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Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934

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I. INTRODUCTION

Though ample resources exist,[1] one need not extensively research endless facts and figures on the social, economic, and cultural losses Indians[2] have suffered since the triumphant European "discovery" of America to understand just how accurate claims of an "American Indian Holocaust" may truly be.[3] Instead, by simply glancing at the two maps that

1. INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter MERIAM REPORT] (report detailing the devastating economic, social, and cultural effects of the Allotment Era policies); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 22.01–.07 (Nell Jessup Newton ed., 5th ed. 2005) [hereinafter COHEN'S HANDBOOK] (discussing government services to address the great need in Indian Country); Jay Winter Nightwolf, *Taking a Stand Against Poverty in Indian Country*, INDIAN COUNTRY TODAY, Sept. 11, 2009, http://indiancountrytoday medianetwork.com/ictarchives/2009/09/11/taking-a-stand-against-poverty-in-indian-country-83921.

2. In accordance with the standard terminology of scholarship and federal policy, this Comment will use the term "Indian" as opposed to "Native American" or "American Indian." *See* COHEN'S HANDBOOK, *supra* note 1, §§ 3.01–.04 (providing a detailed discussion of the nuanced definition, meaning, and significance of the terms Indian tribe, Indian, and Indian Country).

3. RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 (1987) (discussing the effects of the European arrival on Indians and tracing Indian populations over the following 500 years). Thornton observes,

appear on the front page of any issue of *Indian Country Today*, "the most widely circulated Native American newspaper,"[4] one is instantly confronted with a dramatic reality: the first shows the entire United States shaded in red and labeled "Indian Country," while a second map shows that modern-day Indian Country has been reduced to minute dots of red scattered across the vast land mass.[5]

In recognition of the devastation this massive loss of territory wreaked on Indians, Congress enacted the Wheeler-Howard Indian Reorganization Act of 1934 (IRA)[6] to prevent further loss of Indian lands and facilitate reconstruction of the Indian land base.[7] To this end, the IRA is centered around the fee-to-trust program, a process whereby Indian tribes can essentially expand their reservations by requesting to have additional land placed into trust for their benefit.[8] However, the consequent equal and opposite reaction is the removal of any such land from state and local jurisdiction. Accordingly, while the IRA's original rationale and goals are certainly honorable, today, the fee-to-trust process is the subject of fervent opposition as affected communities struggle with the substantial consequences of successful trust acquisitions in their area: the loss of tax revenue,[9] and zoning, planning, and other regulatory control.[10]

> For [Indians] the arrival of the Europeans marked the beginning of a long holocaust, although it came not in ovens, as it did for the Jews. The fires that consumed North American Indians were the fevers brought on by newly encountered diseases, the flashes of settlers' and soldiers' guns, the ravages of "firewater," the flames of villages and fields burned by the scorched-earth policy of vengeful Euro-Americans. The effects of this holocaust of North American Indians, like that of the Jews, was millions of deaths. In fact, the holocaust of the North American tribes was, in a way, even more destructive than that of the Jews, since many American Indian peoples became extinct.

Id. at xv–xvi.

4. COHEN'S HANDBOOK, *supra* note 1, § 1.01.

5. COHEN'S HANDBOOK, *supra* note 1, § 1.01.

6. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–79 (2006).

7. G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578 (2009).

8. *See infra* Part III (describing the IRA's statutory framework and the process for transferring land into trust).

9. 25 U.S.C. § 465 ("[S]uch lands or rights shall be exempt from State and local taxation.").

10. 25 C.F.R. § 1.4(a) (2005) ("[N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property . . . .").

Whether actual or purely speculative, vehement fear of Indian gaming on newly acquired trust land drives much of the controversy surrounding proposed trust acquisitions.[11] Such fear is appropriate given the rapid expansion of tribal gaming across the country;[12] horror stories of quiet, rural towns transformed by massive gaming operations;[13] and documented evidence of negative impacts on affected communities.[14] Because federal law only permits Indian gaming on tribal lands,[15] trust status is a necessary prerequisite for any property on which a tribe wishes to establish a new gaming operation. Thus, beyond "simply" removing land from state and local control, the fee-to-trust process serves as a critical first step in the

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11. Leah L. Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands*, 69 IND. L.J. 255, 257–61 (1993).

12. Indian gaming began with Florida's high-stakes bingo parlors in the 1970s. *Id.* at 257. By 2002, 201 tribes in 28 states operated tribal gaming facilities. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, E-EV-BIA-0063-2003, FINAL EVALUATION REPORT ON THE PROCESS USED TO ASSESS APPLICATIONS TO TAKE LAND INTO TRUST FOR GAMING PURPOSES 1 (2005) [hereinafter EVALUATION REPORT]. Such operations have often represented financial windfalls for the operating tribe; Indian gaming revenues were $9.8 billion in 1999 and shot up to $26 billion by 2007. *Id.*; *Examining Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 22 (2009) [hereinafter *Examining Executive Authority*] (statement of Lawrence E. Long, Att'y Gen., South Dakota, Chairman, Conference of Western Att'ys Gen).

13. *See* JEFF BENEDICT, WITHOUT RESERVATION: HOW A CONTROVERSIAL INDIAN TRIBE ROSE TO POWER AND BUILT THE WORLD'S LARGEST CASINO (First Perennial 2001) (telling the story of how the quiet farming town of Ledyard, Connecticut was irreversibly transformed when the Mashantucket Pequot tribe built the world's largest casino, Foxwoods). Some statistics on the two largest Indian casino resorts include:

> Foxwoods is the largest casino resort complex in the United States. It is located in Connecticut. It was founded in 1986 as a bingo hall. Together with the MGM Grand at Foxwoods, it is one of the largest casino complexes in the world. There are several restaurants, approximately 1,416 hotel rooms and two golf courses. 40,000 guests visit Foxwoods daily.
>
> The Mohegan Sun is the second-largest casino in the United States and is 8 miles from Foxwoods in the woods of southeastern Connecticut. It is on 240 acres. It features the 12,000-seat capacity Mohegan Sun Arena. There is also 100,000 square feet of meeting and function room space, 1,256 hotel rooms, 364,000 square feet of gaming space, a number of restaurants, a golf course, and 130,000 square feet of retail shopping. In May 2011, they announced that the casino would be building a new 300 to 500 room hotel. Another developer will build and own the new hotel.

SY 1,400 Acres: Another Foxwoods or Mohegan Sun?, THE SANTA YNEZ VALLEY JOURNAL, Aug. 18, 2011, http://www.syvjournal.com/archive/9/33/8804/.

Residents of California's rural Santa Ynez Valley are concerned that they could become the next Ledyard due to the Santa Ynez Band of Chumash Indians' recent purchase of and annexation efforts for a 1,400 acre parcel. Rolf Richter, *The Time is NOW to Decide Our Valley's Future: Town Hall Meeting*, THE SANTA YNEZ VALLEY JOURNAL, Aug. 18, 2011, Special Supplement at 2–3.

14. *Crime on Land in Federal Trust*, THE SANTA YNEZ VALLEY JOURNAL, Aug. 18, 2011, http://www.syvjournal.com/archive/9/33/8830/ (including links to hundreds of pages of police reports for crimes committed at the Chumash Casino and Resort from 1997 to 2011).

15. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2006).

expansion of tribal gaming.

As with many issues that incite great passion among affected parties, objective analysis of the situation loses ground to extreme claims and passionate propaganda, exaggerated anecdotes supplant fact-based data, and diametrically opposed sides become entrenched in unmoving positions. Accordingly, this Comment explores the efficacy of the IRA's fee-to-trust process by analyzing the Notices of Decision the Pacific Region Bureau of Indian Affairs has issued on proposed trust acquisitions from 2001 through 2011.[16] Even though the fee-to-trust process includes the opportunity for both administrative and judicial appeals, very few Bureau of Indian Affairs (BIA) fee-to-trust decisions are challenged, and even fewer are reversed.[17] Thus, the initial BIA decisions provide the most meaningful reflection of how the regulatory factors are applied in practice, and thereby provide insight into the problems with, and appropriate reforms for, the IRA fee-to-trust process.

This Comment's approach can be summarized as follows. Part II describes the historical context that led to the enactment of the IRA and its fee-to-trust program by summarizing the evolution of federal Indian policy with an emphasis on the history of Indian property rights.[18] Part III first explains the statutory framework for the IRA's fee-to-trust process and then provides a step-by-step description of how a tribe actually proceeds through the fee-to-trust process from application to eventual acceptance or denial of the proposed acquisition.[19] Part IV summarizes relevant Interior Board of Indian Appeals' (Board) decisions, which provide appellate-level guidance for the BIA's exercise of discretion when making fee-to-trust decisions.[20] Part V begins with a description of the methodology used to analyze and quantify the Pacific Region BIA's Notices of Decision and then discusses the empirical results.[21] Part VI discusses the impact on affected communities of the deficiencies in the fee-to-trust process and suggests appropriate measures for reform.[22] Part VII concludes.[23]

16. *See infra* note 101 and accompanying text (explaining the Bureau of Indian Affairs' authority to make trust land decisions).

17. *See infra* note 290 (detailing appeals rate).

18. *See infra* notes 24–80 and accompanying text.

19. *See infra* notes 81–109 and accompanying text.

20. *See infra* notes 110–73 and accompanying text.

21. *See infra* notes 174–280 and accompanying text.

22. *See infra* notes 281–332 and accompanying text.

II. HISTORY OF INDIAN PROPERTY RIGHTS

The foundation of federal Indian law is the tribes' legal status as sovereign nations. The United States Constitution recognizes this status in the Commerce Clause by naming Indian tribes as one of the sovereign entities with which Congress has the power to regulate commerce.[24] The Supreme Court affirmed this status as far back as 1831 when the Marshall Court described Indian tribes as "domestic dependent nations."[25] To this day, the United States continues to recognize Indian tribes as having "inherent powers of a limited sovereignty which [have] never been extinguished."[26] It is equally fundamental that this sovereignty is a limited one, as the federal government exercises the ultimate authority and control over Indian tribes and their territories. The Marshall Court observed that this relationship "resembles that of a ward to his guardian."[27] As such, tribal property interests are held by "split title" where the United States holds "ultimate title" and the tribe retains a title of mere occupancy.[28] The Marshall Court also re-stated this fundamental characteristic of tribal property interests in much more dominant language, asserting that, "[Indians] occupy a territory to which [the United States] assert[s] a title *independent of their will*, which must take effect in point of possession when their right of possession ceases," thereby making it absolutely clear that the United States has the absolute power to alter—including extinguish—Indian title.[29] Over the years the United States has done just that: continual fluctuations in federal Indian policy have resulted in drastic changes to Indian property interests over the last few centuries.

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23. *See infra* notes 333–36 and accompanying text.

24. U.S. CONST. art. I, § 8, cl. 3 (authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW xxv (2008).

25. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

26. United States v. Wheeler, 435 U.S. 313, 322–23 (1978).

27. *Cherokee Nation*, 30 U.S. at 17.

28. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823) (explaining that the right of occupancy means "the Indian inhabitants are to be considered merely as occupants, to be protected . . . in the possession of their lands, but to be deemed incapable of transferring the absolute title to others"). Indian tribes are "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . ." *Id*. at 574.

29. *Cherokee Nation*, 30 U.S. at 17 (emphasis added); *see also* COHEN'S HANDBOOK, *supra* note 1, § 15.03; Rice, *supra* note 7, at 575.

A. The Removal Era: 1815–1846[30]

In very general terms, prior to the Removal Era, the United States' principal approach to tribal property rights was to negotiate treaties with Indians to acquire sections of their lands, while still allowing them to reside in the same general territory.[31] However, when tribes began to resist such demands, the federal government attempted to completely remove Indians from the South and East Coast territories.[32] Policies from this era aimed to separate tribes and white settlers, primarily by removing Indians to the "unsettled" land west of the Mississippi River.[33] Treaties from this era gave the removed tribes new territories in exchange for relinquishing rights to the entirety of their aboriginal land in the east.[34] Unfortunately, this era in federal Indian policy was characterized by brutality and misery.[35] In many cases, tribal leaders signed the treaties due to overwhelming forces of resignation, military coercion, or fraud, and then the tribes were forcibly removed and marched to their new lands by military operation.[36]

B. The Reservation Era: 1871–1928[37]

Removal of the tribes to land west of the Mississippi River was a satisfactory solution until the Civil War ended and settlers began pushing further west with relentless energy.[38] To accommodate this expansion, the

30. COHEN'S HANDBOOK, *supra* note 1, § 1.03. There is some complexity of timelines here: the Removal Era officially lasted from 1815 to 1846; however, a period that could be generally referred to as the Treaty Era operated during these years as well. *See generally id*. Treaties have been a fundamental policy approach to relations with Indians since prior to the Revolutionary War, and this approach remained central until treaties were officially ended by federal statue in 1871. 25 U.S.C. § 71 (2006); *see also* COHEN'S HANDBOOK, *supra* note 1, §§ 1.02–.03.

31. *See generally* COHEN'S HANDBOOK, *supra* note 1, § 1.03 (providing a detailed discussion of pre-Removal Era treaties).

32. *Id*.

33. *Id*.; Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7 (1995).

34. COHEN'S HANDBOOK, *supra* note 1, § 1.03[4][a]; Royster, *supra* note 33, at 7.

35. COHEN'S HANDBOOK, *supra* note 1, § 1.03[4][a].

36. *Id*. The forced migration of the Cherokee tribe, the "Trail of Tears," has become a well-known symbol of the era's brutality. *Id*. The march began during the summer of 1838 and extended into the winter, with over 4000 Cherokees perishing along the way. *Id*. However, many more tribes suffered similarly horrible removals. *See generally* GRANT FOREMAN, THE LAST TREK OF THE AMERICAN INDIAN (1946).

37. COHEN'S HANDBOOK, *supra* note 1, § 1.04.

38. Royster, *supra* note 33, at 7. Scholars note that this new wave of expansion was distinctly

reservation system[39] was developed, whereby the tribes were forced into isolation on sections of land—reservations—carved out of aboriginal territories.[40] The reservation system was designed to protect the tribes from extinction, ease hostilities by separating Indians from settlers, and civilize the Indians by teaching them agriculture.[41] Indian Commissioner Charles Mix observed that without "'distant and extensive sections of country to assign [the tribes],' the reservation system was 'the only course compatible with the obligations of justice and humanity.'"[42] While trust terminology was not applied to the reservation system at the time, the Supreme Court later explained that the reservations were held "in trust" for the Indian tribes,[43] such that the federal government held fee title and tribes retained beneficial ownership.[44]

C. The Allotment and Assimilation Era: 1887–1928[45]

The Allotment Era was seen as the next logical step from the Reservation Era; the goal of civilizing the Indians would be better achieved by assimilation into the dominant culture rather than isolation on remote reservations.[46] To this end, the General Allotment Act (Dawes Act) was

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intense:

> Powered by more than the technological marvels such as the railroads, the steam engine, and the mechanical harvester, the new expansionist policy was also propelled by the "go-getter" spirit that infused the nation after the war. . . . A determination to thrust the nation westward ruled in Congress and in the boardrooms, towns, and churches. Landless Americans from older sections, as well as newer emigrants temporarily settled, demanded that seemingly vacant Indian lands be put to work. There was no place left to remove the Indian, and there was little sympathy for the preservation of a way of life that left farmlands unturned, coal unmined, and timber uncut. Policymakers had determined that the old hunter way and the new industrial way could not coexist.

COHEN'S HANDBOOK, *supra* note 1, § 1.04.

39. The term "reservation" has a long history of nuanced use in both judicial and statutory language. *See generally* Rice, *supra* note 7, at 602–08. However, it generally describes "any lands set aside for tribal use and occupancy whether set aside by treaty, congressional action, or executive order, and regardless of whether those lands [are] within the aboriginal territories of the tribe." *Id.* at 602.

40. Royster, *supra* note 33, at 7. As treaty-making had been statutorily discontinued, these reservations were now created by executive order or agreements with the tribes and later ratified by statute. COHEN'S HANDBOOK, *supra* note 1, § 1.03[9].

41. Royster, *supra* note 33, at 8.

42. *Id.* at 7 n.20 (citing 1858 COMMISSIONER OF INDIAN AFF. ANN. REP., *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 92, 94 (Francis Paul Prucha, ed., 2d ed. 1990)).

43. Morrison v. Work, 266 U.S. 481, 485 (1925) (stating that the United States acts with "the powers of a guardian and of a trustee in possession" with regard to tribal property).

44. Royster, *supra* note 33, at 8. The split-title trust concept of Indian land rights property interests prevails to this day. *See, e.g.*, United States v. Mason, 412 U.S. 391, 398 (1973).

45. COHEN'S HANDBOOK, *supra* note 1, § 1.04.

46. Royster, *supra* note 33, at 8–9. In fact, many reservation agreements of the 1850s,

enacted in 1887 to break up the Indian reservations.[47] Under the Dawes Act, Congress replaced communal land ownership by the tribes with private ownership by individual Indians.[48] The Dawes Act accomplished this primarily through allotting 160 acre parcels[49] of reservation land to individual Indians to be owned in fee and expressly subject to alienation, encumbrance, and taxation.[50] Once each Indian had been allotted a parcel, the remaining reservation land was designated as "surplus" and opened to non-Indian settlement.[51] This resulted in a massive erosion of the Indian land base[52] as individual Indians transferred or lost[53] their allotted parcels and white settlers developed the surplus land.[54] Allotment was generally

particularly in Nebraska, Kansas, and the Pacific Northwest, contained provisions that provided for allotment of the reservation land. *Id*. at 8; *see also, e.g*., Lummi Indian Tribe v. Whatcom Cnty., 5 F.3d 1355 (9th Cir. 1993) (discussing the 1855 Treaty of Point Elliot). However, some critics of the policy saw it as anything but humanitarian given that its ultimate aim was to terminate the tribal way of life, even going so far as to label it "legal cultural genocide." Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 721 (1986).

47. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), *repealed by* Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified in part at 25 U.S.C. §§ 331–381 (2006)). A 1977 congressional report found that 118 Indian reservations had been allotted under the Dawes Act, and 44 of these had been opened to non-Indian settlement. Royster, *supra* note 33, at 9–10 n.33 (citing 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 309 (1977)).

48. Royster, *supra* note 33, at 10.

49. Amanda D. Hettler, Note, *Beyond a* Carcieri *Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377, 1383 (2011).

50. Burke Act of 1906, ch. 2348, 34 Stat. 182 (amending § 6 of the Dawes Act) (codified at 25 U.S.C. § 349 (2006)).

51. Royster, *supra* note 33, at 13.

52. In 1887, when full-scale allotment began, Indian land holdings totaled approximately 138 million acres, but by 1934, when the Indian Reorganization Act of 1934 ended allotment, Indian land had decreased to approximately 48 million acres. COHEN'S HANDBOOK, *supra* note 1, § 15.07[1][a] n.337. Of the approximately 90 million acres lost, 27 million acres were individually allotted parcels and nearly double, about 60 million, were lost due to the surplus land program. Royster, *supra* note 33, at 13. Moreover, the land that was lost tended to be the most valuable parcels, such that nearly one-half of the remaining Indian-owned lands were desert or semi-arid. Rice, *supra* note 7, at 577.

53. Since individually allotted land became subject to alienation, encumbrance, and taxation, thousands of Indians were dispossessed of their land by sheriff's sale for failure to pay taxes or other liens, as well as by voluntary or fraudulent sales. Royster, *supra* note 33, at 12; *see also* COHEN'S HANDBOOK, *supra* note 1, §1.04 (providing a detailed discussion of how Indian land was lost due to the Dawes Act).

54. For a discussion of the fee patent system used to transfer reservation land into individual Indian ownership and the surplus lands program for opening up reservation land left over once individual allotments were parceled out, see Royster, *supra* note 33, at 10–14.

suspended in 1928 after publication of the Meriam Report,[55] an Institute for Government Research report that detailed the detrimental economic, social, and cultural effects of the allotment policy and called for greater respect for Indian culture.[56]

D. The Reorganization Era: 1928–1942[57]

The dramatic picture painted by the Meriam Report helped generate public support for a change in federal Indian policy and set the stage for the Reorganization Era[58]—where policymakers shifted their focus to rebuilding the Indian land base.[59] As a result, the IRA[60] was passed in order to prevent further loss of Indian lands and provide a process to acquire new lands for Indians.[61] First, the IRA ended the allotment programs by prohibiting further allotment of tribal land[62] and giving the Secretary of the Interior authority to return remaining surplus lands to tribal ownership.[63] However, the cornerstone of the IRA was authorization for the Secretary to acquire new lands to be placed in trust "for the purpose of providing land for the Indians."[64] While the statutory language specifies that the Secretary will

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55. MERIAM REPORT, *supra* note 1; *see also* COHEN'S HANDBOOK, *supra* note 1, §16.03[2][c].

56. Royster, *supra* note 33, at 16. The report helped generate public support for a change in federal Indian policy, but initial efforts to remedy the detrimental effects of the allotment period were restricted by the economic hardship of the Great Depression. *Id*. at 16 n.81.

57. COHEN'S HANDBOOK, *supra* note 1, § 1.05.

58. Royster, *supra* note 33, at 16.

59. Rice, *supra* note 7, at 578.

60. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006). While the Reorganization Era is recognized as spanning the years of 1928 to 1942, the IRA is still in effect today. The controversy surrounding its modern day application is the focal point of this Comment. *See infra* Parts V–VII.

61. Rice, *supra* note 7, at 578. The secondary focus of the IRA was to provide statutory authority for tribal self-government and self-determination in order to require the Secretary of the Interior to recognize and deal with tribal leadership and initiatives. *Id*. As this Comment concerns Indian property interests, it will focus on the first objective of the IRA.

62. 25 U.S.C. § 461 ("On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.").

63. 25 U.S.C. § 463. Section 3 of the IRA authorizes the Secretary "to restore to tribal ownership the remaining surplus lands of any Indian reservation . . . ." *Id*. The Secretary found this to mean that he could to restore any unsettled surplus lands within reservation boundaries as of 1934, but not surplus lands that had been transferred to settlers for homesteading and other activities. Royster, *supra* note 33, at 17 n.89.

