alaska Natives and enhancing the ability of tribal governments to govern their communities. The programs implement this intent in different ways, however. Self-governance is, in many respects, the next step beyond self-determination: It expands the types of programs and responsibilities that tribes can take over, places greater emphasis on minimizing oversight by federal agencies and maximizes flexibility for tribes once programs are included in an agreement.

38. 25 U.S.C. § 450j(f) (1994).

39. Section 403(l) states, in relevant part:

> At the option of a participating tribe or tribes, any or all provisions of Part A of this subchapter shall be made part of an agreement entered into under title III of this Act or this part. The Secretary is obligated to include such provisions at the option of the participating tribe or tribes. If such provision is incorporated it shall have the same force

self-governance agreements the right to incorporate § 105(f) in their agreements, while § 406(c)[40] specifies that § 105(f) applies to all agreements negotiated thereunder.

Section 105(f)(2) gives the appropriate secretary the discretion to donate to a tribe any personal or real property found to be in excess of the needs of the BIA, the IHS or the GSA.[41] Title to property transferred by the secretary automatically vests in the tribe, unless the tribe requests otherwise.[42] If the property has a value in excess of $5,000 and the self-determination contract at issue is terminated, the secretary may, at his or her option, have title to the property revert to DOI or DHHS, as appropriate.[43] Any such transferred property remains eligible for replacement on the same basis as if title is vested in the United States.[44]

Finally, under § 105(f)(3), the secretary may acquire excess or surplus government personal or real property for donation to a tribe if he or she determines that the property is appropriate for use by the tribe for a purpose for which a self-determination contract is authorized under the Act.[45] It is under this section that Indian tribes may acquire excess property from a BRAC base closure.

Regulations promulgated jointly by DOI and DHHS further clarify § 105(f)'s provisions.[46] Additionally, DOI and HHS have developed, in draft form, an "Internal Agency Procedures Handbook" that, when finalized, will guide real and personal property acquisition at the excess and surplus levels.[47] The regulations generally require the appropriate secretary to exercise his or her discretion in a manner that gives maximum effect to requests of tribes for donation of excess and surplus property, provided that the requesting tribe "shall state how the requested property is appropriate for use for any purpose for which a Self-Determination contract or grant is authorized."[48] The regulations differ in important respects, however, if the property at issue is BIA and IHS excess property under § 105(f)(2) or if it is excess or surplus government property of other agencies under § 105(f)(3).

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and effect as if set out in full in Title III or this part.

25 U.S.C. § 458cc(l) (Supp. 1997).

40. Section 406(c) states: "All provisions of . . . [105(f)] of this title shall apply to agreements provided under this part." 25 U.S.C. § 458ff(c) (1994).

41. 25 U.S.C. § 450j(f)(2) (1994).

42. *Id.* § 450j(f)(2)(A).

43. *Id.* § 450j(f)(2)(B).

44. *Id.* § 450j(f)(2)(C).

45. *Id.* § 450j(f)(3).

46. *See generally* 25 C.F.R. §§ 900.85-.107 (1999). These are the only regulations presently implemented that address these issues. Title III does not give the Secretary of the Interior authority to promulgate regulations. While a rulemaking process has been underway for Title IV for some time, proposed regulations are likely to be published in the upcoming months.

47. DOI & HHS, INTERNAL AGENCY PROCEDURES HANDBOOK, at ch. 9 (draft 1998) [hereinafter "IAP"].

48. 25 C.F.R. § 900.86.

In the case of BIA and IHS excess property under § 105(f)(2), a tribe is required to submit a request to the appropriate secretary for specific property "that includes a statement of how the property is intended for use in connection with a Self-Determination contract . . . ."[49] The secretary is directed to exercise discretion in a manner that gives maximum effect to the request.[50] If the secretary awards the property to the requesting tribe, title to the property automatically vests in the tribe.[51] Under certain circumstances, however, including contract retrocession, reassumption, termination or expiration, the secretary has the right to reacquire title to property transferred to a tribe under these provisions.[52]

The process is different if the property is excess or surplus government property under § 105(f)(3). In that case, a tribe is required to submit a request to the appropriate secretary for specific property stating "how the property is appropriate for use for a purpose for which a Self-Determination contract or grant is authorized under the Act."[53] The secretary is required to exercise discretion in a manner that gives maximum effect to the request.[54] Title to the property automatically vests in the tribe once a transfer of the property has occurred.[55] In contrast to BIA and IHS excess property transfers, however, the secretary has no right to reacquire title to such property once title has vested in the tribe.[56]

Once excess and surplus property of agencies other than IHS or BIA has been transferred to a tribe under § 105(f)(3), neither the Act nor the regulations implementing it limit how a tribe can use the property.[57] In fact, the ISDEAA, particularly in Titles III and IV, places great emphasis on giving tribes maximum flexibility to decide how best to discharge responsibilities under ISDEAA agreements with minimal oversight by DOI or DHHS. For example, under Titles III and IV of the Act, tribes have the right to redesign and consolidate programs, as well as

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49. *Id.* § 900.97.
50. *Id.*
51. *Id.* § 900.98.
52. *Id.* § 900.100.
53. *Id.* § 900.104(a).
54. *Id.* § 900.104(b).
55. The regulations set out different provisions detailing how title for personal and real excess or surplus federal property vests in a tribe after the property has been donated. *See id.* § 900.105(a)-(c).
56. *Id.* § 900.106.
57. However, the GSA has developed regulations that create a two-tiered system for acquisition: Federal agencies that will hold title to property may screen excess federal property the first 10 days it is available, and only then can tribes and tribal organizations pursue such property. Indian tribes have requested that the BIA obtain title to desirable property within those 10 days and hold it for the requisite 12 months before transferring title to tribes. Tribes would then continue to be able to screen federal excess property as it became available. However, the BIA has not yet agreed to this position. *See* HOBBS ET AL., STATUS REPORT: INTERNAL AGENCY PROCEDURES HANDBOOK 6 (1998).

reallocate funds, in a manner that enhances the effectiveness of the programs and maximizes their ability to exercise powers of self-governance. This flexibility extends to decisions relating to how property that the tribe owns can best be used to further the goals of the ISDEAA as reflected in that tribe's self-governance agreements.

In sum, tribes have the right under § 105(f)(2) to acquire property that is excess to the BIA and the IHS and under § 105(f)(3) to acquire property that is excess or surplus to other government agencies. A request for BIA or IHS property must state how the property is intended for use in connection with an ISDEAA contract, while a request for other government excess or surplus property need only state how the property is appropriate for use for a purpose for which ISDEAA contracts are authorized. Finally, the secretary of the appropriate agency retains the right to reacquire BIA and IHS excess property transferred to a tribe in certain circumstances, including contract retrocession, reassumption, termination or expiration, but has no right to reacquire excess or surplus property of other agencies.[58]

4. *BIA Policy on BRAC Excess Property Acquisitions*

Due to the specific requirements of BRAC excess property acquisitions, the BIA has developed two guidance documents, "Procedures for Obtaining Department of Defense Properties Including Base Closure and Realignment Properties" and "Justification Required for Requesting a Transfer Without Reimbursement."[59] These guidance documents are in addition to the regulations governing excess and surplus property acquisition found at 25 C.F.R. part 900, subpart I (§ 900.85-§ 900.107).[60]

The first step in the BIA process is a screening criterion, satisfied by either of two possibilities. First, the Area Director reviews the Military Department's Notice of Availability (NOA) to determine if the BIA or a party entering into a self-determination or self-governance contract in the Area Director's jurisdiction has a requirement for the DOD excess property. Alternatively, if the excess real property is located within the boundaries of a federally-recognized Indian reservation, there may be authority to acquire the property under 40 U.S.C. § 483(a)(2) (1998),

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58. *See* 25 C.F.R. § 900.100 (1999).

59. BIA, JUSTIFICATION REQUIRED FOR REQUESTING A TRANSFER WITHOUT REIMBURSEMENT (1998) [hereinafter "BIA JUSTIFICATION"]; BIA, PROCEDURES FOR OBTAINING DEPARTMENT OF DEFENSE PROPERTIES INCLUDING BASE CLOSURE AND REALIGNMENT PROPERTIES (1998) [hereinafter "BIA PROCEDURES"].

60. The BIA appears to have developed the BRAC guidance documents in an effort to tailor the existing regulations (Subpart I) to meet BRAC timelines and criteria.

which governs the transfer of real property located in Indian reservations to the Secretary of the Interior.[61]

Assuming one of these screening criteria is met, the Area Director's Office schedules a meeting with key Area Office (AO) departments (facilities, environmental, contracting and grants, budget, realty) and the party or tribe making a self-determination or self-governance contract.[62] The AO then requests pertinent information about the site (maps, environmental documentation, etc.) from the DOD and conducts a site visit.[63]

Next, the AO provides an acquisition recommendation to the Office of the Deputy Commissioner of Indian Affairs (DCIA). If the BIA decides to acquire the real property, the DCIA must send a letter of intent to the responsible Military Department within the appropriate timelines.[64] Following the issuance of this letter, the AO begins preparing the acquisition application, due no later than sixty days after the NOA. When completing the application, special attention must be given to the justification for the acquisition, including the following criteria:[65]