64. 25 U.S.C. § 465 ("The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."). While the IRA was designed to freeze the allotment program where it stood in 1934 and partially repair certain harms the program had inflicted, Congress did not "restore fee patented or

both acquire and place the land into trust, the Supreme Court views the Secretary's power as also including the authority to place land into trust at the request of tribes or individual Indians who acquire the land themselves.[65]

E. The Termination Era: 1943–1961[66]

While the political forces behind the Reorganization Era and the IRA were powerful, equally strong criticisms of them combined with a post-World War II revival of pro-assimilation social forces to usher in a new era of federal Indian policy, the Termination Era, which focused on terminating tribal recognition and fully assimilating Indians into the dominant culture.[67] To this end, Congress and the BIA worked together to gradually and systematically terminate the government's historical "trusteeship responsibility" to Indians because "little sympathy for, or interest in, preserving a native land base or rebuilding Indian society [remained]."[68] The Termination Era has been characterized as "assimilation with a vengeance" because Congress enacted legislation to terminate federal recognition of many tribes, liquidate tribal assets—including the land base—and give the states jurisdiction over Indians.[69] For those tribes affected,

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homesteaded lands to tribal ownership. . . . [Thus,] [t]he vast majority of lands that had passed into fee during the allotment years remain in fee today . . . ." Royster, *supra* note 33, at 17–18.

65. *See, e.g.*, Cass Cnty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 114 (2006).

66. COHEN'S HANDBOOK, *supra* note 1, § 1.06.

67. Royster, *supra* note 33, at 18. Like the forces that drove the inexorable post-Civil War expansion and consequent Removal Era policies, similar forces were behind the Termination Era's return to assimilation-oriented policies:

> The Indian was caught, just as at the end of the American Civil War, by a set of post-war economic and political forces demanding less government, more independent economic opportunities, reduced federal expenditures, and decentralized local and state operations. The new global world required long-term planning and long-term solutions to deal with rapid change. And to progressive and ambitious returning veterans, Native Americans seemed, once again, a people of the past in a land of the future.

COHEN'S HANDBOOK, *supra* note 1, § 1.06.

68. COHEN'S HANDBOOK, *supra* note 1, § 1.06. On July 1, 1952, the House of Representatives passed a resolution that called for a full investigation into BIA programs in order to design legislation aimed at promoting "the earliest practicable termination of all federal supervision and control over Indians." H.R. REP. NO. 82-2503 (1952).

69. Royster, *supra* note 33, at 18. Even tribes whose federal recognition was not terminated were subjected to state criminal and civil jurisdiction. *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians,* 22 UCLA L. REV. 535 (1975) (exploring the impact of Public Law 280, which gave states civil and criminal jurisdiction over Indians).

"The loss of tribal territory and sovereignty was immediate and complete."[70]

F. The Self-Determination Era: 1961–Present[71]

As national concern for civil rights and increased awareness of the challenges faced by ethnic and racial minorities grew during the 1960s,[72] Termination Era policies were largely reversed[73] and federal Indian policy shifted to focus on "promotion of tribal self-determination, sovereignty, and control over Indian country."[74] Rooted in a firm commitment to tribal self-determination, new policies once again recognized government-to-government relations between the United States and Indian tribes,[75] supported tribal self-governance,[76] and aimed to protect Indian culture.[77] President Johnson ushered in the modern policy era, and his vision of "self-determination [as] a goal that erases old attitudes of paternalism and

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70. Royster, *supra* note 33, at 18. While the loss of territory and sovereignty of the Termination Era was absolute, in comparison to previous eras, the policies were not as sweeping in that they only applied to certain tribes. *Id*. In all, 109 tribes were terminated, which affected 11,466 Indians and 1.3 million acres of tribal land. COHEN'S HANDBOOK, *supra* note 1, § 1.06.

71. COHEN'S HANDBOOK, *supra* note 1, § 1.07.

72. *Id*.

73. *Id*. The Menominee Restoration Act of 1973, 25 U.S.C. §§ 903–903(f) (2006), which repealed an earlier act that terminated the tribe and reinstated all lost rights and privileges, was the first piece of legislation to reverse a Termination Era action and thus served as a symbolic reversal of the era's policies. COHEN'S HANDBOOK, *supra* note 1, § 1.07. Since then, a majority of the terminated tribes have been restored. *Id*.

74. Royster, *supra* note 33, at 19.

75. *Id*. President Reagan announced: "Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes." Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983). Examples of this policy in action are the many tribal–state compacts that have been entered into to address issues ranging from criminal law to natural resource management. *See* COHEN'S HANDBOOK, *supra* note 1, § 6.05.

76. Royster, *supra* note 33, at 19. For example, the Indian Self-Determination and Education Assistance Act of 1975 allowed tribes to more fully participate in management of health, education, economic, and social programs that had previously been controlled exclusively by the BIA. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of 25 U.S.C.). The Tribal Self Governance Act of 1994 is another prime example. Pub. L. No. 103-413, tit. IV, 108 Stat. 4272 (codified in scattered sections of 25 U.S.C.). This Act gave various tribes block grants to be used according to the tribe's discretion as opposed to BIA mandates. COHEN'S HANDBOOK, *supra* note 1, § 1.07.

77. COHEN'S HANDBOOK, *supra* note 1, § 1.07. "In the spirit of affirming [the] 'rich heritage' and 'enduring spirit' of native peoples, President Clinton pledged that 'our first principle must be to respect your right to remain who you are and to live the way you wish.'" *Id*. (quoting DOCUMENTS OF UNITED STATES INDIAN POLICY 343–45 (Francis Paul Prucha ed., 3d ed. 2000)). Legislation exemplifying this goal is numerous and includes the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470mm (2006), the National Museum of the American Indian Act, 20 U.S.C. §§ 80q–80q-15 (2006), the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006), and the Indian Arts and Crafts Act, 25 U.S.C. §§ 305–305f (2006).

promotes partnership and self-help"[78] continues to be a guiding philosophy of current Indian policy; each administration since has re-affirmed its support for this goal.[79] Thus, Justice William C. Canby, Jr. believes "[i]t is perhaps possible, that the contending forces in Indian affairs have reached some sort of balance, and that no further major policy change of direction will occur. [However, n]othing in the history of federal Indian policy . . . justifies confidence in such a conclusion."[80]

III. CURRENT STATE OF THE LAW

A. Statutory Framework for the Fee-to-Trust Process

While the Reorganization Era has passed, its primary piece of legislation, the IRA,[81] remains the cornerstone of current Indian land policy. The IRA expressly authorizes the Secretary of the Interior to acquire land and place it into trust for individual Indians and tribes "for the purpose of providing land for Indians."[82] Additionally, the Supreme Court has generally interpreted it to allow the Secretary to place fee land that

78. COHEN'S HANDBOOK, *supra* note 1, § 1.07 (quoting Lyndon Johnson, Special Message to Congress, 1 PUB. PAPERS 336 (Mar. 6, 1968)).

79. *See generally* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY (Vine Deloria, Jr. ed., 1985) (chronicling the complex evolution of federal Indian policy). President Obama recently affirmed this position:

> We know that, ultimately, this is not just a matter of legislation, not just a matter of policy. It's a matter of whether we're going to live up to our basic values. It's a matter of upholding an ideal that has always defined who we are as Americans. *E pluribus Unum*. Out of many, one. That's why we're here. That's what we're called to do. And I'm confident that if we keep up our efforts, that if we continue to work together, that we will live up to the simple motto and we will achieve a brighter future for the First Americans and for all Americans.

ACHIEVING A BRIGHTER FUTURE FOR TRIBAL NATIONS, 2011 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT 3 (2011), http://www.whitehouse.gov/sites/default/files/2011 whtnc_report.pdf [hereinafter WHITE HOUSE REPORT].

80. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 33 (4th ed., 2004).

81. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006).

82. *Id*. § 465. The IRA only applies to those tribes that did not opt out of its provisions at the time of passage. *Id*. § 478. Thus, the statutory authority for fee-to-trust acquisitions for those tribes that opted out of the IRA is found in the Indian Land Consolidation Act of 1983 (ILCA). 25 U.S.C. §§ 2202–2221 (2006). The ILCA extends the provisions of the IRA to all tribes under federal jurisdiction at the time of passage of the IRA, notwithstanding a tribe's decision to opt out of the IRA. *Id*. § 2202.

individual Indians or tribes have personally acquired into trust.[83] The implications of trust status will be discussed in more depth in Parts V and VI, *infra*, but a general description is important to understand the significance of the IRA. First, consistent with the ward–guardian relationship first promulgated by the Marshall Court in 1831,[84] the federal government holds ultimate or legal title to the trust land and the tribe holds a right to occupy or "beneficial ownership."[85] Even though the United States retains ultimate title, the act of placing fee land into trust transforms the land into "Indian Country"—a term of art that denotes that the land is now under tribal jurisdiction.[86] As such, trust land may not be alienated without an act of Congress; it is fully exempt from state and local taxes,[87] and entirely removed from state and local land use regulation.[88]

Originally, there were no specific standards for the Secretary to adhere to in transferring land into trust because statutorily appropriated funds were limited and Indian tribes were generally too impoverished to purchase land, so the absence of a governing standard was not an issue.[89] However, in large part due to the advent of Indian gaming, tribes gained the immediate funds and steady future revenue stream to regularly purchase fee land and request that the Secretary take it into trust pursuant to the IRA.[90] Thus, in 1980,

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83. *See, e.g.*, Cass Cnty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 114 (1998); Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978) ("The Secretary may purchase land for an individual Indian and hold title to it in trust for him. There is no prohibition against accomplishing the same result indirectly by conveyance of land already owned by an Indian to the United States in trust.").

84. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

85. 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to this Act . . . *shall be taken in the name of the United States* in trust for the Indian tribe or individual Indian for which the land is acquired . . . .") (emphasis added); United States v. Shoshone Tribe, 304 U.S. 111, 115, 117 (1938); Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543, 574, 585 (1823). The right to occupy is interpreted as "full and exclusive possession, use and enjoyment of the land." COHEN'S HANDBOOK, *supra* note 1, § 15.03.

86. COHEN'S HANDBOOK, *supra* note 1, § 15.07[1][b].

87. 25 U.S.C. § 465 ("Title to any lands or rights acquired pursuant to this Act . . . shall be exempt from State and local taxation.").

88. 25 C.F.R. § 1.4(a) (2005) ("[N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property . . . ."); *see also* City of Lincoln City v. Portland Area Dir., 33 IBIA 102, 105–07 (1999) (holding that the BIA does not have to make trust acquisitions subject to enforcement of the use proposed in the trust application).

89. Larry E. Scrivner, *Acquiring Land Into Trust for Indian Tribes*, 37 NEW ENG. L. REV. 603, 605 (2003).

90. *Id.* In fact, Acting Director of the Bureau of Indian Affairs' Office of Trust Responsibilities, Larry Scrivner, commented that, "[t]he advent of Indian gaming has somewhat changed the entire look of what is going on in Indian country." *Id.* at 605. Attorney General for South Dakota Lawrence E. Long recently testified before the Senate Committee on Indian Affairs about the rise of Indian gaming:

Congress implemented specific standards, located at 25 C.F.R. § 151 (Section 151), to govern the process of acquiring fee land and taking it into trust for Indian tribes or individual Indians, known as the "fee-to-trust" process.[91]

Under Section 151, land can be taken into trust for a tribe if the land is within the exterior boundaries of the reservation or adjacent to it, if the tribe already owns an interest in the land, or if the acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing."[92] Land can be taken into trust for an individual Indian if the land is within the exterior boundaries of the reservation or adjacent to it, or the land is already in trust or restricted status.[93] No formal declaration that land is considered an Indian reservation for Section 151 purposes is required;[94] rather, the test is whether the tribe exercises jurisdiction over the land.[95]

Section 151 also differentiates between the factors the Secretary must consider for on-reservation and off-reservation acquisitions.[96] It is important to note that for purposes of Section 151, the term reservation includes not only current reservation boundaries, but also former reservation boundaries where tribal lands have been disestablished or diminished.[97] For on-reservation acquisitions, the Secretary must consider: (1) the statutory

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> Since 1997, Indian gaming revenues have increased at a rapid rate. The National Indian Gaming Commission reported that net revenues from Indian gaming increased from $8.5 billion to $26.0 billion from 1998 to 2007. As a consequence, tribes have significantly greater funds available to purchase land, and seek trust status for that land, than was true in 1934, when the enabling statute was enacted (25 U.S.C. 465), or even in the 1980's and 1990's when the first implementing regulations, now set out at 25 C.F.R. Section 151, were written.

Examining Executive Authority, *supra* note 12, at 22.

91. 25 C.F.R. § 151 (2005). The Section 151 factors govern all discretionary fee-to-trust acquisitions, which include those made under both IRA and ILCA statutory authority. *Id*. See *infra* Part III for a more detailed discussion of the standards governing the fee-to-trust process.

92. 25 C.F.R. § 151.3(a).

93. *Id*. § 151.3(b).

94. *E.g*., Aitkin Cnty. v. Acting Midwest Reg'l Dir., 47 IBIA 99, 106 (2008); *see also, e.g*., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991); United States v. John, 437 U.S. 634, 648–49 (1978).

95. *See Aitkin Cnty*., 47 IBIA at 106–07.

96. "On-reservation" is interpreted to mean within or contiguous to the exterior boundaries of a tribe's reservation. Shawano Cnty. v. Acting Midwest Reg'l Dir., 53 IBIA 62, 76 (2011). "Contiguous" for purposes of Section 151 requires that the acquired land must, at a minimum, touch reservation land. Jefferson Cnty. Bd. of Comm'rs v. Nw. Reg'l Dir., 47 IBIA 187, 205–06 (2008).

97. *Shawano Cnty*., 53 IBIA at 67.

authority for the acquisition; (2) the need for the land; (3) the proposed use; (4) the amount of trust land the individual already owns and how much assistance that individual will need in handling his or her affairs—which only applies to acquisitions for individuals; (5) the impact of the land's removal from state and local tax rolls; (6) the jurisdictional problems and land use conflicts that may arise; (7) whether the BIA is equipped to discharge the additional responsibilities associated with placing the land into trust; and (8) environmental compliance.[98] For off-reservation acquisitions the Secretary must consider all eight on-reservation factors as well as the location of the proposed trust land in relation to both state and reservation boundaries.[99] Additionally, if the off-reservation land will be used for business purposes, a plan outlining the expected economic benefits must be submitted for the Secretary to consider.[100]

B. The Process for Transferring Land into Trust

The process for transferring land into trust is relatively simple. Once the tribe or individual Indian has acquired a piece of property in fee, they begin the fee-to-trust process by submitting an application to their regional BIA office with explanations of why their acquisition qualifies under each relevant Section 151 factor.[101] Upon receipt of a fee-to-trust application, the BIA must give notice of the proposed trust acquisition to state and local governments with jurisdiction over the land and then allow thirty days for submission of comments regarding regulatory jurisdiction, real property taxes, and special assessments.[102] The tribe is then often given the opportunity to respond to any comments, even though such an opportunity is not statutorily mandated.[103] Once the Regional BIA is satisfied that all interested parties have been given reasonable notice and opportunity to comment, a final determination is made and notice of this determination must be published.[104] Unless the appeals process is activated by administrative appeal made to the Board by an interested party,[105] the land is

98. 25 C.F.R. § 151.10.

99. *Id.* § 151.11.

100. *Id.*

101. Scrivner, *supra* note 89, at 606. While Section 151 places fee-to-trust authority with the Secretary of the Interior, under universally accepted delegation principles, the Secretary delegated fee-to-trust decisions to the BIA's Regional Directors. *Id.* at 605–06.

102. 25 C.F.R. §§ 151.10, 151.11(d).

103. *Hearing on H.R. 1291, H.R. 1234, and H.R. 1421 Before the H. Natural Res. Comm. Subcomm. on Indian and Alaska Native Affairs*, 112th Cong. 6–7 (2011) (statement of Susan Adams, Supervisor, Marin Cnty., Cal.) [hereinafter Statement of Susan Adams].

104. 25 C.F.R. § 151.12(b).

105. Scrivner, *supra* note 89, at 607. To qualify as an interested party with standing to appeal,

taken into trust thirty days after publication of the final determination notice.[106] Should the appellant remain unsatisfied with the result of an administrative appeal to the Board, a judicial appeal can be made to the appropriate federal court, but only after the BIA decision is final and the administrative appeals process has been exhausted.[107] While the BIA refrains from taking the land into trust until the appeals process is completed,[108] sovereign immunity bars judicial review and title challenges after the land has been taken into trust.[109]

IV. GUIDANCE FOR APPLICATION OF THE LAW—INTERIOR BOARD OF INDIAN APPEALS' DECISIONS

As there is no currently applicable policy memo from the Secretary of the Interior giving the BIA Regional Directors guidance on how discretionary fee-to-trust decisions should be made,[110] the Board decisions

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the appellant must have a legally protected interest that has been adversely affected by the challenged decision. 25 C.F.R. § 2.2 (2005); 43 C.F.R. § 4.331 (2005); Anderson v. Great Plains Reg'l Dir., 52 IBIA 327, 331 (2010). While the constitutional limitations on federal court jurisdiction do not apply to the Board, "as a matter of prudence, the Board generally limits its jurisdiction to cases in which the appellant can show standing." Santa Ynez Valley Concerned Citizens v. Pac. Reg'l Dir., 42 IBIA 189, 192 (2006). Thus, the Board generally requires that the appellant satisfy the *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), standing requirements of (1) concrete and particularized injury to a legally protected interest; (2) the injury is fairly traceable to the appellee's actions; and (3) the injury is capable of judicial resolution. *See, e.g.*, Rosebud Indian Land & Grazing Ass'n, v. Acting Great Plains Reg'l Dir., 50 IBIA 46, 53 (2009); Voices for Rural Living v. Acting Pac. Reg'l Dir., 49 IBIA 222, 232 (2009).

106. COHEN'S HANDBOOK, *supra* note 1, § 15.07.

107. 43 C.F.R. § 4.314 (2005); Mary Jane Sheppard, *Taking Indian Land Into Trust*, 44 S.D. L. REV. 681, 685 (1998–99). The appellant may also petition the Board for reconsideration, but the Board will only reconsider in extraordinary circumstances, such as a clear error of law or fact. *See, e.g.*, City of Eagle Butte v. Aberdeen Area Dir., 18 IBIA 21 (1989) (parcel of subject land was no longer under Indian ownership at time of Board decision); United Indians of All Tribes Found. v. Acting Deputy Assistant Sec'y, 11 IBIA 276 (1983) (the Board relied on a rescinded regulation). The Board has also granted a petition for reconsideration where its initial decision required clarification due to risk of misinterpretation. *See, e.g.*, Bien Mur Indian Mkt. Ctr. v. Deputy Assistant Sec'y, 14 IBIA 242 (1986). However, simple disagreement with the Board's decision is insufficient grounds for reconsideration. *See, e.g.*, Needles Lodge v. Acting Phx. Area Dir., 31 IBIA 123 (1997).

108. 25 C.F.R. § 2.6 (2005); 43 C.F.R. § 4.314.

109. Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 962 (10th Cir. 2004); Florida v. U.S. Dep't of Interior, 768 F.2d 1248, 1254 (11th Cir. 1985); Big Lagoon Park Co. v. Acting Sacramento Area Dir., 32 IBIA 309, 311, 322 (1998).

110. The Secretary issued such a memo in 2008, but it was rescinded because its discussion of

offer the best insight into how the Section 151 factors should be applied.

A. Standard of Review

It is fundamental to the Board's review of BIA discretionary decisions that it does not substitute its judgment for the BIA's.[111] Rather, the Board will only verify that the BIA properly considered all the legal prerequisites—the Section 151 factors.[112] Proof that the BIA considered each of the Section 151 factors must appear in the Notice of Decision, but there is no requirement that the BIA reach a particular conclusion on any given factor.[113] Furthermore, the factors do not need to be "weighed or balanced in any particular way or exhaustively analyzed."[114] Since the final decision need only be reasonable in its overall analysis, an application may be granted or denied based on less than all the factors if several weighed heavily for or against trust status.[115] Thus, the appellant's unsubstantiated assertions or simple disagreement with the BIA decision are not valid grounds for an appeal to the Board.[116] Additionally, while the Board does have authority to substantively review any legal issues raised, it may not review the constitutionality of any law; constitutional concerns must be judicially reviewed.[117]

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off-reservation acquisitions quickly became too controversial. Telephone Interview with Cheryl Schmidt, Dir., Stand Up For Cal. (Oct. 6, 2011). Known as the "Artman Memo on Commutable Distance," the memo suggested that off-reservation acquisitions should be limited to those parcels located within a "commutable" distance from the tribe's current reservation—a distance that an individual could reasonably be expected to drive to and from work—in order to facilitate employment opportunities for tribe members. *Id*.

111. *E.g.*, Ariz. State Land Dep't v. W. Reg'l Dir., 43 IBIA 158, 159–60 (2006); Cass Cnty. v. Midwest Reg'l Dir., 42 IBIA 243, 246 (2006). However, 43 C.F.R. § 4.330(b) (2005) does provide that the Assistant Secretary can "remove the limitation on the Board's review authority . . . [such that] the Board may fully review a BIA discretionary decision, even to the extent of substituting its judgment for BIA's . . . [and issuing] a final Departmental decision on the merits." Village of Ruidoso v. Albuquerque Area Dir., 31 IBIA 143 (1997).

112. *E.g.*, *Ariz. State Land Dep't*, 43 IBIA at 160.

113. *E.g.*, Eades v. Muskogee Area Dir., 17 IBIA 198, 202 (1989).

114. *E.g.*, Jackson Cnty. v. S. Plains Reg'l Dir., 47 IBIA 222, 231 (2008); Aitkin Cnty. v. Acting Midwest Reg'l Dir., 47 IBIA 99, 104 (2008); Cnty. of Sauk v. Midwest Reg'l Dir., 45 IBIA 201, 206–07 (2007), *aff'd*, No. 07-cv-543-bbc, 2008 WL 2225680 (W.D. Wis. May 29, 2008).

115. *E.g.*, McAlpine v. Muskogee Area Dir., 19 IBIA 2, 2, 6 (1990); Town of Charlestown v. E. Area Dir., 18 IBIA 67, 72 (1989).