- The AO's purpose for the acquisition;
- The authority and funding source for the acquisition. If the BIA seeks to acquire the property for no reimbursement, it must include the congressional authorization for the transfer or a letter requesting exception from the reimbursement requirement to the Office of Management and Budget (OMB) with an endorsement by the Secretary of Interior and an explanation of how the exception will further program objectives;[66]
- If a P.L. 93-638 [self-governance or self-determination] contract is the basis for the acquisition, the contract number and how the property will further the contract's objectives;
- How the use of the property will be consistent with the zoning, physical properties, and environmental/cultural characteristics of the property;
- Whether any significant changes will be made to the use of the property and if so, whether funding exists to make those changes.[67]

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61. BIA PROCEDURES, *supra* note 59, at 1.
62. BIA PROCEDURES, *supra* note 59, at 1.
63. BIA PROCEDURES, *supra* note 59, at 2.
64. BIA PROCEDURES, *supra* note 59, at 2. The timeline requires a letter of intent within 30 days of the NOA.
65. This information is included in block 11 of GSA Form 1334.
66. BIA JUSTIFICATION, *supra* note 59, at 1.
67. BIA PROCEDURES, *supra* note 59, at 2-3.

Indian tribes pursuing acquisition of excess BRAC property through the BIA or the IHS have a vested interest in working closely with the AO throughout the acquisition to ensure that information flows smoothly to the officials working on the acquisition application and that all timelines are met. Where § 105(f)(3) of the ISDEAA is being utilized to justify acquisition of the property, the tribal contractor will want to clarify for the BIA those programs for which the property is being acquired.[68] If the land is to be held in trust, then the regulations require that the tribe includes a supporting resolution in its request for the property.[69]

5. *IHS Policy on BRAC Excess Property Acquisitions*

To date, IHS has not developed any specific guidance on BRAC excess real property acquisitions. The existing regulations require that when a tribe requests that HHS acquire federal excess property in trust, HHS will transfer title to the DOI so that the BIA can take the property into trust for the requesting tribe.[70] The draft Internal Agency Procedures follow this same approach.[71] Therefore, tribes that seek to acquire BRAC excess real property through the IHS must still be prepared to work with the BIA for completion of the trust acquisition process once title is transferred to the BIA.

D. BRAC EXCESS PROPERTY ENVIRONMENTAL CONSIDERATIONS

Significant environmental problems are often associated with DOD properties, necessitating a comprehensive environmental process prior to BRAC property disposal actions.[72] The first step in this process is the creation of a BRAC Cleanup Team (BCT) at each installation. The BCT is usually composed of the site's BRAC Environmental Coordinator (BEC) and representatives from the EPA regional office and the state's environmental agency. The BCT develops and implements a BRAC Cleanup Plan (BCP) for the site, working closely with the LRA in sharing information and tailoring cleanup to proposed land reuse.[73] All bases must also establish a Restoration Advisory Board (RAB) made up of

68. Potential programs include: housing, law enforcement, administration of tribal government, social services, wildlife and parks, education, road maintenance, and environmental services, among others.

69. 25 C.F.R. § 900.88(b)(1) (1999).

70. 25 C.F.R. § 900.99(b)(1) (1999).

71. *See* IAP, *supra* note 47, at 9-14.

72. BRIM, *supra* note 1, at 2-9.

73. DOD GUIDANCE AND POLICIES ON FAST TRACK CLEANUP AT CLOSING INSTALLATIONS *in* BRIM, *supra* note 1, app. F, at F-5 to -6 [hereinafter "FAST TRACK"].

agency and community representatives to ensure that environmental remediation meets community expectations.[74]

The BEC is responsible for reviewing the land holdings within the base and determining whether or not properties are contaminated. This determination is part of the base's Environmental Baseline Survey (EBS).[75] This determination of uncontaminated property is to be completed no later than eighteen months after the date of approval of base closure using the criteria under the Community Environmental Response Facilitation Act (CERFA) for determining whether a property is eligible for a Finding of Suitability to Transfer (FOST).[76] With some exceptions, one of which is discussed below, a parcel cannot be conveyed by deed unless the Military Department makes a FOST.[77]

In addition to site-specific determinations of land contamination, the Military Department is required to prepare NEPA documentation analyzing the environmental consequences of land disposal actions and consideration of alternatives.[78] The NEPA analysis must be completed no later than twelve months after the LRA submits its adopted base redevelopment plan.[79] The NEPA analysis will either result in an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or in an EA that identifies the need for an Environmental Impact Statement (EIS) and a corresponding Record of Decision (ROD).[80]

The significant exception to the requirement that all parcels within the BRAC process undergo comprehensive environmental analysis and be found suitable to transfer is the case of federal-to-federal transfers. Military Departments may assign property to another federal agency prior to the completion of remedial actions that would otherwise be required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[81] However, specific reporting of hazardous substances and required remediation and certification of no polychlorinated biphenyl must be a part of the Military Department's notice of excess property (NOA).[82]

Such federal-to-federal transfers may also occur prior to completion of the NEPA process.[83] Therefore, Indian tribes acquiring BRAC property through a federal-to-federal excess property transfer may or

74. BRIM, *supra* note 1, at 2-10.
75. FAST TRACK, *supra* note 73, at F-8.
76. BRIM, *supra* note 1, at 2-11.
77. BRIM, *supra* note 1, at 2-11.
78. BRIM, *supra* note 1, at 2-8.
79. BRIM, *supra* note 1, at 2-8.
80. BRIM, *supra* note 1, at 2-7.
81. BRIM, *supra* note 1, at 2-13.
82. 41 C.F.R. § 101-47.202-2(10) (1998).
83. *Id.*

may not have the benefit of comprehensive documentation by the transferring Military Department of the environmental condition of the property.

II. THE FEE-TO-TRUST PROCESS SHOULD BE REVISED TO ACCOMMODATE BRAC PROPERTY TRANSFERS

Indian tribes successful in having BRAC properties transferred to them must decide if they want the property in fee simple or if they want it placed in trust and possibly designated a reservation. In making this decision, tribes must consider many factors.

For example, land acquired in fee simple status is freely alienable and requires little if any federal involvement other than the transfer itself from the Military Department. Therefore, a tribe will want to acquire real property in fee status if it will at some point desire to sell that property.

On the other hand, a tribe that seeks to acquire real property in trust status must be prepared to work with the acquiring federal agency and the BIA and to comply with all applicable regulations.[84] However, there are benefits to trust acquisition of real property. First, land held in trust for a tribe has been found to be outside state taxation jurisdiction.[85] Land held in trust is also outside of state regulatory jurisdiction.[86] However, while trust land may be used by the tribe and, subject to applicable regulations, may be leased,[87] it is not freely alienable by the tribe.

To accommodate the many Indian tribes that have sought to restore tribal land bases which for various reasons have diminished, the BIA has developed a process for administering tribal requests to transfer fee land into trust. This process, discussed below, does not specifically address federal-to-federal transfers such as those under the BRAC procedures.

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84. This usually means 25 C.F.R. Part 151, the general regulations for fee-to-trust acquisitions. *See* 25 C.F.R. §§ 151.1-.15 (1999). However, other statutes and regulations may apply. *See infra* note 85.

85. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (finding that absent explicit congressional direction to the contrary, there is a presumption against a state's authority to tax Indians or tribes within Indian country); Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) (finding off-reservation trust land to be within intended scope of Indian country for taxation purposes). However, taxation jurisdiction may be impacted by the status of taxation of the military base at the time of transfer, whether the state is a Public Law 280 state, and whether the property is determined to be a part of the tribe's reservation following the transfer. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-154 (1973) (distinguishing between "trust land" and "reservation land" impacting taxation jurisdiction).

86. Bryan v. Itasca County, 426 U.S. 373 (1976) (examining inherent tribal regulatory jurisdiction and finding that even Public Law 280 did not extend all state regulatory jurisdiction over Indian lands).

87. *See* 25 C.F.R. §§ 162.1-.20 (1999).

A. OVERVIEW OF THE FEE-TO-TRUST PROCESS

Over forty statutes authorize the Secretary of the Interior to take fee land owned by tribes or individual Indians into trust.[88] In addition, Congress has authorized the General Services Administration (GSA) to transfer excess federal land within an Indian reservation's exterior boundaries to the Department of Interior (DOI) to be held in trust for that tribe.[89]

Due to the multiplicity of statutes authorizing acquisition of land in trust for tribes, the Department of Interior developed a generalized set of fee-to-trust regulations found at 25 C.F.R. Part 151. The regulations set out the procedures to be followed and criteria to be considered by the BIA in a trust acquisition decisionmaking process. One of the key distinctions made in these regulations is between on-reservation acquisitions and off-reservation acquisitions. For on-reservation acquisitions, including land contiguous to a reservation, federal regulations require the Secretary of the Interior to consider the following factors:

> a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
> b) The need of the individual Indian or the tribe for additional land;
> c) The purposes for which the land will be used;
> d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
> e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
> f) Jurisdictional problems and potential conflicts of land use which may arise; and
> g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
> h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6,

88. For example, the Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to take both on- and off-reservation land into trust. 25 U.S.C. § 465 (1994). While this is a general authorization for trust acquisitions, many other statutes are tribal-specific. *See, e.g.*, Coquille Restoration Act, 25 U.S.C. §§ 715-715g (1994 & Supp. 1997).