116. *E.g.*, *Aitkin Cnty.*, 47 IBIA at 104; *Ariz. State Land Dep't*, 43 IBIA at 160; *Cass Cnty.*, 42 IBIA at 246–47.

117. *E.g.*, *Jackson Cnty.*, 47 IBIA at 227–28 (2008); *Ariz. State Land Dep't*, 43 IBIA at 160; *Cass Cnty.*, 42 IBIA at 247.

B. Factor One: Statutory Authority

First, the BIA must consider whether it has "statutory authority for the acquisition and any limitations contained in such authority."[118] The BIA's statutory authority to take land into trust is rarely an issue and is most frequently satisfied by the IRA or the Indian Land Consolidation Act of 1983 (ILCA).[119]

C. Factor Two: Need for Land

The second Section 151 factor for the BIA to consider is "[t]he need of the individual Indian or the tribe for additional land."[120] The Board gives the

> BIA . . . broad leeway in its interpretation or construction of tribal "need" for the land . . . . [because] it is readily imaginable that that "need" will vary from one tribe to another or from one individual Indian to another such that flexibility in evaluating "need" is an inevitable and necessary aspect of BIA's discretion.[121]

As such, contrary to the common understanding of "need," a tribe does not have to be landless[122] or financially destitute to satisfy the need requirement.[123] The Board reasons that "[a] financially secure tribe might

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118. 25 C.F.R. § 151.10(a) (2005).

119. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2006); Indian Land Consolidation Act of 1983, 25 U.S.C. §§ 2202–2221 (2006). See *supra* note 82 for further discussion of the IRA and ILCA. Statutory authority can also be provided by any of the many mandatory tribe-specific acts. *E.g.*, Isolated Tracts Act of 1963, Pub. L. No. 88–196, 77 Stat. 349. However, the focus of this Comment is discretionary fee-to-trust decisions under the IRA and ILCA.

120. 25 C.F.R. § 151.10(b).

121. Cnty. of Sauk v. Midwest Reg'l Dir., 45 IBIA 201, 209 (2007).

122. *E.g.*, South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 798–99 (8th Cir. 2005); Kansas v. Acting S. Plains Reg'l Dir., 36 IBIA 152, 155 (2001); *see also* United States v. 29 Acres of Land, 809 F.2d 544, 545 (8th Cir. 1987); Chase v. McMasters, 573 F.2d 1011, 1011–16 (8th Cir. 1978); City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 162 (D.D.C. 1980); City of Tacoma v. Andrus, 457 F. Supp. 342, 345–46 (D.D.C. 1978).

123. *E.g.*, South Dakota v. Acting Great Plains Reg'l Dir., 39 IBIA 283, 290–91 (2004); Cnty. of Mille Lacs v. Midwest Reg'l Dir., 37 IBIA 169, 171–73 (2002). The judiciary has affirmed the Board's understanding of need. *South Dakota*, 423 F.3d at 798–99. In exploring the IRA's legislative history, the Supreme Court found that: "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. REP. NO. 73-1804, at 6 (1934)). With the Court's view from *Mescalero Apache Tribe* in mind, the Eighth Circuit recently concluded that:

well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed."[124] Thus, the Board has found a financially stable tribe's need for land valid where the land base is fully developed and the tribe needs additional land to provide infrastructure and expanded economic development to support its members and protect the environment.[125] There is also valid need where the tribe possesses a large amount of land but much of it is sub-marginal and unsuitable for development.[126] Additionally, while the BIA is not required to consider a tribe's income, it may do so.[127]

Other needs the Board has affirmed as sufficient include: the need for trust status to protect the land from alienation and thereby secure it for future generations;[128] the need for trust status to qualify for federal land management assistance grants and programs;[129] the need for tribal self-determination unhampered by the regulatory control of local government;[130] and the need to eliminate taxation.[131] Furthermore, a tribe need only provide reasonable explanations for its asserted needs; the BIA is not compelled to require a specific level of detail, proof, or specificity from the tribe in describing its need.[132]

Additionally, the difference between need for land and need for *trust*

> Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities. . . . [Thus, a]lthough the legislative history frequently mentions landless Indians, we do not believe that Congress intended to limit its broadly stated purposes of economic advancement and additional lands for Indians to situations involving landless Indians.

South Dakota, 423 F.3d at 798.

124. *Cnty. of Mille Lacs*, 37 IBIA at 173 (quoting Avoyelles Parish v. E. Area Dir., 34 IBIA 149 (1999)).

125. *Cnty. of Mille Lacs*, 37 IBIA at 173. Much of the contention around the need requirement and financially secure tribes arises on applications from tribes with lucrative gaming operations. *See Examining Executive Authority*, *supra* note 12, at 22. However, the Board has affirmed BIA conclusions on need in such cases because "the Nation's interest in securing its tribal self-determination and stability [is] rooted not in its gaming income, which 'may not always be a viable income,' but in its landbase." *Cnty. of Sauk*, 45 IBIA at 209.

126. *See* Shawano Cnty. v. Midwest Reg'l Dir., 40 IBIA 241, 243 (2005).

127. *Cnty. of Sauk*, 45 IBIA at 210.

128. 25 U.S.C. § 177 (2006) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."); *e.g.*, South Dakota v. Acting Great Plains Reg'l Dir., 39 IBIA 283, 292 (2004); *see also* COHEN'S HANDBOOK, *supra* note 1, §15.06 (detailed discussion of federal restraint on alienation of tribal land, which "reverses the common-law presumption of alienability, and vests great power over tribal land in the federal government").

129. *E.g.*, Cass Cnty. v. Midwest Reg'l Dir., 42 IBIA 243, 247 (2006).

130. *Id.*

131. Shawano Cnty. v. Acting Midwest Reg'l Dir., 53 IBIA 62, 79 (2011).

132. *E.g.*, *id.* at 78.

land is a crucial detail; the BIA is to consider the need for land, *not* the need for trust land.[133] Thus, the Board finds arguments that tribes could use the land as they propose to without trust status unpersuasive.[134] The Board has also held that a tribe's competency to handle its affairs is not an appropriate need consideration, and thereby finds arguments that a competent tribe fails to establish need unpersuasive as well.[135]

D. Factor Three: Proposed Use of the Land

The third Section 151 factor for the BIA to consider is "[t]he purposes for which the land will be used."[136] The BIA need not examine every possible use for the land, but must show it considered "relevant facts . . . which are, or should be, within BIA's knowledge" and should include discussion of these facts in its decision.[137] Similarly, mere speculation by the appellant about an intended use other than that stated by the tribe in its application is an insufficient ground for the Board to vacate and remand a BIA decision.[138] However, if the appellant substantiates such an allegation with evidence, the BIA must consider it in the proposed use analysis.[139] Furthermore, if the actual use of the land changes from the proposed use while the application is in process and the BIA issues a decision without knowledge of this changed use, the BIA can vacate its decision and reanalyze the application in light of the new information.[140] However, a

133. *E.g.*, South Dakota v. U.S. Dep't of Interior, 423 F.3d 790, 801 (8th Cir. 2005) ("[I]t would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance."); *South Dakota*, 39 IBIA 283, 292–93 (2004).

134. *South Dakota*, 423 F.3d at 801; *South Dakota*, 39 IBIA at 292–93.

135. Cnty. of Mille Lacs v. Midwest Reg'l Dir., 37 IBIA 169, 173 (2002); *South Dakota*, 39 IBIA at 292.

136. 25 C.F.R. § 151.10(c) (2005).

137. City of Lincoln City v. Portland Area Dir., 33 IBIA 102, 107 (1999) (quoting Village of Ruidoso v. Albuquerque Area Dir., 32 IBIA 130, 139 (1998)).

138. *E.g.*, Iowa v. Great Plains Reg'l Dir., 38 IBIA 42, 52–53 (2002).

139. *Village of Ruidoso*, 32 IBIA at 138–40. In that case, the appellant alleged that the tribe intended to use the land for gaming purposes and cited facts that showed the subject property had been donated to the tribe by a gaming operator, the gaming operator had established a gaming relationship with the tribe, and the apparent prior use of the property was for gaming-related purposes. *Id.* The Board found these facts relevant and held that the BIA should have addressed them in its analysis of the tribe's proposed use of the property. *Id.* at 140.

140. Sycuan Band of Mission Indians v. Acting Sacramento Area Dir., 31 IBIA 238, 247–50 (1997).

decision to accept land into trust based on a specific proposed use does not restrict actual use to that specified use in any way.[141] Thus, if the actual use changes from the proposed use after the land has been accepted into trust, the Board cannot vacate and reanalyze the decision.[142]

E. Factor Four: Trust Land Already Owned and Degree of Assistance Needed

The BIA need only apply the fourth Section 151 factor to applications from individual Indians: "[I]f the land is to be acquired for an individual Indian, [the BIA must consider] 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."[143] This factor is relatively straightforward; the only Board commentary on it has been to confirm various needs as valid considerations. These valid need considerations include the applicant's age, income, education level, potential for health problems, need to protect homesite, and need for trust status to qualify for the BIA's probate and estate planning services.[144]

F. Factor Five: Impact of Removal on State Tax Rolls

The fifth factor requires the BIA to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."[145] Thus, when a state or local government taxes activities or transactions on the proposed trust land, asserts loss of such revenue if land is taken into trust, and provides an estimate of this loss, the BIA must consider such loss in making its decision.[146] In considering an asserted negative impact from tax loss, the BIA is permitted to consider factors that may offset the tax loss, such as the tribe's contribution to the economic growth of the area.[147] However, while the BIA may consider any offsetting factors, it may not require the tribe to offer funds or promise contributions as compensation for tax loss from a successful trust acquisition.[148]

The Board has also laid out several more important parameters for tax loss analysis. First, the BIA need only consider the impact stemming from

141. *City of Lincoln City*, 33 IBIA 102, 105–07 (1999).
142. *See id.*
143. 25 C.F.R. § 151.10(d) (2005).
144. South Dakota v. Acting Great Plains Reg'l Dir., 39 IBIA 301, 307–08 (2004).
145. 25 C.F.R § 151.10(e).
146. *E.g.*, Rio Arriba Bd. of Cnty. Comm'rs v. Acting Sw. Reg'l Dir., 36 IBIA 14, 25–26 (2001).
147. Cnty. of Mille Lacs v. Midwest Reg'l Dir., 37 IBIA 169, 175 (2002).
148. *E.g.*, Shawano Cnty. v. Acting Midwest Reg'l Dir., 53 IBIA 62, 81 (2011).

the specific request for that specific tract of land; it is not required to consider the cumulative impact of the tax loss resulting from all trust land in the area.[149] Similarly, the BIA is only required to consider the tax amount to be lost based on the current use of the land, not the future loss based on proposed development, change in use,[150] or speculative tax losses.[151] However, even though the BIA is not required to consider speculative tax losses, it may consider them if it believes such losses are relevant.[152]

G. Factor Six: Jurisdictional and Land Use Conflicts

The sixth Section 151 factor is consideration of "[j]urisdictional problems and potential conflicts of land use which may arise."[153] While such problems require consideration, there is no requirement that they be resolved as a precondition to acceptance of the land into trust.[154] However, the Board has found a specific "type of potential land use conflict which should be resolved by agreement, if at all possible"; when the proposed acquisition is subject to a use restraint—such as a special use permit—at the time of application, the BIA is permitted to deny the application until the tribe makes a good faith effort to resolve the issue.[155]

The Board's jurisdiction and land use conflict holdings also parallel some of those from its tax loss analysis. First, the BIA need only consider jurisdictional and land use conflict stemming from the specific request for that specific tract of land; it is not required to consider the cumulative impact resulting from all trust land in the area.[156] However, even though the BIA is not required to consider cumulative impacts, it may consider them if it finds such impacts relevant.[157] Similarly, the BIA is not required to consider

149. *E.g.*, Shawano Cnty. v. Midwest Reg'l Dir., 40 IBIA 241, 249 (2005); *South Dakota*, 39 IBIA at 308–09; Ziebach Cnty. v. Acting Great Plains Reg'l Dir., 38 IBIA 227, 230 (2002).

150. *Shawano Cnty.*, 40 IBIA at 249.

151. *E.g.*, Skagit Cnty. v. Nw. Reg'l Dir., 43 IBIA 62, 81 (2006) (quoting *Rio Arriba*, 38 IBIA at 24).

152. Aitkin Cnty. v. Acting Midwest Reg'l Dir., 47 IBIA 99, 111 (2008).

153. 25 C.F.R. § 151.10(f) (2005).

154. Avoyelles Parish v. E. Area Dir., 34 IBIA 149, 155 (1999).

155. Yerington Paiute Tribe v. Acting W. Reg'l Dir., 36 IBIA 261, 263 (2001).

156. *E.g.*, South Dakota v. Acting Great Plains Reg'l Dir., 39 IBIA 283, 294–95 (2004).

157. *South Dakota*, 39 IBIA at 309 (finding it proper for the BIA to consider a tribe's argument that it already held a large amount of land in trust status, so adding the proposed parcel would not increase jurisdictional issues significantly).

speculative assertions that the tribe will alter the use of the land after trust status is achieved because "[t]he Regional Director is simply not required to speculate as to events that may or may not occur at some unknown point in the future."[158]

H. Factor Seven: BIA's Ability to Discharge Additional Responsibilities

The seventh Section 151 factor is "whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land into trust status."[159] This factor can be satisfied with minimal analysis because the Board has held that the BIA's determination that it is equipped to discharge any additional responsibilities is sufficient.[160] Thus, this factor has not emerged as a point of contention for fee-to-trust appeals, and the Board has not issued any further relevant or significant holdings regarding it.

I. Factor Eight: Environmental Compliance

Under the eighth factor, the BIA must consider whether the applicant provided sufficient information to allow it to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures (NEPA) and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.[161] This factor has not emerged as a point of contention for fee-to-trust appeals, and the Board has not issued any relevant or significant holdings regarding it.

J. Factor Nine: Proximity to State and Reservation Boundaries

In addition to the previous eight factors, the BIA must consider two additional factors for off-reservation acquisitions.[162] The first off-reservation factor is consideration of the land's proximity to state and

158. *E.g.*, Shawano Cnty. v. Acting Midwest Reg'l Dir., 53 IBIA 62, 81–82 (2011).

159. 25 C.F.R. § 151.10(g) (2005).

160. *See, e.g.*, Roberts Cnty. v. Acting Great Plains Reg'l Dir., 51 IBIA 35, 43–44 (2009) ("Appellants have provided nothing to contradict the Tribe's submission, and, in the absence of any such showing, we are not convinced that the Regional Director was required to address this factor in more detail.").

161. 25 C.F.R. § 151.10(h). Enacted in 1969, NEPA, 42 U.S.C. §§ 4321–4370 (2006) "requires federal administrative agencies to factor environmental considerations into their discretionary decision-making. . . . primarily by requiring preparation and public circulation of environmental impact statements ('EISs')." Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 A.L.I.-A.B.A. 757, 759 (2010).

162. 25 C.F.R. § 151.11; *see supra* notes 93–97 and accompanying text (discussing which acquisitions are considered off-reservation acquisitions).

reservation boundaries.[163] Then, "as the distance between the tribe's reservation and the land to be acquired increases, the [BIA] shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition."[164] This factor has not emerged as a point of contention for fee-to-trust appeals, and the Board has not issued any relevant or significant holdings regarding it.

K. Factor Ten: Expected Economic Benefits

The second off-reservation factor requires the tribe to "provide a plan which specifies the anticipated economic benefits associated with the proposed use" if the land is being acquired for "business purposes."[165] This factor has not emerged as a point of contention for fee-to-trust appeals, and thus the Board has not issued any relevant or significant holdings regarding it.

L. Other Considerations

The Board has also issued several non-factor-specific holdings for the BIA to follow. First, where a long period of time has passed between the application and the BIA's decision, the BIA must update its analysis before taking the land into trust.[166] Additionally, the BIA only has to take reasonable efforts to notify local governments of its fee-to-trust decisions.[167] When the BIA has taken reasonable efforts, the burden then passes to any notified local official to pass notice on to other appropriate officials.[168]

The Board, as well as federal courts, have also addressed allegations of built-in structural bias within the BIA that inappropriately affects the administration of the fee-to-trust process in favor of Indians.[169] However,

163. 25 C.F.R. § 151.11(b).

164. *Id*.

165. *Id*. § 151.11(c).

166. Okanogan Cnty. v. Acting Portland Area Dir., 30 IBIA 42, 43 (1996) (noting a gap of approximately five years between application and decision).

167. Avoyelles Parish Police Jury v. E. Area Dir., 34 IBIA 149, 156 (1999).

168. *Id*.

169. South Dakota v. U.S. Dep't of Interior, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007); South Dakota v. Acting Great Plains Reg'l Dir., 49 IBIA 129, 144 (2009).

such allegations have been squarely rejected.[170] Relying on Supreme Court precedent, a federal district court found the BIA's policies of tribal self-determination, Indian self-government, and hiring preferences for Indians appropriate because they were established by Congress in the IRA.[171] The appellant must present a "substantial showing of bias" to disqualify an officer; without clear evidence, "courts should presume that public officers have discharged their official duties properly."[172] This has proven to be a high standard to meet, as even a showing that the deciding officer was currently a member and former tribal official of the tribe applying for a fee-to-trust acquisition was not substantial enough to disqualify the officer for bias.[173]

V. APPLICATION OF THE LAW—PACIFIC REGION BUREAU OF INDIAN AFFAIRS' DECISIONS

A. Methodology of This Project

This study includes all Notices of Decision issued by the Pacific Region BIA Office[174] between 2001 and 2011 under the statutory authority of the IRA and ILCA,[175] for a total of 111 decisions from which both factual and analytical data were collected.[176] The factual data compiled from each

170. *South Dakota*, 49 IBIA at 144 (citing *South Dakota*, 401 F. Supp. 2d at 1011).

171. *Id*. ("[T]he U.S. Supreme Court [has] found the preference policy reasonable and rationally designed to further Indian self-government and not violative of due process.") (citing Morton v. Mancari, 417 U.S. 535, 542, 555 (1974)).

172. *South Dakota*, 401 F. Supp. 2d at 1011 (quoting United States *ex rel*. De Luca v. O'Rourke, 213 F.2d 759, 765 (8th Cir. 1954); Sokaogon Chippewa Cmty. v. Babbitt, 929 F.Supp. 1165, 1176 (W.D. Wis. 1996)).

173. Roberts Cnty. v. Acting Great Plains Reg'l Dir., 51 IBIA 35, 49–50 (2009).

174. There are a total of twelve regional BIA offices, each of which independently issues decisions on fee-to-trust applications for its service area. *Regional Offices*, U.S. DEPARTMENT OF THE INTERIOR, INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm (last updated Sept. 21, 2012).

175. Indian Reorganization Act of 1934, 25 U.S.C. §§ 465–479 (2006); Indian Land Consolidation Act of 1983, 25 U.S.C. §§ 2202–2221 (2006*); see also supra* note 82 (explanation of why the IRA applies in some cases and the ILCA in others); *supra* note 119 (explaining that statutory authority can also be provided by any of the many mandatory tribe-specific acts).

176. The Pacific Region BIA actually provided 114 Notices of Decision, but two were superseded due to error and one was stayed to allow the Attorney General to review environmental concerns. Notice of Decision from Pac. Region BIA to Amber Soza, Morongo Band of Mission Indians (Mar. 24, 2011) (trust land decision on 1.48 acres) (*superseded by* Apr. 18, 2011); Notice of Decision from Pac. Region BIA to Cedarville Rancheria (Feb. 22, 2008) (final trust land decision on 8.44 acres, supersedes stayed July 25, 2007 decision); Notice of Decision from Pac. Region BIA to Norma Jean Hamlin Gandara, Morongo Band of Mission Indians (Aug. 27, 2002) (trust land decision on 5.19 acres) (*superseded by* Dec. 23, 2002). In the two cases superseded due to error, only the final Notice of Decision was included in the analysis. Notice of Decision from Pac. Region

decision includes: the date of the decision; the county the proposed trust acquisition was located in; the size of the proposed trust acquisition; whether the request was tribal or individual; whether the request was for an on- or off-reservation acquisition; and whether the BIA decided to accept the land into trust or not.[177] In addition to this factual data, the Pacific Region BIA's analysis of each Section 151 regulatory factor was tabulated.[178] The Pacific Region BIA's particular expression of its reasoning and facts considered varied from decision to decision; thus, each consideration was grouped into broader categories to allow for meaningful analysis of the data.[179] As the Pacific Region BIA frequently cited more than one consideration under each factor, multiple reasons were recorded when this occurred.

While this study includes more data than previously collected regarding BIA decisions on discretionary fee-to-trust applications,[180] it is important to note its limitations. The data set for this analysis comes solely from the Pacific Region BIA Office, which serves California, and only covers decisions from 2001 through 2011. These limitations make it inappropriate to draw conclusions about the entire history of discretionary fee-to-trust decisions or the actions of the BIA as a whole. Additionally, the BIA primarily considers facts and reasons supplied by the tribe in its application and comments from government agencies, legislators, concerned individuals, and the like; it generally does not conduct its own independent

BIA to Amber Soza, Morongo Band of Mission Indians (Apr. 18, 2011) (trust land decision on 1.48 acres); Notice of Decision from Pac. Region BIA to Norma Jean Hamlin Gandara, Morongo Band of Mission Indians (Dec. 23, 2002) (trust land decision on 5.19 acres). However, the stayed July 25, 2007 decision, not the final February 22, 2008 decision, was included in the analysis since it included full review while the final notice did not. Notice of Decision from Pac. Region BIA to Cedarville Rancheria (July 25, 2007) (trust land decision on 8.44 acres).

177. *See infra* Table 1.

178. *See supra* Part III.A (explaining the regulatory factors); Part IV (detailing the Board's guidance on application of the factors).

179. For example, under the second regulatory factor, need for the land, the original tabulation of BIA reasoning consisted of seventy-three uniquely expressed considerations. This was further organized into fourteen categories. *See infra* Table 5. For example, the "Deficiencies in Current Land Holdings" category consists of the substantially similar considerations of: large portion unsuitable for development, current trust land is inadequate, current trust land is checkerboarded, and need to provide access to a landlocked parcel. *Id*. This same method was used to tabulate the data collected for each regulatory factor.