89. 40 U.S.C. § 483(a)(1) (1994).

appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.[90]

If the land to be acquired in trust is outside of, and not contiguous to, the tribe's reservation, the following criteria must be considered in addition to those listed above:

a) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

b) Where land is being acquired for business purposes, the tribe shall provide a plan, which specifies the anticipated economic benefits associated with the proposed use.

c) Contact the state and local governments pursuant to § 151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the regulatory jurisdiction, real property taxes and special assessments.[91]

A tribe is required to prepare and submit to the BIA a fee-to-trust application responding to each of the above criteria applicable to the particular acquisition.[92] Two thirty-day notice periods are a part of the fee-to-trust process: one immediately following a tribe's application (for state and local governments to comment on the impacts of the trust transfer on taxes, land use and jurisdiction) and the second following title examination at the end of the process (to allow interested parties to appeal the decision prior to final agency action).[93]

With respect to environmental concerns, a Level I Survey Checklist must be completed, examining the likelihood of contaminants on the site

90. 25 C.F.R. § 151.10 (1999).
91. *Id.* § 151.11.
92. *Id.* § 151.9.
93. *Id.* §§ 151.10-.12.

prior to approval of the tribe's application.[94] In 1995, the DOI revised its departmental manual to make the pre-acquisition environmental site assessment standards more stringent for screening sites for contamination.[95] Therefore, future land acquisitions by the DOI are subject to greater scrutiny with respect to environmental contamination and completed remediation.

Furthermore, the tribe must, as a part of its fee-to-trust application, submit either or both an Environmental Assessment (EA) and Finding of No Specific Impact (FONSI) for National Environmental Policy Act (NEPA) compliance.[96] The proposed action to be considered in the EA is the tribe's proposed use of the land, including the environmental consequences and a discussion of alternatives. Additionally, the BIA is required to consider, in the NEPA review process, an exhaustive list of environmental laws that may be triggered by the proposed action.[97]

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94. *See* DOI, DEPARTMENTAL MANUAL, 602 DM 2 (1995).
95. *Id.*
96. *See* DOI, DEPARTMENTAL MANUAL, 516 DM 6 (1995).
97. The laws included in the BIA Fee-to-Trust Checklist include:

1. Cultural Resources
   (a) Archeological Resources Protection Act
   (b) National Historic Preservation Act
   (c) American Indian Religious Freedom Act
2. Water and Related Land Resources
   (a) Safe Drinking Water Act of 1974
   (b) Flood Disaster Protection Act of 1973
   (c) Coastal Zone Management Act of 1972
   (d) Executive Order 11988 (Floodplain Management)
   (e) Executive Order 11990 (Wetlands Protection)
   (f) Clean Water Act
   (g) Rivers and Harbors Act of 1899
   (h) Wild and Scenic Rivers Act of 1968 (Sec. 7)
   (i) Federal Power Act
   (j) Water Resources Planning Act of 1965
   (k) Other (see 516 DM 4, App. 1.2)
3. Wildlife
   (a) Endangered Species Act
   (b) Fish and Wildlife Coordination Act
   (c) Fish and Wildlife Conservation at Small Watershed Projects
4. Marine Resources
   (a) Deepwater Port Act
   (b) Ocean Dumping
   (c) Marine Protection, Research and Sanctuaries Act
5. Air Quality
   (a) Clean Air Act
6. Miscellaneous
   (a) Intergovernmental Coordination Act of 1968
   (b) Surface Mining Control and Reclamation Act of 1977
   (c) Resources Conservation and Recovery Act of 1976
   (d) Noise Control Act of 1972, as amended
   (e) Other (see 516 DM 4, App. 1.4, 1.6, 1.8)

BIA MANUAL supp. I, Illus. 20 (1993).