180. This is likely due in part to the time-consuming process of obtaining the BIA fee-to-trust Notices of Decision. They are not available in any electronic or hard copy database. Instead, the interested party must contact the issuing BIA office and request them. In most cases, a Freedom of Information Act Request (5 U.S.C. § 552 (2006)) must be filed.

investigation.[181] Thus, in a given decision, it is unclear whether the absence of a particular consideration under any given factor is a reflection of the BIA's choice of relevant facts or simply a reflection of the information provided to the BIA. However, despite such limitations, and with these limitations in mind, the data set is still sufficient to reveal meaningful insight into the IRA fee-to-trust process because, as federal Indian policy expert Vine Deloria notes, "Regardless of the posture of any national administration toward Indians and their problems, the lower-level bureaucracy largely determines what the actual policy of the government will be."[182]

B. Empirical Results

1. General Observations

Based on review of the entire data set, several initial observations are apparent. Most significantly, 100% of the proposed fee-to-trust acquisitions submitted to the Pacific Region BIA from 2001 through 2011 were granted.[183] Additionally, across all 111 decisions, the Pacific Region BIA did not conclude that a single factor weighed against acceptance of the land into trust. This resulted in a total of 10,538.03 acres being accepted into trust for individual Indians and tribes in California over that period.[184] Overall, the average request was for 94.94 acres and the median request was approximately 13.39 acres.[185] The smallest request was for 0.19 acres and the largest for 1,160.00 acres.[186]

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181. *See* Ariz. State Land Dep't v. Midwest Reg'l Dir., 43 IBIA 158, 165 (2006) (explaining that because the appellant did not participate in the comment process, the "[appellant] cannot reasonably expect BIA, in its trust acquisition decision, to address a concern that it did not know about"); Iowa v. Great Plains Reg'l Dir., 38 IBIA 42, 53–54 (2002) (Finding: (1) because local governments did not respond, the BIA was not able to measure the impact of the proposed acquisition on them, and (2) "BIA may rely on the representations of a local governmental entity as to its legal authority. BIA is not required to conduct an independent legal analysis of the authority."); Rio Arriba Bd. of Cnty. Comm'rs v. Acting Sw. Reg'l Dir., 36 IBIA 14, 24 (2001) (agreeing with argument that "it was Appellant's responsibility to notify BIA of any significant change in the information it had furnished previously"); City of Lincoln City v. Portland Area Dir., 33 IBIA 102, 107 (1999) (finding no authority for the appellant's contention that the BIA must examine possible uses for the land that are not stated in the application); *see also* Scrivner, *supra* note 89, at 607 (no mention of independent investigation when describing the BIA's decision-making process).

182. AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, *supra* note 79, at 6.

183. *See infra* Table 1.

184. *See infra* Table 1.1.

185. *Id*.

186. Notice of Decision from Pac. Region BIA to Karuk Tribe (Sept. 19, 2008) (trust land decision on 0.19 acres); Notice of Decision from Pac. Region BIA to Santa Rosa Rancheria Tachi Tribe (Feb. 26, 2008) (trust land decision on 1,160.00 acres); *see infra* Table 1.1.

The decisions were also divided and analyzed according to whether the application was submitted by a tribe for land to be taken into trust for the tribe as a whole or by an individual for land to be taken into trust on that individual's behalf. Ninety-seven of 111, or approximately 87%, were tribal applications, while individual Indians submitted 14, or approximately 13%, of the applications.[187] The average tribal request was for 108.06 acres and the median tribal request was 19.70 acres.[188] Range-wise, the smallest tribal request was for 0.19 acres and the largest for 1,160.00 acres.[189] The average, median, smallest, and largest requests for individual applications—4.00, 2.85, 0.39, and 13.68 acres respectively—were smaller than the tribal requests.[190] A total of 55.97 acres were accepted into trust for individual Indians and 10,482.06 acres for tribes.[191]

Additionally, the decisions were divided and analyzed according to whether the application was for an on- or off-reservation acquisition.[192] Of the 111 decisions, 97, or approximately 87%, were for on-reservation acquisitions and 14, or 13%, were for off-reservation acquisitions.[193] On-reservation requests were made for an average of 94.37 acres and a median of 12.05 acres.[194] The smallest on-reservation request was for 0.19 and the largest for 1,160.00 acres.[195] While it does not change the statutory meaning

187. *See infra* Table 2.

188. *See infra* Table 1.1.

189. Notice of Decision from Pac. Region BIA to Karuk Tribe (Sept. 19, 2008) (trust land decision on 0.19 acres); Notice of Decision from Pac. Region BIA to Santa Rosa Rancheria Tachi Tribe (Feb. 26, 2008) (trust land decision on 1,160.00 acres); *see infra* Table 1.1.

190. Notice of Decision from Pac. Region BIA to Renee Najera, Morongo Band of Cahuilla Mission Indians (June 4, 2008) (trust land decision on 0.39 acres); Notice of Decision from Pac. Region BIA to Maggie Margaret Sample Marquez, Wilma Jane Sample Shell, and Marian Louise Sample Stakewitz, Big Sandy Rancheria (Sept. 12, 2003) (trust land decision on 13.68 acres); *see infra* Table 1.1. This difference in acreage is logically connected to that fact that individual acquisitions were predominately for primary residences whereas tribes sought to acquire additional trust land for diverse purposes such as land banking and commercial development. *See infra* Part V.B.4. Land banking is the practice of acquiring property for strategic development purposes, such as preparation for unspecified future needs. *See* Diana A. Silva, Note, *Land Banking as a Tool for the Economic Redevelopment of Older Industrial Cities*, 3 DREXEL L. REV. 607, 608 (2011).

191. *See infra* Table 1.1.

192. *See supra* notes 93–97 and accompanying text (explaining the difference between on- and off-reservations acquisitions).

193. *See infra* Table 3.

194. *See infra* Table 1.1.

195. Notice of Decision from Pac. Region BIA to Karuk Tribe (Sept. 19, 2008) (trust land decision on 0.19 acres); Notice of Decision from Pac. Region BIA to Santa Rosa Rancheria Tachi

of on-reservation, 36% of on-reservation lands involved parcels located within the exterior boundaries of the reservation and the remaining 64% of parcels were located outside of, but contiguous to, the exterior boundaries of land held in trust by the requesting tribe.[196] For off-reservation applications, the average request was for 98.85 acres with a median request of 33.90 acres.[197] The smallest off-reservation request was for 0.56 acres and the largest was for 882.80 acres.[198] A total of 9,154.16 on-reservation and 1,383.87 off-reservation acres were accepted into trust.[199]

2. Factor One: Statutory Authority

The Pacific Region BIA's statutory authority to take land into trust was satisfied by the ILCA in 70% of decisions, with the remaining 30% satisfied by the IRA.[200] This factor does not require further analysis, merely notation that the BIA is acting pursuant to statutory authority.

3. Factor Two: Need for Land

Consistent with the Board's grant of "broad leeway" and "flexibility" in determining need,[201] the considerations the Pacific Region BIA noted in its need for the land analysis were numerous and varied; a total of 690 considerations mentioned were grouped into 14 categories.[202] In descending order of frequency of appearance among the 111 total decisions, the results were as follows: the amount of trust land the tribe currently owns was considered in 73.87% of decisions, the importance of self-determination and sovereignty in 72.07%, the fact that the tribe has lost trust land in 54.05%, deficiencies in current land holdings in 53.15%, housing considerations in 37.84%, economic factors in 36.04%, cultural considerations in 25.23%, use considerations in 22.52%, long-term planning considerations in 18.02%, tribal membership considerations in 14.41%, location of the property in 14.41%, the tribe's achievements in 10.81%, the degree of cooperation with and support from local entities in 4.50%, and several miscellaneous

Tribe (Feb. 26, 2008) (trust land decision on 1,160.00 acres); *see infra* Table 1.1.

196. *See infra* Table 1.1.

197. *Id*.

198. Notice of Decision from Pac. Region BIA to Karuk Tribe (Sept. 29, 2010) (trust land decision on 0.56 acres); Notice of Decision from Pac. Region BIA to Mesa Grande Band of Mission Indians (Sept. 6, 2001) (trust land decision on 882.80 acres); *see infra* Table 1.1.

199. *See infra* Table 1.1.

200. *See infra* Table 4. See also *supra* note 82, for further discussion of the IRA and ILCA.

201. Cnty. of Sauk v. Midwest Reg'l Dir., 45 IBIA 201, 209 (2007); *see supra* notes 120–35 and accompanying text (outlining the Board's guidance on need analysis).

202. *See infra* Table 5.

considerations in 4.50%.[203]

While the most frequently cited category was the amount of current trust land owned by the tribe, this consideration does not appear to have much of a role beyond mere recitation because the average amount of current trust land owned was 4,622.49 acres and ten decisions noted amounts over 10,000 acres.[204] Thus, it appears that other circumstances can easily satisfy the need factor even where the tribe already owns a large amount of trust land, which is consistent with the Board's holdings that additional land may be needed for a variety of reasons.[205] Such reasons appear throughout the Pacific Region BIA's decisions, as seen in the strong presence of consideration of deficiencies in current land holdings, economic factors, and housing considerations.[206]

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203. *Id*. Thirty-two decisions noted land lost during the Termination Era, four decisions noted land lost during the Allotment Era, two noted land lost by forced sale, and one each by executive order and unspecified means. *Id*.

204. Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians (Nov. 30, 2011) (trust land decision on 78.50 acres) (noting current trust land of 12,255.21 acres); Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians (Jan. 24, 2011) (trust land decision on 49.47 acres) (noting current trust land of 12,303.50 acres); Notice of Decision from Pac. Region BIA to Tule River Tribe (Jan. 6, 2011) (trust land decision on 40.00 acres) (noting current trust land of 55,396.00 acres); Notice of Decision from Pac. Region BIA to Tule River Tribe (Jan. 4, 2010) (trust land decision on 40.00 acres) (noting current trust land of 55,396.00 acres); Notice of Decision from Pac. Region BIA to John E. Linton, Morongo Band of Cahuilla Mission Indians (May 3, 2005) (trust land decision on 10.30 acres) (noting current tribal trust land of 31,115.47); Notice of Decision from Pac. Region BIA to Robert Allan St. Marie, Sr., Morongo Band of Cahuilla Mission Indians (Mar. 1, 2005) (trust land decision on 0.64 acres) (noting current tribal trust land of 31,000.00 acres); Notice of Decision from Pac. Region BIA to David J. Matthews, Morongo Band of Cahuilla Mission Indians (Dec. 2, 2004) (trust land decision on 5.04 acres) (noting current tribal trust land of 31,115.47 acres); Notice of Decision from Pac. Region BIA to Morongo Band of Cahuilla Mission Indians (Sept. 29, 2003) (trust land decision on 619.90 acres) (noting current trust land of 31,115.47 acres); Notice of Decision from Pac. Region BIA to Norma Jean Hamlin Gandara, Morongo Band of Cahuilla Mission Indians (Dec. 23, 2002) (trust land decision on 5.19 acres) (noting current tribal trust land of 31,075.47 acres); *see also infra* Table 6.

205. While acceptance of more land into trust when the tribe currently owns relatively large amounts of land already may be a point of contention for those in opposition to such an acquisition, the Board has made it clear that such arguments are wholly unpersuasive as the currently owned land may be deficient in some way. Cnty. of Mille Lacs v. Midwest Reg'l Dir., 37 IBIA 169, 171–73 (2002); *see* Shawano Cnty. v. Midwest Reg'l Dir., 40 IBIA 241, 243 (2005); *see also supra* notes 120–35 and accompanying text (outlining the Board's guidance on need analysis); *infra* Table 5 (listing reasons current trust land may be considered deficient).

206. *See infra* Table 5. The most frequently noted deficiencies in land were topographical problems that prohibit development, such as steep, rocky, mountainous terrain or drainage problems (24.32% of decisions). *Id*. Nearly as frequently, 18.92% of decisions note that the current trust land is inadequate because it is already fully developed or insufficient to meet the tribe's development

The second and third most frequently cited categories, the importance of self-determination and sovereignty and the fact that the tribe has lost land, reflect a strong emphasis on policy-based considerations.[207] The top considerations in the importance of self-determination and sovereignty category included statements that the tribe had established a need for self-determination, self-jurisdiction, self-governance, and sovereignty.[208] The lost land category included regular recognition of the tribe's efforts to rebuild and consolidate its land, as well as the challenges it has faced in doing so.[209] Consistent with the Self-Determination Era of federal Indian policy that began in the 1960s and continues through today,[210] these results communicate recognition of a responsibility for, or duty to remedy, the harm inflicted on Indian communities during past policy eras.[211]

4. Factor Three: Proposed Use of the Land

The third factor, the proposed use of the land, primarily comprised notation of the proposed and current use of the land—100.00% and 75.68% of decisions respectively.[212] Residential use outnumbered commercial use, but not substantially.[213] While much of the public concern about the transfer of fee land into trust revolves around how the land will be used once in trust, 68.47% of decisions noted that the tribe did not plan to change the current use.[214] Such concern may still be appropriate considering that approximately 9% of decisions noted that the tribe had no specific immediate plan for the

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needs. *Id*.

207. *Id*.

208. *Id*.

209. *Id*. BIA recognition of a tribe's efforts to rebuild their land base is also seen in the relatively common reference to "checkerboarded" land as a deficiency in current land holdings. *Id*. "Checkerboarded" is a term of art used when a tribe's trust land holdings do not form a united whole, but instead form a patchwork pattern primarily due to changes in federal Indian land policy over the years. COHEN'S HANDBOOK, *supra* note 1, § 1.04.

210. *See supra* notes 72–80 and accompanying text (discussing the Self-Determination Era).

211. This duty to remedy past harms is particularly well-illustrated by the Pacific Region BIA's regular comparison of current trust holdings with past holdings—either original reservation size or amount of aboriginal land. *See infra* Table 5.

212. *See infra* Table 7.

213. *Id*. While Section 151 does not restrict an individual applicant's use for trust land, the decisions over the last eleven years reflect a 100% residential use for individual acquisitions. *See infra* Table 8.

214. *See infra* Table 7. However, as used in the decisions, the phrase "no planned change in current use" does not signify that no development will occur, but rather that such improvements will be consistent with the current use. For example, there is no planned change in current use when the land currently has two mobile homes located on it and the tribe plans to replace the mobile homes with modular homes, a maintenance facility, a water storage tank, access roads, the tribal housing authority, and community development buildings. Notice of Decision from Pac. Region BIA to Karuk Tribe (Feb. 8, 2008) (trust land decision on 16.23 acres).

land, but that it would potentially be used for future residential or commercial development.[215]

To a lesser degree than proposed and current use, the following considerations were also noted: the location of the land—18.02%; degree of cooperation with and support from local entities—9.91%; economic considerations—9.01%; importance of self-determination and sovereignty—7.21%; deficiencies in current land holdings—7.21%; housing considerations—2.70%; and cultural considerations—1.80%.[216]

5. Factor Four: Trust Land Already Owned and Degree of Assistance Needed

The amount of trust land already owned and degree of assistance needed factor only applies to individual applicants.[217] Thus, all fourteen individual decisions should have included this analysis; however, three decisions did

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215. *See infra* Table 7. However, the Pacific Region BIA has firmly rebutted concern about potential future development with responses such as,

> The BIA is not required to make speculative inquiry concerning every possible use that may arise sometime in the future. If and when the tribe decides to develop the subject parcels, they will have to comply with applicable federal requirements, as well as any agreement they now have with [the] County.

Notice of Decision from Pac. Region BIA to Santa Rosa Rancheria Tachi Tribe (Feb. 26, 2008) (trust land decision on 1,160.00 acres). The Board's holdings provide substantial support for this position. *See e.g.*, Iowa v. Great Plains Reg'l Dir., 38 IBIA 42, 52–53 (2002).

Public concern about gaming use was also evident in the decisions, and the Pacific Region BIA responded to a number of comments to clarify that it was appropriately analyzing an application as a non-gaming request even though the current or proposed use involved the tribe's casino, such as a shared parking lot or septic leach field. *See, e.g.*, Notice of Decision from Pac. Region BIA to Agua Caliente Band of Cahuilla Indians (Aug. 19, 2008) (trust land decision on 1.72 acres) ("In accordance with the Department's guidelines, the acquisition is not gaming-related if the land and improvements are not used exclusively for the gaming facility and not essential to its operation, but the gaming facility is merely sharing in infrastructure improvements."); Notice of Decision from Pac. Region BIA to Chicken Ranch Rancheria of Me-Wuk Indians (Mar. 20, 2003) (trust land decision on 42.00 acres) (finding that a septic field is merely shared infrastructure). This is because under the Department of the Interior's gaming checklist, an acquisition is not for gaming purposes unless the proposed use is exclusively for a gaming operation or is essential to the gaming operation. U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SEC'Y, CHECKLIST FOR GAMING ACQUISITIONS GAMING-RELATED ACQUISITIONS AND IGRA SECTION 20 DETERMINATIONS 1 (2007), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001904.pdf; *see generally* Erik M. Jensen, *Indian Gaming on Newly Acquired Lands*, 47 WASHBURN L.J. 675 (2008) (discussing Indian Gaming Regulatory Act acquisitions).

216. *See infra* Table 7.

217. *See supra* note 143 and accompanying text.

not mention either prong.[218] Of the eleven decisions to analyze this factor, 100% indicated that the applicant did not own any other trust land.[219] Additionally, the Pacific Region BIA's analysis of the degree of assistance needed indicates that applicant need weighs in favor of acceptance because 90.91% of decisions that analyzed it concluded that even though no assistance was needed, the need to protect the land for future generations outweighed the fact that the applicant did not need assistance.[220] Thus, this factor serves little function beyond mere recitation because the facts of the acquisition are easily overruled by a policy rationale that could arguably apply to all fee-to-trust acquisitions.

6. Factor Five: Impact of Removal on State Tax Rolls

All but five decisions gave an estimated tax loss amount based on recent tax assessed on the subject property.[221] The estimates averaged $9,277, with

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218. Notice of Decision from Pac. Region BIA to Orval, Mac & William Hayward, Redding Rancheria (Oct. 13, 2011) (trust land decision on 1.50 acres); Notice of Decision from Pac. Region BIA to Lucille Rice, Morongo Band of Mission Indians (Sept. 14, 2011) (trust land decision on 1.34 acres); Notice of Decision from Pac. Region BIA to Jeanette McCain, Redding Rancheria (Feb. 17, 2011) (trust land decision on 0.70 acres); *see infra* Table 9. One of the individual decisions that was missing this analysis does mention under the need for the land analysis that the applicant needs help managing the property. Notice of Decision from Pac. Region BIA to Jeanette McCain, Redding Rancheria (Feb. 17, 2011) (trust land decision on 0.70 acres).

219. *See infra* Table 9. However, this result does not lead to the conclusion that ownership of other trust land will prohibit further land being taken into trust for an individual's benefit. As seen in the need for the land analysis, it is likely that many policy-based and practical considerations would outweigh any contention that the individual already owns sufficient trust land. *See infra* Table 5; *supra* notes 201–211 and accompanying text (discussing the Pacific Region BIA's need analysis).

220. *See infra* Table 9.

221. *See infra* Table 10. While a specific tax loss estimate may be highly relevant, the BIA's analysis is not erroneous if such an estimate is not present. *See supra* notes 145–52 and accompanying text (detailing the Board's guidance on tax loss analysis). The decisions that did not consider a specific estimate of tax loss noted mitigating circumstances such as: the tribe had entered an agreement for annual contributions in lieu of taxes; there is currently no retail activity on the land, so there is no loss of sales or use tax; and the amount is small, so impact is minimal. Notice of Decision from Pac. Region BIA to Elk Valley Rancheria (June 9, 2011) (trust land decision on 2.00 acres); Notice of Decision from Pac. Region BIA to Agua Caliente Band of Cahuilla Indians (Dec. 13, 2004) (trust land decision on 10.00 acres); Notice of Decision from Pac. Region BIA to Elk Valley Rancheria (Jan. 23, 2004) (trust land decision on 179.09 acres); Notice of Decision from Pac. Region BIA to Norma Jean Hamlin Gandara, Morongo Band of Mission Indians (Dec. 23, 2002) (trust land decision on 5.19 acres); Notice of Decision from Pac. Region BIA to Soboba Band of Luiseño Indians (Sept. 10, 2002) (trust land decision on 950.00 acres).

Additionally, several instances of what appeared to be erroneous copying and pasting from one document to another were found. Two decisions contained identical tax analysis, in its entirety, despite a difference of approximately 420 acres in the subject parcels. Notice of Decision from Pac. Region BIA to Morongo Band of Cahuilla Mission Indians 3 (Dec. 1, 2010) (trust land decision on 431.26 acres); Notice of Decision from Pac. Region BIA to San Pasqual Band of Diegueno Mission

a median of $2,916.[222] The highest estimate was $97,220[223] and sixteen decisions noted tax losses over $20,000.[224] The Pacific Region BIA also

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Indians 4 (Jan. 4, 2010) (trust land decision on 9.08 acres). Both Notices of Decision stated the following:

> Parcels accepted into federal trust status are exempt from taxation and would be removed from the County's taxing jurisdiction. In the 2009–2010 tax years, the total tax assessed on the subject parcels was $1,777.72. During the comment period, none of the solicited agencies indicated that any adverse impacts would result from the removal of the subject parcel from the tax rolls.
>
> It is our determination that no significant impact will result from the removal of this property from the county tax rolls given the relatively small amount of tax revenue assessed on the subject parcel.

Notice of Decision from Pac. Region BIA to Morongo Band of Cahuilla Mission Indians 3 (Dec. 1, 2010) (trust land decision on 431.26 acres); Notice of Decision from Pac. Region BIA to San Pasqual Band of Diegueno Mission Indians 4 (Jan. 4, 2010) (trust land decision on 9.08 acres).

Tax revenues were similarly transposed in two more cases with a difference of over 600 acres in the proposed acquisitions. Notice of Decision from Pac. Region BIA to Morongo Band of Cahuilla Mission Indians 3 (Apr. 15, 2004); Notice of Decision from Pac. Region BIA to Morongo Band of Mission Indians 8 (Sept. 29, 2003) (trust land decision on 7.39 acres). Given the common fact patterns, it is reasonable for the BIA to use common phrases and rationales across various decisions, as was present in the Notices of Decision analyzed for this Comment. However, the BIA should not fail to provide individualized analysis based on the unique circumstances of each proposed acquisition.

222. *See infra* Table 10.

223. Notice of Decision from Pac. Region BIA to Augustine Band of Cahuilla Mission Indians (Jan. 8, 2008) (trust land decision on 37.08 acres) (noting previous year tax of $97,220).

224. Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians (Nov. 30, 2011) (trust land decision on 78.50 acres) (noting previous year tax of $20,176); Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians (Jan. 24, 2011) (trust land decision on 49.47 acres) (noting previous year tax of $34,757); Notice of Decision from Pac. Region BIA to Tule River Tribe (Jan. 6, 2011) (trust land decision on 40.00 acres) (noting previous year tax of $36,293); Notice of Decision from Pac. Region BIA to Sycuan Band of Kymeyaay Nation (Dec. 14, 2010) (trust land decision on 48.64 acres) (noting previous year tax of $20,000); Notice of Decision from Pac. Region BIA to Table Mountain Rancheria (Aug. 25, 2010) (trust land decision on 175.00 acres) (noting previous year tax of $66,830); Notice of Decision from Pac. Region BIA to Bear River Band of Rohnerville Rancheria (Mar. 22, 2010) (trust land decision on 113.00 acres) (noting previous year tax of $22,656); Notice of Decision from Pac. Region BIA to Tule River Tribe (Jan. 4, 2010) (trust land decision on 40.00 acres) (noting previous year tax of $36,293); Notice of Decision from Pac. Region BIA to Redding Rancheria (Nov. 27, 2009) (trust land decision on 3.65 acres) (noting previous year tax of $22,400); Notice of Decision from Pac. Region BIA to Augustine Band of Cahuilla Mission Indians (Jan. 8, 2008) (trust land decision on 37.08 acres) (noting previous year tax of $97,220); Notice of Decision from Pac. Region BIA to Table Mountain Rancheria (Oct. 15, 2007) (trust land decision on 72.81 acres) (noting previous year tax of $43,000); Notice of Decision from Pac. Region BIA to Tuolumne Band of Me-Wuk Indians (Jan. 12, 2007) (trust land decision on 297.18 acres) (noting previous year tax of $23,348); Notice of Decision from Pac. Region BIA to Shingle Spring Band of Miwok Indians (Sept. 8, 2006) (trust land decision on 77.03 acres) (noting previous year tax of $23,039); Notice of Decision from Pac. Region BIA to Morongo

considered a variety of circumstances that mitigated or offset the tax loss, financially or otherwise. The most common mitigating factor—considered in 41.44% of decisions—was ways the tribe contributes to the community, such as providing employment, purchasing goods and services, and making charitable contributions.[225] The tribe's efforts to cooperate with and support from local entities was noted in 34.23% of decisions, and benchmarking with county tax revenue totals to put the estimated tax loss in perspective was seen in 27.03%.[226] However, the Pacific Region BIA's emphasis on benchmarking is arguably meaningless, because only an incredibly large or extremely high-value property would result in a tax loss that would make such a comparison relevant.

While not as prominent as in other factors, policy-based considerations, such as the need for self-determination or a statement that the tribe's needs outweigh the impact of removal, were mentioned in 26.13% of decisions.[227] The remaining considerations were responses to local concerns and several miscellaneous considerations, in 5.41% and 6.31% of decisions, respectively.[228]

7. Factor Six: Jurisdictional and Land Use Conflicts

Concern about the state and local governments' loss of control over the land is one of the primary arguments against fee-to-trust acquisitions.[229] Thus, the concerned public would hope to see some teeth in the jurisdiction and land use conflict analysis. However, overall, the results show that the Pacific Region BIA has largely avoided significant analysis and replaced it with filler considerations.[230] For example, 92.79% of the decisions recited

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Band of Cahuilla Mission Indians (Jan. 26, 2005) (trust land decision on 715.00 acres) (noting previous year tax of $54,000); Notice of Decision from Pac. Region BIA to Santa Ynez Band of Mission Indians (Jan. 14, 2005) (trust land decision on 6.90 acres) (noting previous year tax of $43,340); Notice of Decision from Pac. Region BIA to Sycuan Band of Mission Indians (May 14, 2002) (trust land decision on 82.85 acres) (noting previous year tax of $24,875); Notice of Decision from Pac. Region BIA to Table Mountain Rancheria (Apr. 9, 2002) (trust land decision on 7.76 acres) (noting previous year tax of $34,164); *see infra* Table 10.

225. *See infra* Table 11.

226. *Id*. While a tribe's commitment to make contributions in lieu of tax loss is a rational reason for the BIA to consider the tax impact of removal nominal, the BIA has no authority to mandate a tribe to do so or condition acceptance upon such a promise. *E.g*., Shawano Cnty. v. Acting Midwest Reg'l Dir., 53 IBIA 62, 81 (2011); *see also supra* note 148 and accompanying text.

227. *See infra* Table 11.

228. *Id*.

229. The Pacific Region BIA did take public concern into consideration; it specifically addressed public concerns received in 12.61% of decisions and also emphasized the degree of cooperation with and support from local entities in 26.13% of considerations. *See infra* Table 12.

230. *See also infra* note 302 (providing an example of conspicuous use of filler analysis in the proposed use factor).

the legal results of transfer to trust status: criminal jurisdiction will remain with the state, but the land will be removed from state and local civil jurisdiction.[231] While relevant, these results are true of every fee-to-trust acquisition in California,[232] and thus the observations do not constitute meaningful analysis. There was also regular consideration—30.63% of decisions—of how various services will be provided to the land.[233] Again, while relevant, this is simply recitation of routine results of transfer to trust status; in fact, most of the services simply continue without change.[234] Additionally, in almost a quarter—23.42%—of decisions, the Pacific Region BIA engaged in minimal analysis, which demonstrates a reprehensible failure to fully consider the significant jurisdiction and land use consequences of a transfer of fee land to trust status.[235]

The second most common category of considerations was factors that contribute to mitigation or absence of jurisdictional conflict, which appeared in 57.66% of decisions.[236] On the surface, the considerations in this category do provide some indication that the loss of state and local jurisdiction will not have a negative effect on the community. For example, it is reasonable to assert that the fact that the land use will not change or that the proposed use is consistent with current zoning indicates a low potential for jurisdictional conflict.[237] However, this reasoning ignores the fact that once the land is taken into trust, the tribe is no longer bound by local zoning regulations or the use stated in its application, which is precisely the public's basis for concern about jurisdictional and land use conflict.[238]

Even in the rare instance of admitted land use conflict, the Pacific

231. *See infra* Table 12.

232. California is subject to 18 U.S.C. § 1163 (2006) and Public Law 280, 28 U.S.C. § 1360 (2006), which authorized state courts to exercise jurisdiction over offenses by or against Indians if the state has amended its constitution or enacted legislation for this purpose, and thus eliminated special federal criminal jurisdiction over reservations in affected areas. Goldberg, *supra* note 69, at 536–38.

233. *See infra* Table 12.

234. *Id*.

235. *See infra* Table 13. Of the 26 decisions categorized as containing only minimal analysis, approximately half only recited the maintenance of criminal jurisdiction by the state and transfer of civil and regulatory jurisdiction to the tribe. *Id*. The other half noted these jurisdictional changes plus one additional factor such as the fact that no adverse comments were received or police service would continue as is. *Id*.

236. *See infra* Table 12.

237. *See id*.

238. *See* Statement of Susan Adams, *supra* note 103, at 5.

Region BIA concluded that the tribe's needs outweighed jurisdictional conflict.[239] Policy-based considerations were also used to respond to public concerns and were present in 9.01% of decisions.[240]

8. Factor Seven: BIA's Ability to Discharge Additional Responsibilities

In the vast majority of decisions—91.89%—the Pacific Region BIA found that the acquisition would present no significant additional burdens on its operations.[241] It came to this conclusion most frequently due to the absence of a change in land use.[242] Other significant considerations included: the fact that the tribe did not have other leases, rights of way, or other trust applications forthcoming; the tribe would assume development and day-to-day management of the property; or the property was on-reservation.[243]

Where the Pacific Region BIA did anticipate additional burdens, it noted them and held them to be minimal burdens that it was equipped to handle.[244] As the Board has sanctioned minimal analysis of the seventh factor by holding that the BIA's determination of its capacity is conclusive,[245] the Pacific Region BIA's analysis certainly satisfies this standard. However, the

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239. Notice of Decision from Pac. Region BIA to Table Mountain Rancheria 9 (Oct. 15, 2007) (trust land decision on 72.81 acres) (Noting local concern about uses that are incompatible with the subject land's current zoning, but concluding, "when considering the Tribe's land acquisition request, the Department recognizes the Tribe's ongoing struggle to reestablish its land base . . . . With its limited land base, the Tribe, as a sovereign government, has implemented a utilization plan that best meets the needs of its members. It is our determination that the needs of the Tribe in this case out weigh [sic] any jurisdictional conflicts that may exist."); *see infra* Table 12.

240. *See infra* Table 12. For example, in a 2006 Notice of Decision, the Pacific Region BIA responded to local concerns about the loss of jurisdiction with particularly strong, broad policy rationales:

> The gist of the above concerns is the loss of jurisdiction over the subject property. The County will in fact lose jurisdictional control with an approved acquisition. However, the very essence of a "trust" acquisition is to enable tribes . . . the opportunity to plan and implement programs for the benefit of its community. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination. It is our determination that the needs of the Tribe in this case out weigh [sic] any jurisdictional issues that may arise as a result of a trust conversion.

Notice of Decision from Pac. Region BIA to Shingle Spring Band of Miwok Indians 7 (Sept. 8, 2006) (trust land decision on 77.03 acres).

241. *See infra* Table 14.

242. *Id*.

243. *Id*.

244. *Id*. Probate services to individual applicants comprised the majority of the noted additional burdens, with lease, mortgage, and construction loan processing appearing relatively frequently as well. *Id*.

245. *See, e.g*., Roberts Cnty. v. Acting Great Plains Reg'l Dir., 51 IBIA 35, 43–44 (2009); *see also supra* note 160 and accompanying text (discussing Board guidance on the additional BIA responsibility analysis).

Pacific Region BIA did make an effort to give this factor more than minimal consideration by reinforcing its determination with mention of: how services will be provided—17.12%; policy considerations—12.61%; absence of activities that would require BIA involvement—12.61%; the land's character—8.11%; the degree of cooperation with local entities—3.60%; and financial considerations—3.60%.[246]

9. Factor Eight: Environmental Compliance

The environmental compliance review is straightforward with specific federal requirements to be met.[247] While there was some public concern about potential use, reflected in the Pacific Region BIA's analysis of this factor and introductory summary of comments received, the federal requirements were met in 100% of applications.[248]

10. Factor Nine: Proximity to State and Reservation Boundaries

The Pacific Region BIA exhibited some confusion in its application of factor nine as evidenced by several incidents of mistaken analysis. Analysis of the proximity to state and reservation boundaries is only statutorily required for off-reservation acquisitions,[249] but the Pacific Region BIA

246. *See infra* Table 14. It is interesting that the most frequent policy consideration in the factor seven analysis was a recognition that the whole exercise of transferring fee land to trust status would not be required but for the wrongful termination of the tribe in the first place. *Id*. While only mentioned in 8.11% of decisions, it not only reaffirms the Pacific Region BIA's commitment to remedying past injury to the tribes, but provides a powerful response to any argument against the acquisition on factor seven grounds. *Id*.; *see supra* notes 209–11 and accompanying text (reflecting on the Pacific Region BIA's emphasis on lost land under the factor one need analysis).

247. *See supra* note 161 and accompanying text (explaining the environmental compliance requirements).

248. *See infra* Table 15. NEPA was satisfied by categorical exclusion due to no change in land use in 62.16% of decisions and Environmental Assessment (EA) resulting in issuance of a Finding of No Significant Impact (FONSI) in 40.54% of decisions. *Id*. These percentages exceed 100% because three decisions involved multiple parcels where NEPA was satisfied by an EA and FONSI on one and a categorical exclusion on another. *Id*. Hazardous substance determinations were satisfied in all decisions by a Phase 1 Contaminant Survey Checklist that reflected no hazardous materials or contaminants on the subject property. *Id*.

249. Section 151 states:

> The [BIA] shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated: . . . The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's

analyzed it in five on-reservation acquisitions and failed to mention it in one off-reservation acquisition.[250] Given the strongly favorable analysis in the other factors overall, it is unlikely that inclusion or exclusion of this analysis would have changed the outcome of any of the flawed decisions.[251] However, consideration of the correct factors should be a bare minimum.

The location of the subject property relative to state boundaries was noted in specific mileage in 61.11% of decisions, while 38.89% of decisions generally noted that the property does not cross state boundaries.[252] The subject property was an average of 6.60 miles away from other trust land, and the median distance was 1.40 miles away.[253] The closest distance was 0.08 miles and the farthest was 30.00 miles.[254] Additionally, 66.67% of the decisions noted other considerations, such as the tribe's need or history.[255]

11. Factor Ten: Expected Economic Benefits

Like factor nine, factor ten need only be considered for off-reservation acquisitions, but with the additional condition that it only applies to off-reservation land being acquired for business purposes.[256] Of the fourteen

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reservation . . . .

25 C.F.R. § 151.11 (2005).

250. *See infra* Table 16. Factor nine was unnecessarily analyzed in five on-reservation acquisitions. Notice of Decision from Pac. Region BIA to Agua Caliente Band of Cahuilla Mission Indians 4 (Mar. 9, 2010) (trust land decision on 30.00 acres); Notice of Decision from Pac. Region BIA to Mooretown Rancheria 5–6 (June 25, 2003) (trust land decision on 160.05 acres); Notice of Decision from Pac. Region BIA to Mooretown Rancheria 5 (June 6, 2002) (trust land decision on 33.14 acres); Notice of Decision from Pac. Region BIA to Sycuan Band of Mission Indians 13 (May 14, 2002) (trust land decision on 82.82 acres); Notice of Decision from Pac. Region BIA to Tyme Maidu Tribe 6–7 (May 7, 2001) (trust land decision on 18.50 acres). Factor nine should have been, but was not, analyzed in one off-reservation acquisition. Notice of Decision from Pac. Region BIA to San Pasqual Band of Diegueno Mission Indians (Jan. 4, 2010) (trust land decision on 9.08 acres). Interestingly, this decision also contained a possible error in the tax analysis. *See supra* note 221.

251. *See infra* notes 268–71 and accompanying text (discussing the prevalence of rubber-stamping in the Pacific Region BIA's trust land decisions).

252. *See infra* Table 16.

253. *See infra* Table 17.

254. Notice of Decision from Pac. Region BIA to Karuk Tribe (Sept. 15, 2010) (trust land decision on 20.70 acres) (noting distance from other trust land of 0.08 miles); Notice of Decision from Pac. Region BIA to Karuk Tribe (Mar. 12, 2008) (trust land decision on 2.64 acres) (noting distance from other trust land of 15.00 and 30.00 miles for the two parcels in the proposed acquisition); *see also infra* Table 17.

255. *See infra* Table 16.

256. Section 151 states,

> The [BIA] shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated: . . . Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits . . . .

off-reservation decisions, only seven included factor ten analysis; five were not required to because the land was not acquired for a business purpose, but the remaining two should have included factor ten analysis.[257] As with the errors in the factor nine analysis, it is unlikely that the errors in the factor ten analysis would have changed the outcome of the flawed decisions.[258] However, the legislative intent to give greater scrutiny to off-reservation acquisitions is clear on the face of Section 151: "[A]s 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. . . . [and] greater weight to the concerns raised."[259] Thus, the failure to even consider the additional factors is a considerable error.

The proposed use was stated in 100% of decisions that analyzed the factor.[260] Even though Section 151 requires "a plan which specifies the anticipated economic benefits associated with the proposed use,"[261] just over half—57.14%—of decisions actually specified expected benefits.[262] Only two—28.57%—provided a business plan.[263] The decisions also contained reference to the need for the land, mostly phrased in policy-based language, as well as recognition of cooperation with the city and history of investment

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25 C.F.R. § 151.11 (2005).

257. *See infra* Table 18. Two off-reservations acquisitions should have, but did not, include factor ten analysis. Notice of Decision from Pac. Region BIA to San Pasqual Band of Diegueno Mission Indians 3 (Jan. 4, 2010) (trust land decision on 9.08 acres) (tribe intends to build shopping plaza with at least one retail store, a restaurant and a gas station); Notice of Decision from Pac. Region BIA to Mesa Grande Band of Mission Indians 9 (Sept. 6, 2001) (trust land decision on 882.80 acres) (tribe intends to use for commercial bison operation involving "direct sale of breeding stock and meat animal, and . . . spin-off businesses that include food specialty items . . . , art and handcrafted items"). The San Pasqual decision also includes erroneous factor nine analysis and potentially erroneous tax analysis. *See supra* notes 221, 249–50 and accompanying text.

258. *See infra* notes 268–71 and accompanying text (discussing the prevalence of rubber-stamping in the Pacific Region BIA's trust land decisions).

259. 25 C.F.R. § 151.11.

260. *See infra* Table 18.

261. 25 C.F.R. § 151.11(c).

262. *See infra* Table 18.

263. Notice of Decision from Pac. Region BIA to Tule River Tribe (Jan. 6, 2011) (trust land decision on 40.00 acres); Notice of Decision from Pac. Region BIA to Tule River Tribe (Jan. 4, 2010) (trust land decision on 40.00 acres); *see infra* Table 18. While two applications included a business plan, they were both for the same parcel. The 2011 application was simply a re-submission of the 2010 request.

on the subject property.[264] While the analysis of this factor was minimal, it has not emerged as a point of contention for fee-to-trust appeals, and thus is apparently adequate.

C. Conclusions from the Pacific Region BIA Decisions

Other than the handful of erroneously applied factors or missing analysis,[265] the results clearly show that the Pacific Region BIA followed the regulatory requirements and Board guidelines in making fee-to-trust decisions over the last eleven years. This compliance level is consistent with government findings of BIA performance on a national scale; in 2006, the Government Accountability Office (GAO) found that the BIA "generally followed its regulations for processing land in trust applications."[266] However, from the Pacific Region BIA decision data, it is equally apparent that despite the façade of multi-factor analysis and diverse, individualized considerations,[267] the process is merely an exercise in rubber-stamping.[268] Strong indications of rubber-stamping in the Pacific Region BIA fee-to-trust decisions include the 100% acceptance rate,[269] the lack of a single factor being found to support denial, meaningless "filler" considerations,[270] and frequent mention of policy statements capable of negating almost any contrary argument.[271]

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264. *See infra* Table 18.

265. *See supra* notes 221, 250, 257 and accompanying text.

266. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-781, INDIAN ISSUES: BIA'S EFFORTS TO IMPOSE TIME FRAMES AND COLLECT BETTER DATA SHOULD IMPROVE THE PROCESSING OF LAND IN TRUST APPLICATIONS 5 (2006) [hereinafter GAO REPORT], *available at* http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-06-781/pdf/GAOREPORTS-GAO-06-781.pdf; *see also* EVALUATION REPORT, *supra* note 12, at 2 ("[T]he Department's process for assessing tribal applications for the Secretary of Interior to take land into trust for Indian gaming was in accordance with laws and regulations.").

267. A total number of 2,438 considerations were mentioned in the Pacific Region BIA Notices of Decision from 2001 through 2011. *See infra* Table 19.

268. "[R]ubber-stamp: . . . to approve, endorse, or dispose of (as a document or policy) as a matter of routine use without the exercise of judgment or at the implied command of another person or body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1,983 (Philip Babcock Gove et al. eds., 2002).

269. *See infra* Table 1.

270. *See supra* notes 226–40 and accompanying text (noting discussion of meaningless benchmarking in the tax impact analysis, mere recitation of the legal results of transfer in the jurisdictional conflict analysis, and land use conflict analysis premised on inapplicable zoning regulations); *see also infra* note 302 (providing an example of conspicuous filler analysis of the proposed use factor).

271. For example, 90.91% of the individual decisions that analyzed the need of the applicant under factor four found that the need to protect the land for future generations—a sweeping policy consideration—outweighed the fact that the applicant needed no assistance. *See supra* note 220 and accompanying text. Additionally, generic policy considerations, such as need for self-determination

Nevertheless, the BIA is not solely responsible; in a 2006 study, the GAO found that "most of the criteria in the regulations are not specific and thus do not offer clear guidance for how the BIA should apply them. . . . As a result, the BIA decision maker has wide discretion."[272] Thus, the problem is not one of inappropriate application of clear guidelines, but rather of a toothless system with "standards [that] can be met by virtually any trust land request."[273] Accordingly, the level of negative impact an affected community must show in order to successfully challenge a trust acquisition request is extremely high.

The Pacific Region BIA fee-to-trust decisions also demonstrate how unbalanced the system is. For example, of all 2,438 considerations mentioned, only 292, or 11.98%, reflected consideration of state and local interests.[274] The lack of symmetry in the analysis "has resulted in a trust

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or sovereignty, were included in 72.07% of the factor two, need for the land, analysis. *See supra* notes 201–211 and accompanying text.

This issue even persists up to the judicial appeals level in federal courts: "To the extent plaintiffs argue that the proposed acquisition is inconsistent with § 465, this argument fails because, as discussed in more detail below, the regional director expressly found that the acquisition will foster self-determination." City of Yreka v. Salazar, No. CIV. 2:10-1734 WBS EFB, 2011 WL 2433660, at *6 (E.D. Cal. June 14, 2011). Furthermore, the degree to which a trust acquisition must further federal Indian policy goals is minimal: "The acquisition need not be essential or sine qua non to self-determination or economic advancement, but the [BIA] must conclude that the acquisition is more than merely helpful or appropriate." *Id*. at *7.

272. GAO REPORT, *supra* note 266, at Highlights.

273. Statement of Susan Adams, *supra* note 103, at 7.

274. *See infra* Table 19. Furthermore, some considerations mentioned in support of accepting land into trust were contradictory to basic principles established by the Board when viewed from the affected community's position. For example, the Board has been clear that the BIA need not consider speculative consequences, uses, or tax impacts. *See supra* Part IV (explaining Board guidance on application of the regulatory factors). However, the Pacific Region BIA found a tribe's need for land-banking—essentially building up the land base simply to have more land for potential future use—relevant, and allowed indefinite statements of proposed use, such as merely mentioning potential future development. *See infra* Tables 5, 7.