This analysis applies equally to transfers of property under BRAC. The transfer of title from a Military Department to the BIA for the purpose of placing the title in trust for the benefit of a tribe triggers none of the policy considerations that the Part 151 regulatory transfer process in its current form[98] is designed to address. The more logical and practical approach is for the BIA to take the position the United States espoused, and the Supreme Court affirmed, in *Mescalero Apache Tribe v. Jones*:[99] The Department need not undertake costly and lengthy steps for the sake of formality which ultimately are of no consequence because prior actions of the United States render them meaningless.[100]

With this standard in mind, it is important to note that the BRAC process itself incorporates the most salient policy goals set forth in Part 151, each of which is discussed below.[101] Thus, by the time the BRAC property transfer process is complete, and the BIA acquires title to the property, the core policy concerns addressed by the regulations of Part 151 have been met.[102]

First, a Military Department evaluating a tribe's request for property transfer under BRAC must consider, among others, the following factors: environmental impacts of the proposed use, whether the proposed transfer will have an adverse impact on the use of the rest of the base, and whether the proposed use is the highest and best use of the land.[103] The Military Department must also consult with the Local Reuse Authority (LRA), which is comprised of local governmental interests, in making excess property determinations, and the LRA has authority to impact the final disposition of the property.[104] An LRA may request postponement

98. On April 12, 1999, the Department of Interior published proposed regulations to replace 25 C.F.R. Part 151. *See* 64 Fed. Reg. 17,574 (1999).

99. 411 U.S. 145 (1973).

100. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 154 n.11 (1973).

101. For example, approval by the Secretary and a description of the need for the acquisition is required. 25 C.F.R § 151.3, § 151.10(b) (1999). Both are included in the BIA's application for the excess transfer. Local government consultation is required. *Id.* § 151.10(e)-(f), § 151.11(d). The LRA is consulted in the context of both excess and surplus property. Environmental clearances are required, and in the case of BRAC property, the Military Department has analyzed a transferred parcel and found the property suitable to transfer (free of hazardous substances). *See id.* § 151.10.

102. Existing BIA policy recognizes the duplicity in the two processes and sets of policies. *See* BIA Memorandum on the Base Closure and Realignment Act (BRAC), *Clarification to the October 17, 1997 Memorandum—Base Closure and Realignment Act (BRAC) Transfers* (July 27, 1998) [hereinafter BIA Memorandum on BRAC] (on file with authors). In the *BIA Procedures*, instructions are given for the BIA's completion of block 11 of GSA Form 1334, justifying the acquisition. *See* BIA PROCEDURES, *supra* note 59. In completing block 11, the Area Office must detail the purpose, need and authority for the acquisition, and how the use of the property will be consistent with the zoning, physical properties and environmental/cultural characteristics of the property. BIA PROCEDURES, *supra* note 59.

103. *See* BRIM, *supra* note 1, at 3- 9.

104. *See* BRIM, *supra* note 1, at 3-9 to -10.

or reconsideration of a federal transfer.[105] Thus, the process already provides for consideration of the key Part 151 issues, making the Part 151 procedures redundant.

Further, the fee-to-trust process already includes two thirty-day periods for public involvement, one for comment and one for appeal.[106] Subjecting tribal excess property acquisitions to duplicative public involvement/appeal rights procedures only increases the time and resources necessary for the transaction and weakens tribal/federal control over the outcome of the process. Thus, the BRAC process has sufficient public notice/involvement procedures to ensure that the concerns of Part 151 are met.

In addition, because BRAC property is held by the DOD prior to excess transfer and is subsequently held by the BIA in restricted status for the tribe following the excess transfer, the issues of removal of the property from tax rolls and impact on local governments[107] should not be considered by the BIA.[108] If the tribe has communicated to the BIA and Secretary its intent to place the property in trust at the federal-to-federal transfer stage, the assistance of the Secretary and the BIA in acquiring the excess property validates the trust acquisition as clearly approved by the Secretary.[109]

Next, the Military Department is required as part of the BRAC excess property acquisition process to include in its Notification of Availability (NOA) of excess property a discussion of the status of civil and criminal jurisdiction on the site, because of its federal ownership.[110] Unless the Military Department has gone through a specific retrocession of jurisdiction process,[111] the federal government retains jurisdiction over base property. In the BIA's application for the property, it must include a discussion of how the property will be used consistent with current zoning and land use restrictions and show that such restrictions will not be changed significantly.[112] When considering the application, the Military Department must determine whether the requested transfer will adversely impact the proposed uses of the rest of the base.[113]

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105. BRIM, *supra* note 1, at 3-10.

106. 25 C.F.R. § 151.10-.12 (1999).

107. *See* 25 C.F.R. §§ 151.10(e), 151.11(d) (1999).

108. *See* 25 C.F.R. § 151.2(e) (1999) (defining "restricted status"); 25 C.F.R. § 151.10(e) (limiting consideration of state and local impacts to land that was formerly in "unrestricted fee status").

109. *See* 25 C.F.R. § 151.3 (1999) (requiring Secretarial approval for trust acquisition).

110. 41 C.F.R. § 101-47.202-2(b)(5) (1998).

111. *See* 10 U.S.C. § 2683 (1994) (governing the federal relinquishment of jurisdiction); 40 U.S.C. § 255 (1994) (governing the federal acquisition of jurisdiction).

112. BIA PROCEDURES, *supra* note 59, at 2-3.

113. BRIM, *supra* note 1, at 3-9.

Once that determination has been made, it is a duplication of effort to require a tribe to provide further documentation in the fee-to-trust process. In the fee-to-trust application, a tribe must discuss the impact of the transfer on taxes, jurisdiction and land uses.[114] However, since base property is under federal governmental control and not subject to local and state taxes, jurisdiction and land use laws, the tribe's acquisition of the property has no direct impact on local and state government. The only possible impact is a hypothetical one: What if the property was transferred to a non-federal entity and jurisdiction reverted to the state or local government? However, as discussed above, the Military Department evaluates such potential impacts prior to the transfer, and the BIA should consider them again in the context of the fee-to-trust process. The BRAC process in its totality, taking into account all of the other base property that is now made subject to local control, jurisdiction and taxes, already addresses these concerns. In other words, the net impact of the tribal trust acquisition will in most cases be completely negated by the fact that the state and local governments are obtaining jurisdiction over, and potentially title to, additional lands due to the BRAC process.

It should also be emphasized that the BRAC process insures that the LRA is consulted on disposal decisions, so that local governments have a voice in the process at the excess level. Therefore, issues of local impact, impact on tax rolls, and jurisdictional conflicts[115] are addressed at the excess transfer level, making a subsequent Part 151 process unnecessary and duplicative.

Finally, the BRAC process also requires significant environmental documentation of the status of base property, including an environmental baseline survey (EBS), CERFA determinations of suitability to transfer (including disclosure of hazardous substance related information) and NEPA documentation.[116] In addition, the BIA requires that, as a part of its excess property acquisition application, the BIA (in conjunction with the tribe) show "[h]ow the use of the property will be consistent with the zoning, physical properties, and environmental/cultural characteristics of the property."[117]

The fee-to-trust process requires a Level I contaminant survey and NEPA documentation examining the environmental consequences of the proposed use of the acquired land. Clearly, in the BRAC context, the EBS and FOST for the parcel should suffice for the Level I survey. In addition, the Military Department may have concluded NEPA documen-

114. 25 C.F.R § 151.10 (1999).
115. 25 C.F.R. § 151.10(e), (f) (1999).
116. *See* BRIM, *supra* note 1, at ch. 2, app. F.
117. BIA PROCEDURES, *supra* note 59, at 2-3.

tation associated with the proposed land use. Finally, the BIA's own application for the property contains a detailed description of the environmental consequences of the proposed land use. Therefore, the environmental documentation requirements of Part 151[118] will be met, or exceeded, in the course of the BRAC excess property transfer process.

B. BIA'S CURRENT POSITION ON THE APPLICABILITY OF PART 151 TO BRAC PROPERTY TRANSFERS AND RECOMMENDATIONS FOR CHANGING THE PROCESS

On July 27, 1998, the BIA DCIA issued a Memorandum to all Area Directors on the issue of BRAC and 25 C.F.R. Part 151. In the memorandum, Area Directors were urged to consult with tribes to start the Part 151 process as early as possible in the BRAC property acquisition process to eliminate delays. Area Directors are also encouraged to look at BRAC documentation that can be utilized for the Part 151 process:

> The BRAC process produces considerable documentation about the land being conveyed. Much of this documentation can be used by the tribe to fulfill the requirements under 25 C.F.R. 151. Utilization of the applicable information gathered during the BRAC process will assist the tribe in developing its trust acquisition package. You should assist the tribe in reviewing the material produced by the BRAC process and identify what can be copied and used to meet the 25 CFR 151 requirements. This should make the fee-to-trust application more efficient and expedite the review and decision making process.[119]

While it is productive that the BIA has taken this position with respect to BRAC documentation, its Memorandum does not go far enough. As discussed above, the BRAC process not only creates valuable documentation; it is also a procedural exercise that makes the Part 151 process unnecessary. Public and local governmental involvement, appeal rights, and notice periods are all a part of the BRAC land acquisition process, making the Part 151 process duplicative and unnecessary.

Therefore, the BIA should promulgate specific fee-to-trust regulations for BRAC excess property transfers. These regulations should minimize the fee-to-trust requirements for tribes that seek to place excess real property acquired through the BRAC process into trust. There are several reasons that justify special treatment of BRAC property in the fee-to-trust regulations.

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118. 25 C.F.R. § 151.10(h) (1999).
119. BIA Memorandum on BRAC, *supra* note 102, at 1-2.