Additionally, various considerations were mentioned in support of acceptance, as seen from the tribe's perspective, while the same considerations from the community perspective were found to weigh in favor of denial. For instance, just as a tribe may desire trust status for a parcel in order to protect from unwanted development or provide a semi-rural lifestyle, a community may oppose trust status for a parcel because they will lose the ability to zone and otherwise regulate the property to protect it from unwanted development. *See* Notice of Decision from Pac. Region BIA to Barona Group of Capitan Grande Band of Mission Indians 8–9 (Sept. 12, 2002) (trust land decision on 385.15 acres) ("The Barona Band presents two reasons for its need for additional land: 1) the Band is growing; 2) Wildcat Canyon Road has become very busy due to an off-reservation housing development . . . . It is the Band's desire to ensure that all current and future members have accessibility to home sites, to allow those individuals who desire, to live among their people in a

land process that fails to meaningfully include legitimate [state and local] interest[s], to provide adequate transparency to the public, or to demonstrate fundamental balance in trust land decisions."[275] Again, this unbalanced analysis is not the product of inappropriate use of discretion by the BIA, but rather of federal policy: the "BIA has the specific mission to serve Indians and tribes and is granted broad discretion to decide in favor of tribes."[276]

In fact, Section 151 on its face provides a strong indication of this built-in process bias. Section 151 requires heightened scrutiny for off-reservation acquisitions, which appears to indicate consideration of local interests.[277] However, land located *outside of the reservation*, but contiguous to its exterior boundaries, is classified as *on-reservation*.[278] As a result, acquisitions of contiguous land are not subject to heightened scrutiny even though the land is physically outside of the current reservation and actually off-reservation under the common understanding of the plain language.[279] This distinction is important because it significantly alters the percentage of applications that are subjected to the heightened off-reservation scrutiny; 64% of the Pacific Region BIA decisions were for parcels located outside of, but contiguous to, the exterior boundaries of the requesting tribe's reservation, but due to their on-reservation classification were only subjected to the lower on-reservation scrutiny.[280] Thus, Section 151 facilitates transfer into trust of lands that are physically outside of reservation boundaries and thereby dramatically shifts the balance in favor of Indian interests to the

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semi-rural setting."); Notice of Decision from Pac. Region BIA to Soboba Band of Luiseño Indians 3 (Sept. 10, 2002) (trust land decision on 950.00 acres) ("It is the Band's desire to ensure that all current and future members have accessibility to home sites, to allow those individuals who desire, to live among their people in a semi-rural setting.").

275. Statement of Susan Adams, *supra* note 103, at 5.

276. *Id*. at 8; s*ee also Who We Are*, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/index.htm (last updated Sept. 24, 2012) ("The Bureau of Indian Affairs (BIA) mission is to 'enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to *protect and improve the trust assets* of American Indians, Indian tribes and Alaska Natives.'") (emphasis added).

The BIA's unbalanced analysis also finds support in long-standing principles of interpretation applied to federal Indian law—the canons of construction, which require government "[u]ndertakings with the Indians [to] be liberally construed to the benefit of the Indians." Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972), *supplemented by* 360 F. Supp. 669 (D.D.C. 1973), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974). "These canons were first developed in the context of treaty interpretation, but the courts have consistently extended them to non-treaty sources of positive-law, such as agreements, statutes, executive orders, and federal regulations." COHEN'S HANDBOOK, *supra* note 1, § 2.02[1].

277. 25 C.F.R. § 151.11 (2005).

278. *See supra* notes 96–97 and accompanying text.

279. 25 C.F.R. § 151.11 (indicating heightened scrutiny only "when the land is located outside of and noncontiguous to the tribe's reservation"); *see also supra* notes 93–97 and accompanying text (discussing which acquisitions are considered off-reservation acquisitions).

280. *See infra* Table 1.1.

detriment of state and local interests.

VI. IMPACT AND RECOMMENDATIONS

The prevalent rubber-stamping, lack of meaningful standards, and unbalanced analysis have caused "significant controversy, serious conflicts between tribes and states, counties and local governments, including litigation costly to all parties, and broad distrust of the fairness of the system."[281] Specifically, the loss for perpetuity of the authority to plan, zone, and regulate is a significant loss of control for a community. Because zoning is "one of the primary ways in which the community can maintain its integrity," this erosion of land planning authority essentially nullifies shared community goals, such as carefully crafted community plans.[282] In particular, gaming acquisitions are generally the subject of fierce community opposition and debate due to their effect on the surrounding region.[283]

Furthermore, loss of tax base is a chief concern for many communities.[284] It may be reasonable to accept a tax loss as relatively

281. Statement of Susan Adams, *supra* note 103, at 5.

282. *Examining Executive Authority*, *supra* note 12, at 24.

283. *See, e.g.*, Courtenay Edelhart, *Porterville Gaming Gives Kern Glimpse of What May Come Here*, THE BAKERSFIELD CALIFORNIAN, Feb. 4, 2012, http://www.bakersfield.com/news/business/x1135852814/Porterville-gaming-gives-Kern-glimpse-of-what-may-come-here (including interviews with community members who support local Indian casinos); Edward Sifuentes, *Indian Reservation Expansion Drawing Objections From Neighbors*, NORTH COUNTY TIMES, Jan. 29, 2012, http://www.nctimes.com/news/local/sdcounty/region-indian-reservation-expansions-drawing-objections-from-neighbors/article_aac7b9da-d871-51ae-969c-b87613feb080.html ("The county Board of Supervisors has a long-standing policy of opposing tribal land transfers out of concern the land could be used for building casinos.").

While a successful IRA trust acquisition does not automatically authorize gaming on the land, trust status is required for all Indian gaming on lands acquired after 1988, and thus the IRA fee-to-trust process is frequently the first step toward establishment of a new Indian gaming operation. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2006); *see supra* notes 11–14 and accompanying text (discussing the increase in Indian gaming operations and its effects).

284. The comments received and summarized in the Pacific Region BIA Notices of Decision from 2001 through 2011 reflect an overwhelming opposition to the loss of tax revenue from trust land acquisitions. *E.g.*, Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians 3 (Nov. 30, 2011) (trust land decision on 78.50 acres) (summarizing comments received that note how tax loss will adversely affect many county entities and services, including the county library and several schools); Notice of Decision from Pac. Region BIA to Table Mountain Rancheria 3 (Aug. 25, 2010) (trust land decision on 175.00 acres) ("[T]he county states that the trust acquisition will impact its ability to maintain adjacent roadways and develop Millerton Road . . . as designated in the Fresno County General Plan.").

insignificant based on an annual estimate and current use considerations, as did the Pacific Region BIA in accordance with Board guidelines.[285] However, the loss of tax revenue is much more difficult to minimize when one factors in removal for perpetuity and future development on the land, which could potentially yield much higher tax revenues.[286] Additionally, even though the Pacific Region BIA heavily emphasized offsetting the tax loss through contributions to the community and economic stimulation,[287] there is still a notable loss of power. Rather than the assurance of tax revenue lawfully owed, the county is forced to accept the less attractive alternative of relying on these voluntary contributions. It is with these significant land use and revenue consequences in mind that twenty-one states sided with Rhode Island by signing onto an amicus curiae brief in defense of state and local interest in the *Carcieri* case, observing that,

> [T]he exercise of [fee-to-trust decision-making] power has substantial, and permanent, consequences for the impacted state and local communities. Indeed, that power gives the [BIA] the capacity to change the entire character of a state, particularly when the [BIA] uses it in coordination with modern Tribes, some of which have developed substantial wealth, through Indian gaming or otherwise, and are located in populated areas and existing communities.[288]

Even though an appeals process is in place to protect both the Indians and communities from erroneous decisions,[289] the initial BIA decision is of paramount importance because the vast majority of BIA decisions prevail

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285. *See infra* Tables 10, 11.

286. For example, a Santa Barbara County tax loss analysis of a 1,400.00 acre parcel the Santa Ynez Band of Chumash Indians would like transferred to trust status projected a loss of $19 million over ten years and $150 million over fifty years if the land was used for housing as the tribe states as its proposed use. Doreen Farr, *Chumash Fee-to-Trust Impacts Too Costly*, SANTA BARBARA NEWS PRESS, Dec. 18, 2011, http://www.newspress.com/Top/Article/article.jsp?Section=OPINIONS-LETTERS&ID=566267434210820139&Archive=true. The study also indicated a potential loss of $55 million over ten years or $450 million over fifty years if the property was developed according to a 2004 development proposal, which included a 300-room hotel, golf course, equestrian center and 275 homes. *See also Examining Executive Authority*, *supra* note 12, at 23–24 ("The property tax is, however, the major source of local funding for schools and local governments generally, so repeated acquisitions of land in trust can seriously undermine local governments. This situation is aggravated by the refusal of the BIA to consider the cumulative effect on the tax rolls of taking new land into trust. Thus, even if half the land in a county is already in trust, a new 100-acre acquisition is analyzed as if it were the first acquisition in trust in the county.").

287. *See infra* Table 11 (showing that 41.82% of decisions mention off-set of the tax loss by tribal contributions to the community).

288. Brief of the States of Ala., Alaska et al. as Amici Curiae Supporting Petitioners, at 2, Carcieri v. Salazar, 555 U.S. 379 (2008) (No. 07-526), 2008 WL 2445505 at *2.

289. *See supra* notes 106–17 and accompanying text (explanation of the appeals process and standard of review).

due to an extremely low appeal rate.[290]

Because the current fee-to-trust process largely ignores or downplays these critical community concerns, state and local governments may need to turn to the political process in order to influence public policy and motivate legislative action. In fact, the time is ripe for a legislative overhaul of the fee-to-trust process due to the Supreme Court's controversial decision in *Carcieri v. Salazar*.[291] There the Court held that only tribes under federal jurisdiction at the time of the IRA's enactment in 1934 are eligible for its fee-to-trust process. [292] This decision shocked Indian Country, and tribes immediately began calling for legislative action—a "*Carcieri* fix."[293] State

290. Only 4 of the 111 total fee-to-trust decisions issued by the Pacific Region BIA from 2001 through 2011 were appealed to the Board. Blue Lake Mobile Home Park Tenants Ass'n v. Pac. Reg'l Dir., 52 IBIA 19, 19–20 (2010) (dismissing appeal because the land had already been transferred into trust and the Board has "no authority to . . . divest the United States of title to the land held in trust for the Tribe and return fee simple to the Tribe"); City of Yreka v. Pac. Reg'l Dir., 51 IBIA 287, 287–88 (2010) (affirming BIA decision because appellant failed to show BIA decision was based on material errors of fact or improper exercise of discretion); Bunney v. Pac. Reg'l Dir., 49 IBIA 26, 26–27 (2009) (affirming BIA decision because appellant failed to show that the "Regional Director failed to properly exercise his discretion, that the decision is in error, or that decision is not supported by substantial evidence"); Friends of E. Willits Valley v. Acting Pac. Reg'l Dir., 37 IBIA 213, 216–217 (2002) (dismissing for failure to show standing because appellant failed to "describe any concrete injury which affects it 'in a personal and individual way'") (citations omitted).

Only one Pacific Region BIA fee-to-trust decision from 2001 through 2011 has been substantively challenged in the federal courts. City of Yreka v. Salazar, No. CIV. 2:10-1734 WBS EFB, 2011 WL 2433660 (E.D. Cal. June 14, 2011). There, the court agreed with the Board's determination that the Pacific Region BIA had properly considered each factor and exercised its discretion reasonably. *Id.* at *10. A second Pacific Region fee-to-trust case was brought in the federal courts but the plaintiffs were challenging a standing determination issued by the Board rather than the substance of the BIA's fee-to-trust decision. Pres. of Los Olivos v. U.S. Dep't of the Interior, 635 F. Supp. 2d 1076, 1079–80 (C.D. Cal. 2008).

291. Carcieri v. Salazar, 555 U.S. 379 (2009). The *Carcieri* case involved a Rhode Island tribe that successfully transferred a parcel of land into trust status through the IRA fee-to-trust process and then proceeded to disregard local building codes. *Id.* at 385. In response, the State of Rhode Island challenged the BIA's fee-to-trust decision, arguing that the tribe was not eligible for the IRA's fee-to-trust process because it was not under federal jurisdiction in 1934, when the IRA was enacted. *Id.* at 382. The Court found that due to the phrase "now under Federal jurisdiction," the IRA only applies to tribes that were "under federal jurisdiction at the time of the statute's enactment" in 1934. *Id.*

292. *Id.*

293. This holding was shocking given that for over seventy years, the BIA had been accepting land into trust on behalf of tribes that were recognized after 1934. Hettler, *supra* note 49, at 1380. Furthermore,

> This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era

and local governments also began calling for comprehensive reform of "a broken system, where the non-tribal entities most affected by the fee to trust process are without a meaningful role."[294] Thus, the *Carcieri* decision presents a historic opportunity for broader reform of a system that has left both tribal and non-tribal entities deeply dissatisfied.[295]

A. Re-define Need

The IRA and its fee-to-trust process were enacted in 1934 in reaction to the Allotment Era policies, which had essentially destroyed the Indian land base and left tribes economically and culturally devastated.[296] However, the landscape is vastly different today.[297] Due to a combination of the federal Indian policy shift to a firm commitment to self-determination and protection of Indian culture and the tremendous success of many Indian gaming operations and other economic development projects, many tribes utilizing the fee-to-trust process no longer fit the post-Allotment reality of nearly universal need.[298] Thus, current efforts to reform the fee-to-trust

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> that has since been restored, and every tribe that adopted the IRA or OIWA and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net. Thus, it is clear that a congressional "fix" for this decision is both necessary and appropriate.

Rice, *supra* note 7, at 594.

294. Statement of Susan Adams, *supra* note 103, at 59.

295. *Id*. (explaining the system is "broken" because non-tribal entities do not have a meaningful role in the process); Rice, *supra* note 7, at 592 (asserting that the system is "dysfunctional" because the BIA has been adverse to accepting land into trust after litigation involving breach of the government's trust obligations). Tribes have also complained that the process is slow, which causes significant delays in development plans, and that some BIA offices do not prioritize proposed trust acquisition applications. Jack McNeel, *Indian Law Practitioners Stress Importance of Land into Trust*, INDIAN COUNTRY TODAY, Feb. 23, 2004, http://indiancountrytodaymedianetwork.com/ictarchives/2004/02/23/indian-law-practitioners-stress-importance-of-land-into-trust-90003. Several commentators have labeled the BIA's inefficient handling of trust land requests "neglect." Rice, *supra* note 7, at 589.

296. *See supra* notes 45–65 and accompanying text (discussing the Allotment Era and its effects).

297. *Hearing on H.R. 1291, H.R. 1234 and H.R. 1421 Before the H. Natural Res. Comm. Subcomm. on Indian and Alaska Native Affairs*, 112th Cong. 54–56 (2011) (statement of Donald Craig Mitchell, Att'y at Law Supervisor, Anchorage, Ala.) (arguing for the *Carcieri* decision should be upheld because the IRA was enacted to address the social and economic conditions of 1934, which have now changed considerably).

298. *See supra* notes 71–100 and accompanying text (discussing the Self-Determination Era and the fee-to-trust process). Consequently, "[w]hile the legacy of allotment still lives on today, tribes often apply to have the Secretary of the Interior take land into trust for reasons that do not fall under that initial purpose." Hettler, *supra* note 49, at 1401. For example, tribes most frequently request land to be taken into trust for economic development purposes, but there is some debate regarding the existence of actual economic benefits. *Examining Executive Authority*, *supra* note 12, at 22–23; *see infra* text accompanying notes 321–23 (discussing reasons why the fee-to-trust program does not fulfill the original policy goals).

process should more clearly define the scope and limits of need under the IRA. Susan Adams's testimony before the House of Representatives summarizes the issue well:

> The BIA regulations provide inadequate guidance as to what constitutes legitimate tribal need for trust land acquisitions. There are no standards other than that the land is necessary to facilitate tribal self-determination, economic development or Indian housing. *These standards can be met by virtually any trust land request, regardless of how successful the tribe is or how much land it already owns*. As a result, there are numerous examples of BIA taking additional land into trust for economically and governmentally self-sufficient tribes already having wealth and large land bases.[299]

Accordingly, a more nuanced, critical approach to the need analysis should be designed to weed out applications from tribes with adequate tribal resources. It is important to remember that there are still many tribes with a legitimate need to rebuild their land bases, expand their economic development projects, and achieve greater levels of self-governance.[300]

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299. Statement of Susan Adams, *supra* note 103, at 62 (emphasis added); *see, e.g.*, Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians (Nov. 30, 2011) (trust land decision on 78.50 acres) (accepting approximately 80 acres into trust for a tribe that already owned 12,305 acres of trust land and operated a profitable casino); Notice of Decision from Pac. Region BIA to Pala Band of Luiseño Mission Indians (Jan. 24, 2011) (trust land decision on 49.47 acres) (accepting approximately 50 acres into trust for a tribe that already owned 12,305 acres of trust land and operated a profitable casino).

300. For example, 29 of the 111 total Pacific Region BIA Notices of Decision were for tribes with less than 100 acres of current trust land, and 9 tribes had less than 20 acres. *See infra* Table 1. Many of these tribes lost their land during the Termination Era and thus requested land to be taken into trust as part of an ongoing effort to rebuild their former land bases. *See, e.g.*, Notice of Decision from Pac. Region BIA to Redding Rancheria (Nov. 11, 2009) (trust land decision on 3.65 acres) (tribe lost land in the Termination Era, currently has only 3.33 acres in trust); *see also infra* Table 5. Similar to the description of need in many Pacific Region BIA Notices of Decision, the Board described the Redding Rancheria's need:

> Despite the fact that the termination policy has been expressly repudiated by both Congress and the Executive branch, those tribes that have been restored are still seeking adequate federal assistance in reestablishing and strengthening their own governments, and in acquiring lands to replace those lost through termination. The lack of an adequate land base is the primary limiting factor in the efforts of restored tribes to reconstitute their tribal governments, provide housing for tribal members, and develop local economies.

However, "'Need' is not without limits."[301] Thus, the objective of reform should be to highlight and more specifically define legitimate needs, while placing clear upper limits on what constitutes need.

B. Increase Scrutiny of the Proposed Use

Similar to the need for a more specific definition of need, the proposed use should be subjected to higher scrutiny. As the fee-to-trust process is currently implemented, too many applications with vague, nonspecific statements about the proposed use of the land are accepted.[302] As the legal counsel for the Office of the Governor for California has pointed out a number of times, when there is insufficient information about the future use of the land, the BIA cannot properly evaluate the proposed acquisition.[303] Likewise, state and local entities cannot properly assess and provide

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> Termination continues to reveal its devastating effect on the Redding Rancheria as is demonstrated by their inadequate trust land base. Although the Tribe and the land within the Rancheria boundaries were restored by court order, the tribe only has 3.33 acres of land in federal trust.
>
> . . . .
>
> It is our determination that the Redding Rancheria has an established need for additional trust land based on the above stated reasons.

Notice of Decision from Pac. Region BIA to Redding Rancheria 3 (Nov. 27, 2009) (trust land decision on 3.65 acres).

301. Statement of Susan Adams, *supra* note 103, at 62.

302. *See infra* Table 7. A particularly vague proposed use analysis stated, in its entirety:

> This parcel of land is within the Traditional Use Area of the Tribe. The Tribe seeks to consolidate its land base, provide the opportunity to diversify its economic development and protect its natural and cultural resources.
>
> In systematically acquiring its aboriginal territory, the Tribe seeks to consolidate its land base, provide for the opportunity to diversify its economic development and protect its natural and cultural resources. While, there is no specific development proposal for the property; it has the potential for exceptional highway commercial development. Further, it is exceptionally situated to benefit the Tribe, in that it abuts to an existing Tribal trust parcel.

Notice of Decision from Pac. Region BIA to Agua Caliente Band of Cahuilla 4 (Sept. 20, 2011) (trust land decision on 5.31 acres).

Furthermore, beyond excessive vagueness, this analysis is a prime example of filler analysis. First, the third sentence essentially echoes the first two. Additionally, every on-reservation acquisition abuts trust land. *See supra* notes 96–97 and accompanying text. Thus, this proposed acquisition is no more exceptionally suited than the vast majority. *See infra* Table 3 (87% of the Pacific Region Notices of Decision from 2001 through 2011 were for on-reservation acquisitions).

303. Letter from Andrea Lynn Hoch, Legal Affairs Sec'y, Office of the Governor of Cal., to Robert Eben, Superintendent, Pac. Region Bureau of Indian Affairs 3 (Nov. 12, 2010) [hereinafter Letter] (on file with author) ("The application speaks generally of the need to establish a larger land base but provides no specific uses for these proposed additional lands. The Band states no immediate need or use for the land. . . . Since the Notice does not indicate a particular need or use of the parcel, there does not appear to be enough information for the Secretary to properly review the Band's application.").

comments to the BIA regarding the proposed acquisition without a full and accurate picture of how the land will be used, and thus how it will impact their community. The degree of disclosure required should be similar to that required for local planning, zoning, and permitting processes.[304] Because these processes "are being preempted by the trust land decision, ... [more specific] information about intended uses is reasonable and fair to require."[305]

Some communities have even seen their worst nightmare realized when a tribe successfully transfers land into trust, purportedly for a non-gaming use, and subsequently commences gaming activity on the land.[306] In fact, the Office of the Inspector General found that the "Department [of the Interior] and the National Indian Gaming Commission (NIGC) lack a process for ensuring that all lands used by Indian tribes for gaming meet the requirements of the Indian Gaming Regulatory Act."[307] In response, NIGC and Office of Indian Gaming Management officials have suggested that the Section 151 factors be amended to require tribes to certify, subject to criminal penalties, that any gaming on their land is not the product of an unapproved conversion of a non-gaming fee-to-trust acquisition to a gaming use.[308]

This suggested amendment for unapproved gaming conversions does not translate seamlessly to issues a community may have when a tribe's actual use differs from its proposed use. This is due to the Board's unwavering protection of tribal sovereignty by finding that acceptance of land into trust based on a specific proposed use does not restrict actual use *in any way*.[309] However, land use restrictions and intergovernmental agreements are enforceable once the land is taken into trust and promote

304. Statement of Susan Adams, *supra* note 103, at 61.

305. *Id*.

306. EVALUATION REPORT, *supra* note 12, at 5, 7, 18; *see also supra* note 283 (explaining that trust status is a necessary prerequisite for Indian gaming on land acquired after 1988).

307. EVALUATION REPORT, *supra* note 12, at i.

308. *Id*. at 8 ("[O]ne possible solution would be to amend the requirements in 25 C.F.R. Part 151 to require all tribes that have taken land into trust since the passage of [the Indian Gaming Regulatory Act] to certify in writing, subject to criminal penalties (Title 18), that (1) no gaming is taking place on those lands; or (2) the lands have been converted and that the use of the lands for gaming has been approved through an official land determination made by the [Department of the Interior].").

309. City of Lincoln City v. Portland Area Dir., 33 IBIA 102, 105–07 (1999); *see also supra* Part IV.D.

self-determination by allowing tribes to decide, plan, and negotiate as a sovereign nation.[310] Thus, use of these tools to prevent conflict by restricting tribal use to that proposed in the fee-to-trust application should be strongly encouraged, or even mandated, by the fee-to-trust process.[311] In this way, legitimate state and local concerns about the loss of land use planning authority would be meaningfully addressed, while still honoring the tribe's desired use for the land and sovereignty over it.[312]

C. Provide Meaningful Standards for the BIA

The recommendations to re-define need and increase scrutiny of the proposed use are both symptoms of a process-wide issue that is widely recognized as a critical flaw: "The lack of meaningful standards or *any* objective criteria in fee to trust decisions made by the BIA."[313] Modeled

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310. Friends of E. Willits Valley v. Cnty. of Mendocino, 123 Cal. Rptr. 2d 708, 714–16 (Ct. App. 2002). There the court explained:

> We hold that federal law does not void prior restrictions on land agreed to before the land passed into trust. . . . [Federal law] precludes involuntary local regulation of tribal lands; our decision does not alter that rule. Moreover, sovereignty and self-determination are promoted when tribes are free to decide what voluntary agreements they will or will not enter into, and when and under what circumstances they will waive their sovereign immunity and subject themselves to state court jurisdiction. Were we to hold that even voluntary restrictions on land use are automatically voided by the passage of land into trust . . . the ability of tribes to negotiate and plan would be impeded. . . . The public policies underlying federal Native American law countenance statutory interpretations that . . . preserv[e] for Native American tribes the freedom to judge for themselves what agreements best promote their own welfare.

Id. (citations omitted).

Intergovernmental agreements, also called Memorandums of Agreement or Understanding (MOAs and MOUs), have been used successfully "in a wide array of subject areas, including enforcement of judgments, education, environmental control, child support, law enforcement, taxation, hunting and fishing, and zoning." COHEN'S HANDBOOK, *supra* note 1, §6.05.

311. Given that the very nature of an intergovernmental agreement fosters cooperation, understanding, and mutual benefit, their use should be strongly encouraged to address friction across a range of fee-to-trust issues, including mitigation of environmental impacts and pressure on local infrastructure and services. Lawmakers made tribal–state gaming compacts a central component of the Indian Gaming Regulatory Act in order to accommodate the often extremely adverse positions of tribes and states on gaming matters. 25 U.S.C. § 2710(d) (2006) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . conducted in conformance with a Tribal-State compact . . . ."), *invalidated by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); COHEN'S HANDBOOK, *supra* note 1, § 6.05. Thus, such a provision may be a just and effective solution for fee-to-trust issues as well.

312. While tribes would likely argue that a provision limiting their unrestricted use of trust land infringes on their sovereignty rights, use would only be restricted when it varied from the use chosen and described by the tribe itself. Thus, such a provision would encourage full and honest disclosure of the actual intended use, as well as fostering a cooperative relationship with affected communities. Furthermore, an expedited review process could be designed to allow tribes to alter the land use once in trust should they find the stated proposed use is no longer ideal at some point.

313. Statement of Susan Adams, *supra* note 103, at 62.

after a crucial component of the Indian Gaming Regulatory Act process,[314] the reformed fee-to-trust process should include a factor that requires the BIA to "balance the benefit to the tribe against the impact to the local community."[315] In this way, legitimate state and local interests will receive due consideration, rather than sporadic mention and easy dismissal, as demonstrated in the Pacific Region BIA decisions.[316] Critics also argue that the BIA's wide discretion needs to be limited by increased guidance on the type of situation that should result in denial of a proposed trust acquisition.[317] In addition to re-definition of need and heightened scrutiny of the proposed use, lawmakers need to clarify what jurisdictional and land use conflicts and what tax impacts should weigh in favor of denial.[318]

Even beyond factor-specific clarity, some are calling for lawmakers to revisit the very rationale for the fee-to-trust program:

> [W]e do not say today that there is no genuine rationale for a land into trust program, but it can be said that there is a lack of clearly articulated and well-justified reason for this massive governmental program and that any reform of the program ought to seek to articulate its goals in a concrete and ascertainable way.[319]

Thus, the fee-to-trust process needs to be updated to reflect the landscape of the twenty-first century, which is vastly different than that immediately following the Allotment Era policies and subsequent enactment of the IRA.[320] Review on a foundational level is particularly important in

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314. 25 U.S.C. § 2719(b)(1)(A) (2006) ("Subsection (a) of this section will not apply when—(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination . . . .").

315. Statement of Susan Adams, *supra* note 103, at 62.

316. *See infra* Table 19.

317. *Examining Executive Authority*, *supra* note 12, at 24–25 (Discussing inadequate guidance for trust land decision makers and quoting a GAO report: "For example, one criterion requires BIA to consider the impact of lost tax revenues on state and local governments. However, the criterion does not indicate a threshold for what might constitute an unacceptable level of lost tax revenue and, therefore, a denial of an application.").

318. GAO REPORT, *supra* note 266, at 18 (demonstrating the standards' vagueness with a graph juxtaposing the Section 151 text with the GAO's analysis of what each factor means).

319. *Examining Executive Authority*, *supra* note 12, at 23.

320. *See supra* Parts II.F, III.A.,VII.A.

light of a recent study that called the rationale of the fee-to-trust program into serious doubt with findings that indicate that "in many instances, the acquisition of land in trust for tribes actually *inhibits* economic development," which is the primary justification for the fee-to-trust program.[321] Experts agree that the unique nature of trust land is to blame.[322] For example, restrictions on alienation of trust land limit its value as collateral for loans necessary to develop it.[323] Thus, the underlying rationale and goals should be revisited as the starting point for any reform.

D. Create a Meaningful Role for State and Local Entities

While Section 151 does include a mechanism for incorporating state and local interests in the fee-to-trust process,[324] it is severely inadequate. The notice provided to state and local governments is limited and often insufficient for such entities to comprehensively analyze and comment on the proposed acquisition.[325] For example, the notice does not include the actual fee-to-trust application and often does not state the tribe's proposed use.[326] Additionally, state and local governments are only invited to comment narrowly, on tax revenue and jurisdictional conflict impacts only, in a limited thirty-day period.[327] In order to meaningfully participate in the process and protect legitimate interests, state and local governments need full disclosure of the proposed trust acquisition and more time to respond.

Furthermore, "governments and individuals with significant interests [are often] unaware of the acquisition request until it is too late" because the process only includes notice to state and local governments with regulatory jurisdiction.[328] This excludes nearby state and local governments as well as affected individuals, who may have significant concerns. Moreover, while

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321. *Examining Executive Authority*, supra note 12, at 22–23 (citing TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATION?: AN ECONOMIC HISTORY OF AMERICAN INDIANS (1995) (reporting a study that found trust status actually impedes the economic productivity of the property)).

322. *Examining Executive Authority*, *supra* note 12, at 23.

323. *Id*.

324. 25 C.F.R. §§ 151.10, 151.11(d) (2005); *see also supra* text accompanying note 102 (discussing the IRA notice and comment provision).

325. GAO REPORT, *supra* note 266, at 20.

326. *See* Notice of Decision from Pac. Region BIA to Morongo Band of Cahuilla Mission Indians (Aug. 27, 2010) (notice of (non-gaming) land acquisition application).

327. 25 C.F.R. §§ 151.10, 151.11(d); s*ee also supra* text accompanying note 102 (discussing the IRA notice and comment provision).

328. *To Amend the Act of June 18, 1934, To Reaffirm the Auth. of the Sec'y of the Interior To Take Land into Trust for Indian Tribes: Hearing on H.R. 3697 and H.R. 3742 Before the H. Comm. on Natural Res*., 111th Cong. 52 (2009) (statement of Richard Blumenthal, Att'y Gen. of Conn.) [hereinafter Statement of Richard Blumenthal].

the BIA often does accept comments from affected individuals, it is not statutorily mandated to even consider them.[329] Thus, "towns and their residents appear[] to have little chance of even being heard, let alone challenging [a] tribe's land trust requests."[330] Accordingly, the extremely narrow notice requirement should be expanded to include: full disclosure of the tribe's intentions for the proposed acquisition; a longer comment period; notice to all state and local governments, not just those with regulatory jurisdiction; the opportunity for comments on the full range of impacts, not just tax and jurisdictional conflict; and the opportunity for public comment.

Beyond simply broadening the notice requirements, "a new paradigm is needed where counties are considered meaningful and constructive stakeholders in Indian land related determinations."[331] To this end, the fee-to-trust process should strongly encourage intergovernmental agreements between tribes and affected communities that address the full range of impacts. Providing an expedited process or a lower threshold for demonstrated need when such agreements have been reached would "encourage[] cooperation and communication . . . and reduce costs and frustration to all involved."[332] Encouragement of intergovernmental agreements would ensure all affected parties, both tribal and non-tribal, have meaningful roles in the process and adequate opportunity to protect their interests.

VIII. CONCLUSION

Similar to the snapshot of reality the *Indian Country Today* maps immediately convey,[333] the acceptance rate for IRA fee-to-trust acquisitions in California from 2001 through 2011 instantly communicates an equally powerful message:[334] with a 100% acceptance rate, the process is merely an exercise in extreme rubber-stamping. Given that treaties were the primary method of swindling Indians out of billions of acres of homeland,[335] perhaps Indians—now on the receiving end of an extremely unbalanced, but entirely

329. 25 C.F.R. §§ 151.10, 151.11(d).
330. *See* Statement of Richard Blumenthal, *supra* note 328, at 50.
331. Statement of Susan Adams, *supra* note 103, at 62.
332. Statement of Susan Adams, *supra* note 103, at 62.
333. *See supra* text accompanying note 5 (describing the maps).
334. *See infra* Table 20.
335. COHEN'S HANDBOOK, *supra* note 1, §§ 1.01, 1.03[1].

legal, process—are finally achieving some degree of justice, however ironic. Although such results may be well-deserved, the means—a biased, toothless process—do not justify the ends. The consequences for affected communities are too significant to be cavalierly swept aside: the loss, for perpetuity, of planning, zoning, and other regulatory control, as well as substantial portions of tax revenue.[336] Thus, there is great need for comprehensive reform of the fee-to-trust process. At its core, such reform must create a meaningful role in the process for affected communities, establish clear and specific standards, and emphasize collaborative solutions. In this way, the miniscule red dots representing Indian Country can grow in proportion to the appropriate needs of the tribes, while a graph of the acceptance rate will depict an equally appropriate degree of balance and efficacy in the IRA fee-to-trust process.

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336. 25 U.S.C. § 465 (2006); 25 C.F.R. § 1.4(a) (2006).

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Table 1. *Factual Data – All Decisions*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
1	**11.30.2011**	San Diego	78.50	**Tribe** - Pala Band of Luiseno Mission Indians of the Pala Reservation	**ON -** contiguous	ACCEPT
2	**10.13.2011**	Shasta	1.50	**Individual** - Member of Redding Rancheria	**ON -** within	ACCEPT
3	**10.4.2011**	Riverside	40.00	**Tribe -** Morongo Band of Mission Indians	**ON -** contiguous	ACCEPT
4	**9.20.2011**	Riverside	5.31	**Tribe -** Agua Caliente Band of Cahuilla Indians of Agua Caliente Indian Reservation	**ON -** contiguous	ACCEPT
5	**9.14.2011**	Riverside	1.34	**Individual -** Member of Morongo Band of Mission Indians	**ON -** within	ACCEPT
6	**6.17.2011**	San Diego	90.00	**Tribe -** Viejas (Baron Long) Group of the Capitan Grande Band of Mission Indians of the Viejas Reservation	**ON -** contiguous	ACCEPT
7	**6.9.2011**	Del Norte	2.00	**Tribe -** Elk Valley Rancheria	**ON -** contiguous	ACCEPT
8	**5.31.2011**	San Diego	16.69	**Tribe -** Ewiiaapaayp Band of Kumeyaay Indians	**ON** - contiguous	ACCEPT
9	**4.18.2011**	Riverside	1.48	**Individual -** Member of Morongo Band of Mission Indians	**ON -** within	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
10	**3.28.2011**	Riverside	4.20	**Individual -** Member of Morongo Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
11	**3.24.2011**	Riverside	1.00	**Individual -** Member of Morongo Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
12	**3.22.2011**	Riverside	5.09	**Individual -** Member of Morongo Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
13	**2.17.2011**	Shasta	0.70	**Individual -** Member of Redding Rancheria	**ON -** within	ACCEPT
14	**1.24.2011**	San Diego	49.47	**Tribe -** Pala Band of Luiseño Mission Indians of the Pala Reservation	**ON -** contiguous	ACCEPT
15	**1.6.2011**	Tulare	40.00	**Tribe -** Tule River Tribe	**OFF** ≈ 20 miles away	ACCEPT
16	**12.14.2010**	San Diego	48.64	**Tribe -** Sycuan Band of Kumeyaay Nation	**ON -** contiguous	ACCEPT
17	**12.1.2010**	Riverside	431.26	**Tribe -** Morongo Band of Cahuilla Mission Indians	**ON -** contiguous	ACCEPT
18	**9.29.2010**	Siskiyou	0.56	**Tribe** - Karuk Tribe	**OFF -** 0.12 miles away	ACCEPT
19	**9.21.2010**	Humboldt	12.05	**Tribe -** Blue Lake Rancheria	**ON -** contiguous	ACCEPT
20	**9.15.2010**	Siskiyou	20.70	**Tribe** - Karuk Tribe	**OFF -** .08 miles away	ACCEPT
21	**8.25.2010**	Fresno	175.00	**Tribe -** Table Mountain Rancheria	**ON -** contiguous	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
22	**5.28.2010**	Riverside	20.00	**Tribe -** Agua Caliente Band of Cahuilla Indians of Agua Caliente Indian Reservation	**ON -** within	ACCEPT
23	**3.22.2010**	Humboldt	113.00	**Tribe -** Bear River Band of the Rohnerville Rancheria	**ON -** contiguous	ACCEPT
24	**3.9.2010**	Riverside	30.00	**Tribe -** Agua Caliente Band of Cahuilla Indians of Agua Caliente Indian Reservation	**ON -** within	ACCEPT
25	**1.4.2010**	San Diego	9.08	**Tribe -** San Pasqual Band of Diegueno Mission Indians	**OFF -** distance not listed	ACCEPT
26	**1.4.2010**	Tulare	40.00	**Tribe -** Tule River Tribe	**OFF** ≈ 20 miles away	ACCEPT
27	**11.27.2009**	Shasta	3.65	**Tribe -** Redding Rancheria	**ON -** within	ACCEPT
28	**10.2.2009**	Humboldt	5.01	**Tribe** - Big Lagoon Rancheria	**OFF** ≈ 0.25 miles away	ACCEPT
29	**3.4.2009**	Madera	11.61	**Tribe -** Picayune Rancheria of Chukchansi Indians	**ON -** contiguous	ACCEPT
30	**3.3.2009**	Del Norte	7.19	**Tribe** - Smith River Rancheria	**ON -** contiguous	ACCEPT
31	**9.22.2008**	Shasta	0.50	**Tribe** - Redding Rancheria	**ON -** within	ACCEPT
32	**9.19.2008**	Siskiyou	0.19	**Tribe** - Karuk Tribe	**ON -** contiguous	ACCEPT
33	**9.19.2008**	Fresno	71.19	**Tribe -** Big Sandy Rancheria of Mono Indians	**ON -** contiguous	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
34	**8.19.2008**	Riverside	1.72	**Tribe -** Agua Caliente Band of Cahuilla Indians of Agua Caliente Indian Reservation	**ON -** within	ACCEPT
35	**6.27.2008**	Riverside	477.65	**Tribe -** Soboba Band of Luiseño Indians	**ON -** contiguous	ACCEPT
36	**6.4.2008**	Riverside	0.39	**Individual -** Member of Morongo Band of Cahuilla Mission Indians	**ON -** contiguous	ACCEPT
37	**5.14.2008**	Siskiyou	0.90	**Tribe** - Karuk Tribe	**OFF -** 1.4 miles away	ACCEPT
38	**5.6.2008**	San Diego	8.00	**Tribe -** Sycuan Band of Kumeyaay Nation	**ON -** contiguous	ACCEPT
39	**3.13.2008**	Siskiyou	2.64	**Tribe** - Karuk Tribe	**OFF** ≈ 15 miles away	ACCEPT
40	**3.5.2008**	Fresno	13.39	**Tribe** -Table Mountain Rancheria	**ON -** contiguous	ACCEPT
41	**2.26.2008**	Kings	1160.00	**Tribe** - Santa Rosa Rancheria Tachi Tribe	**ON -** contiguous	ACCEPT
42	**2.8.2008**	Siskiyou	16.23	**Tribe -** Karuk Tribe	**ON -** contiguous	ACCEPT
43	**1.8.2008**	Riverside	37.08	**Tribe** - Augustine Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
44	**12.14.2007**	San Diego	3.31	**Tribe -** San Pasqual Band of Diegueno Mission Indians	**ON -** contiguous	ACCEPT
45	**10.15.2007**	Fresno	72.81	**Tribe -** Table Mountain Rancheria	**ON -** contiguous	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
46	**7.25.2007**	Modoc	8.44	**Tribe -** Cedarville Rancheria	**ON -** contiguous	ACCEPT
47	**5.10.2007**	San Diego	10.27	**Tribe -** La Jolla Band of Luiseno Mission Indians	**ON -** contiguous	ACCEPT
48	**1.12.2007**	Tuolumne	297.18	**Tribe -** Tuolumne Band of Me-Wuk Indians	**ON -** contiguous	ACCEPT
49	**12.1.2006**	Siskiyou	13.46	**Tribe -** Karuk Tribe	**ON -** contiguous	ACCEPT
50	**9.22.2006**	Fresno	60.00	**Tribe -** Table Mountain Rancheria	**ON -** contiguous	ACCEPT
51	**9.15.2006**	Humboldt	40.13	**Tribe -** Blue Lake Rancheria	**ON -** contiguous	ACCEPT
52	**9.8.2006**	El Dorado	77.03	**Tribe -** Shingle Spring Band of Miwok Indians of Shingle Springs Rancheria Verona Tract	**OFF** - less than 1 mile away	ACCEPT
53	**8.29.2006**	Sonoma	18.03	**Tribe** - Dry Creek Rancheria Pomo Indians	**ON -** contiguous	ACCEPT
54	**8.4.2006**	Humboldt	6.36	**Tribe** - Blue Lake Rancheria	**ON -** within	ACCEPT
55	**6.26.2006**	Siskiyou	0.70	**Tribe -** Karuk Tribe	**ON -** contiguous	ACCEPT
56	**5.15.2006**	Fresno	9.82	**Tribe -** Big Sandy Rancheria of Mono Indians	**ON -** within	ACCEPT
57	**4.9.2006**	Mendocino	19.70	**Tribe -** Sherwood Valley Rancheria of Pomo Indians	**ON -** contiguous	ACCEPT
58	**2006**	San Diego	2.26	**Tribe -** Sycuan Band of Kumeyaay Nation	**ON -** contiguous	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
59	**8.17.2005**	Del Norte	3.64	**Tribe -** Elk Valley Rancheria	**ON -** within	ACCEPT
60	**8.17.2005**	San Diego	1.87	**Tribe -** Barona Group of the Capitan Grande Band of Mission Indians	**ON -** contiguous	ACCEPT
61	**7.26.2005**	Tuolumne	1.00	**Tribe -** Chicken Ranch Rancheria of Me-Wuk Indians	**ON -** within	ACCEPT
62	**6.17.2005**	Humboldt	8.13	**Tribe -** Karuk Tribe	**ON -** contiguous	ACCEPT
63	**5.3.2005**	Riverside	10.30	**Individual -** Member of Morongo Band of Cahuilla Mission Indian Tribe	**ON -** within	ACCEPT
64	**3.1.2005**	Riverside	0.64	**Individual -** Member of Morongo Band of Cahuilla Mission Indian Tribe	**ON -** contiguous	ACCEPT
65	**2.25.2005**	San Diego	5.42	**Individual -** Member of the La Jolla Indian Reservation	**ON -** within	ACCEPT
66	**2.4.2005**	Mendocino	10.29	**Tribe -** Round Valley Indian Tribe	**ON -** within	ACCEPT
67	**1.26.2005**	Riverside	715.00	**Tribe -** Morongo Band of Cahuilla Mission Indians	**ON -** contiguous	ACCEPT
68	**1.14.2005**	Santa Barbara	6.90	**Tribe -** Santa Ynez Band of Mission Indians	**ON -** contiguous	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
69	**12.13.2004**	Riverside	10.00	**Tribe -** Agua Caliente Band of Cahuilla Indians of Agua Caliente Indian Reservation	**ON -** within	ACCEPT
70	**12.2.2004**	Riverside	5.04	**Individual** - Morongo Band of Cahuilla Mission Indians of the Morongo Reservation	**ON -** within	ACCEPT
71	**11.5.2004**	Madera	111.70	**Tribe -** Picayune Rancheria of Chukchansi Indians	**ON -** contiguous	ACCEPT
72	**7.12.2004**	Lassen	875.00	**Tribe -** Susanville Indian Rancheria	**ON -** contiguous	ACCEPT
73	**6.1.2004**	Siskiyou	2.50	**Tribe -** Quartz Valley Indian Reservation	**ON -** within	ACCEPT
74	**4.15.2004**	Riverside	277.00	**Tribe -** Morongo Band of Cahuilla Mission Indians	**ON -** contiguous	ACCEPT
75	**4.15.2004**	Riverside	7.39	**Tribe -** Morongo Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
76	**3.3.2004**	Riverside	145.00	**Tribe -** Morongo Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
77	**1.23.2004**	Del Norte	179.09	**Tribe -** Elk Valley Rancheria	**ON -** contiguous	ACCEPT
78	**1.15.2004**	Del Norte	0.32	**Tribe -** Smith River Rancheria	**ON -** within	ACCEPT
79	**1.15.2004**	San Diego	585.00	**Tribe -** Barona Group of the Capitan Grande Band of Mission Indians	**ON -** contiguous	ACCEPT
80	**12.18.2003**	King	55.36	**Tribe -** Santa Rosa Rancheria	**OFF -** 3 miles away	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
81	**10.27.2003**	Santa Barbara	12.36	**Tribe -** Santa Ynez Band of Mission Indians	**ON -** contiguous	ACCEPT
82	**9.29.2003**	Riverside	619.90	**Tribe -** Morongo Band of Mission Indians	**ON -** contiguous	ACCEPT
83	**9.15.2003**	Fresno	5.31	**Tribe -** Table Mountain Rancheria	**ON -** within	ACCEPT
84	**9.12.2003**	Fresno	13.68	**Individual -** Member of Big Sandy Rancheria	**ON -** within	ACCEPT
85	**6.25.2003**	Butte	160.05	**Tribe -** Mooretown Rancheria	**ON -** contiguous	ACCEPT
86	**5.28.2003**	Del Norte	4.34	**Tribe -** Smith River Rancheria	**ON -** within	ACCEPT
87	**4.18.2003**	Del Norte	9.62	**Tribe -** Elk Valley Rancheria	**ON -** within	ACCEPT
88	**3.20.2003**	Tuolumne	42.00	**Tribe -** Chicken Ranch Rancheria of Me-Wuk Indians	**ON -** contiguous	ACCEPT
89	**3.13.2003**	Lake	0.38	**Tribe -** Big Valley Rancheria of Pomo Indians	**ON -** within	ACCEPT
90	**3.11.2003**	Del Norte	1.01	**Tribe -** Smith River Rancheria	**ON -** within	ACCEPT
91	**2.21.2003**	Lassen	3.21	**Tribe -** Susanville Indian Rancheria	**ON -** contiguous	ACCEPT
92	**2003**	Riverside	5.00	**Tribe -** Morongo Band of Cahuilla Mission Indians	**ON -** contiguous	ACCEPT
93	**12.23.2002**	Riverside	5.19	**Individual -** Member of the Morongo Band of Cahuilla Mission Indians	**ON -** within	ACCEPT
94	**10.8.2002**	Del Norte	1.38	**Tribe -** Smith River Rancheria	**ON -** within	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
95	**9.12.2002**	San Diego	385.15	**Tribe -** Barona Group of the Capitan Grande Band of Mission Indians	**ON -** contiguous	ACCEPT
96	**9.10.2002**	Riverside	950.00	**Tribe -** Soboba Band of Luiseño Indians	**ON -** contiguous	ACCEPT
97	**6.19.2002**	Mendocino	14.00	**Tribe -** Coyote Valley Band of Pomo Indians	**ON -** contiguous	ACCEPT
98	**6.6.2002**	Butte	33.14	**Tribe -** Mooretown Rancheria	**ON -** contiguous	ACCEPT
99	**5.14.2002**	San Diego	82.85	**Tribe -** Sycuan Band of Mission Indians	**ON -** contiguous	ACCEPT
100	**5.3.2002**	Madera	61.52	**Tribe -** North Fork Rancheria of Mono Indians	**OFF -** 2 miles away	ACCEPT
101	**4.9.2002**	Fresno	7.76	**Tribe -** Table Mountain Rancheria	**ON -** within	ACCEPT
102	**11.30.2001**	Amador	72.72	**Tribe -** Jackson Rancheria of Me-Wuk Indians	**ON -** contiguous	ACCEPT
103	**9.28.2001**	Tuolumne	28.17	**Tribe -** Tuolumne Band of Me-Wuk Indians of Tuolumne Rancheria	**ON -** contiguous	ACCEPT
104	**9.12.2001**	San Diego	27.79	**Tribe -** Sycuan Band of Mission Indians	**OFF -**1 mile away	ACCEPT
105	**9.6.2001**	San Diego	882.80	**Tribe -** Mesa Grande Band of Mission Indians	**OFF –** 0.74 miles away	ACCEPT
106	**6.29.2001**	San Bernardino	46.00	**Tribe -** San Manuel Band of Serrano Mission Indians	**ON -** contiguous	ACCEPT