First, in the case of BRAC transfers, the property is under federal ownership prior to placement in trust and is not likely subject to any state or local jurisdictional control. Thus, the transfer to trust status has no net impact on state or local government.

Second, the current regulations require the BIA to treat off-reservation acquisitions for "business purposes" with greater scrutiny. The purpose of BRAC, however, is to have land disposal decisions provide for economic redevelopment of the base. Therefore, the fee-to-trust regulations should be amended to encourage off-reservation acquisitions for business purposes.

Third, when the BIA is the acquiring agency, the fee-to-trust criteria in Part 151 have been met by the time the excess property transfer is complete. The BIA's acquisition application will have included all of the key components of the fee-to-trust process: an explanation for the need for the property; the statutory authority for the acquisition; the proposed land use and environmental impacts of that use; the impacts on state and local governments; and jurisdictional and land use issues received by the transfer.

Finally, the Military Department must consult with the LRA prior to making excess property transfers, thereby insuring local governmental involvement in the process. Therefore, subsequently requiring the tribe to go through the fee-to-trust process is unnecessary since the regulatory criteria have already been met during the excess transfer process.

Alternatively, the BIA should review the Part 151 regulations and create a "fast-track BRAC" process within the regulations that clarifies the minimal procedures and documentation necessary to complete trust acquisition following a BRAC excess property transfer to the BIA. Such "fast-track BRAC" regulations would be two separate sub-sections under Part 151, the first for BRAC transfers at the surplus level and the second for transfers at the excess level.

Considering that surplus acquisitions occur without BIA involvement in the necessary GSA paperwork justifying the acquisition of the property, it is reasonable to require a tribe to provide more documentation as a part of their fee-to-trust application. Therefore, the fee-to-trust regulations for BRAC property acquired at the surplus level should be revised to reflect the following requirements: 1) A tribe would still have to show need for acquisition, since the BIA would not have already done so; 2) a tribe would still have to show the purpose and proposed use of the land, again because the BIA was not involved in the acquisition; and 3) other fee-to-trust application requirements, such as the impact on the state and local government, jurisdiction and the environment, should not

require additional documentation.[120] This is because these elements are all fully dealt with in the more exhaustive BRAC process.[121]

Reflecting these three concerns, the fast-track regulations for BRAC property acquired by an Indian tribe at the excess level should include four key components.

First, there should be no thirty-day comment period requirement for consultation with state and local governments. There are two reasons for this: The LRA has been involved in the process already, making the waiting period redundant, and no issues of tax loss or jurisdictional problems arise because it is a federal-to-federal transfer.

Second, there should be no requirement for consideration of potential land use or environmental problems, or for further environmental documentation. Again, there are two main reasons for this. Land use issues are already discussed in the BIA land application and considered by the Military Department and LRA prior to excess transfer, and BRAC environmental documentation should, in most cases, already exceed the Level I/NEPA documentation requirements of 25 C.F.R. § 151.10(h).

Third, a fast-track program would eliminate the requirement for consideration of "tribal need" for the property because the BIA has already substantiated that need to the Military Department and OMB in the excess acquisition process.

Finally, there is no need for heightened scrutiny for off-reservation acquisitions for "business purposes" as required under 25 C.F.R. § 151.11(c). The purpose of BRAC is to provide for economic redevelopment of closed bases, thereby giving precedent to land acquisitions that further that goal. By requiring that off-reservation fee-to-trust acquisitions for business purposes be subjected to heightened scrutiny, Part 151 is in direct conflict with the BRAC process. Indian trust land may be a catalyst for development due to tax and regulatory considerations not applicable to fee land. Therefore, BRAC off-reservation trust acquisition for "business purposes" should be encouraged in the fast-track regulations, not treated with greater scrutiny.

A BRAC fast-track process would obviate the need for a fee-to-trust application or, in the case of surplus acquisition, would minimize the documentation necessary. Once the BIA acquires title to the property, the BIA Area Office would forward the title opinion to the Solicitor's Office for instructions. The BIA would most likely desire to maintain the final thirty-day notice period provided for in 25 C.F.R. § 151.12(b),

120. *See* BRIM, *supra* note 1, at § 3.3.
121. *See* BRIM, *supra* note 1, at § 3.3.

since it has been found that the Quiet Title Act precludes the judicial review of an acquisition after the United States acquires title.[122]

Adoption of this recommendation would both accelerate and simplify the BRAC acquisition process for Indian tribes. This would be an improvement over the current system, which is complicated, time consuming, and redundant.

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122. *See* United States v. Mottaz, 476 U.S. 834 (1986).