Table 1. *Factual Data – All Decisions (Continued)*

	Decision Date	County	Acres	Tribe or Individual	On- or Off-Reservation	Outcome
107	**5.23.2001**	Yolo	83.50	**Tribe -** Rumsey Band of Yocha-De-He Wintun Indians of the Rumsey Indian Rancheria	**ON -** contiguous	ACCEPT
108	**5.7.2001**	Butte	18.50	**Tribe -** Tyme Maidu Tribe of Berry Creek Rancheria	**ON -** contiguous	ACCEPT
109	**5.4.2001**	Mendocino	160.48	**Tribe -** Sherwood Valley Rancheria of Pomo Indians	**OFF** - 4.2 miles away	ACCEPT
110	**4.27.2001**	Lake	40.00	**Tribe -** Big Valley Band of Pomo Indians of the Big Valley Rancheria	**ON -** contiguous	ACCEPT
111	**4.17.2001**	San Bernardino	49.22	**Tribe -** San Manuel Band of Serrano Mission Indians	**ON -** contiguous	ACCEPT

Table 1.1 *Factual Data – Total Acres Accepted*

	Tribal Acres	**Individual Acres**	**On-Reservation Acres**	**Off-Reservation Acres:**	**All Acres**
Average:	108.06	4.00	94.37	98.85	94.94
Median:	19.70	2.85	12.05	33.90	13.39
Smallest:	0.19	0.39	0.19	0.56	0.19
Largest:	1,160.00	13.68	1,160.00	882.80	1,160.00
Contiguous	n/a	n/a	62 (64%)	n/a	n/a
Within	n/a	n/a	35 (36%)	n/a	n/a
Total:	**10,482.06**	**55.97**	**9,154.16**	**1,383.87**	**10,538.03**

Table 2. *Tribal v. Individual Acquisition Comparison*

		% of Total Decisions
Total Acquisitions	111	100%
Tribal Acquisitions	97	87%
Individual Acquisitions	14	13%

Table 3. *On- v. Off-Reservation Acquisition Comparison*

		% of Total Decisions
Total Acquisitions	111	100%
On-Reservation Acquisition	97	87%
Off-Reservation Acquisition	14	13%

Table 4. *Factor 1 – Statutory Authority*
All Decisions

		% of Total Applications
Accepted Under ILCA	78	70%
Accepted Under IRA	33	30%

Table 5. *Factor 2 – Need for the Land Considerations*
All Decisions

		# of Decisions Considered In	% of 111 Total Decisions
Amount of Trust Land Currently Owned		**82**	**73.87%**
Importance of Self-Determination and Sovereignty:		**80**	**72.07%**
	• Need for or tribal goal of self-determination	65	58.56%
	• Need for or tribal goal to exercise jurisdiction, self-governance and sovereignty	33	30.00%
	• Lack of land is primary limiting factor in efforts to reestablish tribal government	10	9.01%
	• Tribe has responsibility to its members to re-establish tribal jurisdiction	7	6.31%
	• Need to clarify jurisdiction	2	1.80%

Table 5. *Factor 2 – Need for the Land Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Tribe Has Lost Trust Land:	**60**	**54.05%**
• Ongoing effort and need to consolidate land, rebuild land base	46	41.44%
• Trust land lost in Termination Era	32	28.83%
• Compare current trust land holdings with size of original reservation	21	18.92%
• Tribe has found it challenging to reacquire lost land due to limiting factors of market availability and tribal funds.	17	15.32%
• Trust land lost in Allotment Era	4	3.60%
• Compare current trust land holdings with amount of aboriginal land	3	2.70%
• Trust land lost by forced sale	2	1.80%
• Trust land lost by unspecified means	1	0.90%
• Trust land lost by executive order	1	0.90%
Deficiencies in Current Land Holdings:*	**59**	**53.15%**
• Large portion unsuitable for development due to topography (steep, high altitude, rocky, flood zone, river drainage basin, mountainous, sensitive biological habitat, fault lines)	27	24.32%
• Current trust land is inadequate (already fully developed; in the process of being developed; cannot sustain housing or economic development needs; no other parcel owned by the tribe is suitable for the use)	21	18.92%
• Current trust land is checker-boarded**	19	17.12%
• Non-tribal land bordering current tribal land is undesirable due to development	4	3.60%
• Need to provide access to landlocked parcel	4	3.60%

Table 5. *Need for the Land Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Housing Considerations:	**42**	**37.84%**
• Need for housing	27	24.32%
• Number of members in need of housing or on a housing wait list; number of members living off-reservation due to lack on-reservation	18	16.22%
• Lack of land is primary limiting factor in efforts to provide housing	10	9.01%
• Current economic and housing situation further justify need for land in trust for housing purposes (high demand—escalating prices of CA real estate)	7	6.31%
• Tribal housing is substandard	3	2.70%
Economic Factors:	**40**	**36.04%**
• Need the land for current development; need to promote economic stability	25	22.52%
• Lack of land is primary limiting factor in efforts to develop economy	10	9.01%
• Trust status is critical (necessary to qualify for federal programs, current operation runs on tight budget)	6	5.41%
• Tribal goal to improve quality of life by economic development	6	5.41%
• Tribe members have high unemployment rate	3	2.70%
• Although tribe has a profitable casino, has need to diversify for economic stability	2	1.80%
• Application need not be denied because the tribe has a successful off-reservation business	1	0.90%
• There is currently a waiting list for services provided on land	1	0.90%
Cultural Considerations:	**28**	**25.23%**
• Tribal or individual goal to create community and tribal culture, and protect cultural resources	17	15.32%
• Need to protect cultural resources (unspecified)	10	9.01%
• Need to protect cultural resources (specific resources mentioned burial grounds, ceremonial site, historic village)	4	3.60%
• Need to protect the environment	3	2.70%
• Tribe has a strong connection to the area, has occupied surrounding land for close to 100 years	1	0.90%
Use Considerations:	**25**	**22.52%**
• Proposed Use	18	16.22%
• Current Use	10	9.01%

Table 5. *Need for the Land Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Long-Term Planning Considerations:	**22**	**18.02%**
• Need to protect and preserve the reservation and land base for future generations	18	16.22%
• Need for land-banking	8	7.21%
• Need to protect and preserve the tribe	5	4.50%
• Long term survival of the tribe depends on tribe's ability to provide employment, housing and community and government services	2	1.80%
Tribal Membership Considerations:	**16**	**14.41%**
• Size of tribe	15	13.51%
• Percent of tribe members who are youth = housing, employment, and cultural resource demands will increase exponentially	10	9.01%
• Tribe experiencing tremendous growth; members are returning to the reservation = need for more housing, infrastructure, economic development	6	5.41%
• Tribal goal to bring members back to the reservation	3	2.70%
Location of the Property:	**16**	**14.41%**
• Land is on-reservation (contiguous or within)	15	13.51%
• Individual's land is close to a relative's property	4	3.60%
Tribe's Achievements:	**12**	**10.81%**
• Tribe has strong government, many capabilities, and a growing economy	8	7.21%
• Tribe has built a: casino, government center, fire department, health clinic, library, day care, community college	4	3.60%
• Tribe employ many, has lowered unemployment and raised the education level of its members	1	0.90%
Degree of Cooperation with and Support From Local Entities:	**5**	**4.50%**
• Tribe has demonstrated commitment to cooperate, such as by entering MOU's/Cooperative Agreements	3	2.70%
• County and state did not object to stated need	1	0.90%
• Unique circumstance: Trust acquisition was an agreed-to land exchange with county to remedy an encroachment onto tribal land by the county airport	1	0.90%

Table 5. *Need for the Land Considerations (Continued)*
All Decisions

		# of Decisions Considered In	% of 111 Total Decisions
Miscellaneous:		**5**	**4.50%**
	• Beatification of the reservation	3	2.70%
	• Tribe has never added to its land base	1	0.90%
	• Individual applicant needs assistance in managing the property	1	0.90%
	Total Considerations:	**692**	

** Both trust and fee lands*
*** Checkerboarded is a term used to describe when a tribe's trust land holdings do not form a united whole, but instead form a patchwork pattern primarily due to changes in federal Indian land policy.*

Table 6. *Factor 2 – Need for the Land Considerations – Amount of Current Trust Land*
All Decisions

# Of Decisions That Mention Amount of Current Trust Land	82 Decisions or 73.87%
Average:	4,622.49
Median:	333.22
Low:	0
High:	55,396.00

Table 7. *Factor 3 – Purpose Considerations*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Proposed Use:	**111**	**100.00%**
• No planned change in current use*	76	68.47%
• Residential	31	27.93%
• Specific plan to build residences	20	18.02%
• Provide for potential future housing	11	9.91%
• Commercial	23	20.72%
• Specific plan for commercial use (storage, day care facility, shopping plaza, retail store, gas station, mini-mart, grocery store, restaurant, expand current commercial development, parking lot, health clinic, lodge for tribal guests)	13	11.71%
• No specific immediate plan, but potential for future development (highway commercial development, additional housing, storage, gas station, mini-mart, tribal offices, future water needs, cultural activities)	10	9.01%
• Cultural Significance (develop cemetery, open space for sensitive biological habitat, protect cultural resources, build museum, build cultural center, restore non-Indian historic site)	13	11.71%
• Community Infrastructure (wastewater treatment facility, storm drain, access road, waterline, water tank, emergency generator)	12	10.81%
• Tribal administration	10	9.01%
• Community Facilities (school, senior center, community center, emergency services, drug treatment facility)	8	7.21%
• Agricultural (hunting, grazing, ranch, vineyard, winery)	6	5.41%
• Land-banking	1	0.90%

Table 7. *Factor 3 – Purpose Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Current Use:	**84**	**75.68%**
• Vacant (entirely or majority)	35	31.53%
• Residential	30	27.03%
• Current use not mentioned**	27	24.32%
• Commercial (truck scales, storage, closed hardware store, hotel, day care, health clinic, dental clinic)	15	13.51%
• Community Facilities (Head Start program, family resources center, community center, senior center, food distribution for low income, drug treatment facility, baseball fields)	10	9.01%
• Parking lot	10	9.01%
• Tribal administration	8	7.21%
• Community Infrastructure (air quality monitoring system, water pump house, wells, access road, septic leech field)	7	6.31%
• Agricultural or grazing	8	7.21%
• Cultural significance (ceremonial site, burial grounds, non-Indian historic site)	6	5.41%
• Casino infrastructure (entrance, parking lot)	3	2.70%
Location:	**20**	**18.02%**
• Land is on-reservation (contiguous or within)	18	16.22%
• Individual's relative lives across street	1	0.90%
• Distance from tribal land	1	0.90%
Degree of Cooperation with and Support from Local Entities:	**11**	**9.91%**
• Specific acts of tribe working with local entities (tribe has stated will comply with local laws; tribe is considering local input; tribe currently working out a land use issue with the county; tribe tried to enter MOU, but didn't due to county's demand for a waiver of sovereignty)	8	7.21%
• Tribal facility on the land provides services to members and non-members	3	2.70%
• Local support (County has okayed development; letters of support for proposed use were received)	2	1.80%
• Current use is consistent with zoning	2	1.80%
• Proposed use consistent with current use	1	0.90%
Economic Considerations:	**10**	**9.01%**
• Response to Comments: Not a gaming acquisition if not exclusively for gaming and not essential to gaming operation—here merely sharing infrastructure (parking lot, septic leech field)	7	6.31%
• Purpose is for economic development	2	1.80%
• Will allow increased financial stability by diversifying tribe's revenue base	1	0.90%

Table 7. *Factor 3 – Purpose Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Importance of Self-Determination and Sovereignty:	**8**	**7.21%**
• Purpose is to enhance self-determination	4	3.60%
• Purpose it to enhance sovereignty and self-governance	3	2.70%
• Purpose is to facilitate reacquisition of tribal lands	3	2.70%
• Purpose is to allow tribe to prevent unwanted development	2	1.80%
Deficiencies in Current Land Holdings:	**8**	**7.21%**
• Purpose is for land consolidation	4	3.60%
• Current trust land is unsuitable for development	2	1.80%
• Will allow access to land-locked parcel	2	1.80%
Housing Considerations:	**3**	**2.70%**
• % will decrease housing needs by	2	1.80%
• City wants higher density housing on the land, but can't force this	1	0.90%
Cultural Considerations:	**2**	**1.80%**
• Purpose is to protect cultural resources (burial grounds)	2	1.80%
Total Considerations:	**410**	

** As used in the decisions, the phrase "no planned change in current use" does not signify no development will occur, but rather, such improvements will be consistent with the current use.*
*** Current use mentioned elsewhere in analysis in 7 of the 27 decisions that did not mention it under Factor 3 analysis.*

Table 8. *Factor 3 – Purpose Considerations*
Individual Decisions Only

	# of Decisions Considered In	% of 14 Total Decisions
Proposed Use	**14**	**100.00%**
• No change	14	100.00%
• No immediate planned change from vacant, use for future primary residence	2	14.29%
Current Use	**13**	**92.86%**
• Primary residence	11	78.57%
• Vacant	2	14.29%
Location	**3**	**21.43%**
• Within exterior boundaries of reservation	2	14.29%
• Relative lives across street	1	7.14%

Table 9. *Factor 4 – Other Trust Land Owned and Degree of Assistance Needed*
Individual Decisions only

	# of Decisions Considered In	% of 11 Total Decisions
Amount of Other Trust Land Owned by the Applicant:	**11**	**100.00%**
• None	11	100.00%
Degree of Assistance the Applicant Needs:	**10**	**90.91%**
• No assistance needed, but need to protect for future generations outweighs fact that she does not need assistance	8	72.73%
• Little or no assistance needed	2	18.18%
Miscellaneous:		
• Allotment policies contributed to lost land for tribe and applicant's family	3	27.27%
• Transfer to trust mandated for the applicant (class members in restoration litigation; per amendment to ILCA)	2	18.18%
Total Considerations:	**27**	
Errors		
• Factor 3 should have been analyzed, but was not*	3	n/a

** One of the decisions that was missing Factor 4 analysis mentioned that the applicant needs help managing the property under Factor 2.*

Table 10. Factor 5 – *Projected Tax Loss Based on Previous Year Tax Amount*

	All Decisions	Tribal Decisions	Individual Decisions
Total	$983,400	$969,478	$13,922
Average	$9,277	$10,424	$1,071
Median	$2,916	$3,687	$439
High	$97,220	$97,220	$3,465
Low	$0	$0	$118
Decisions that do not mention previous year tax amount	5 of 111 decisions 4.50%	4 of 97 decisions 4.12%	1 of 14 decisions 7.14%

Table 11. *Factor 5 – Tax Loss Considerations*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Projected Tax Loss:	**111**	**100.00%**
• Note previous (or recent) property tax amount for the property	106	95.50%
• Currently no commercial activity, so no loss of sales, use or franchise tax	9	8.11%
• Property is tax exempt (Is within tribal jdx; is county land; exempt regardless of trust status because land use)	8	7.21%
• No mention of tax loss amount	5	4.50%
• Potential offset: If land is leased to a non-Indian entity, county would get some income	1	0.90%
Ways the Tribe Contributes to the Community:	**46**	**41.44%**
• Tax loss is not a major impact given large amount tribe contributes to community compared to the relatively small tax loss	42	37.84%
• Purchase of goods and services (vendors they support pay sales and wage taxes; tribe pays sales tax on off-reservation purchases)	31	27.93%
• Employment	28	25.23%
• Reduction in county-sponsored services (daycare, welfare, housing, medical, dental)	14	12.61%
• Charitable contributions (to schools, charities, other organizations, police, road improvement)	13	11.71%
• Income taxes employees pay	12	10.81%
• General economic stimulation ("significant positive economic distribution in the county")	8	7.21%
• Federal funds available for schools w/ Indian children	4	3.60%
• As is land will not benefit community, but in trust tribe will develop = employment, construction, purchases	1	0.90%
Degree of Cooperation with and Support from Local Entities:	**38**	**34.23%**
• No adverse comments received	29	26.13%
• Tribe has agreed to voluntary annual contributions in lieu of lost tax	9	8.11%
• County supports acquisition; good working relationship	3	2.70%
• Tribe has said will attempt to resolve Rx financial issues by in lieu payments	1	0.90%

Table 11. *Factor 5 – Tax Loss Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Benchmarking:	**30**	**27.03%**
• Compare total county property tax to lost amount and find small in comparison	23	20.72%
• Tax loss is a fraction of a % of total county property taxes	15	13.51%
• Compare total county tax to lost amount and find small in comparison	6	5.41%
• Tax loss is a fraction of a % of total county taxes	2	1.80%
• Compare property value to total valuation of all property in county	2	1.80%
Tribe's Needs	**29**	**26.13%**
• Tax exemption is not motivation (need to for jurisdiction, self-determination, housing, land base)	21	18.92%
• Tribe's needs far outweigh impact from removal	8	7.21%
Local Concerns:	**6**	**5.41%**
• Concern that tax loss now is small, but if developed would be substantial—BIA not required to speculate to potential lost revenue if developed	2	1.80%
• Concern about business on the land having tax exemption advantage—BIA explains away	1	0.90%
• Concern about adverse impacts of commercial development—BIA: this is not tribe's stated need	1	0.90%
• Concern about loss of a specific application fee—BIA: this is a one time loss = not significant	1	0.90%
• Received objection, but no specific detail	1	0.90%
Miscellaneous:	**7**	**6.31%**
• Only notes previous tax year amount—no other analysis at all	4	3.60%
• Taxes are current	2	1.80%
• Only notes no commercial activity, so no sales or use tax loss—no other analysis at all	1	0.90%
Total Considerations:	**414**	

Table 12. *Factor 6 – Jurisdiction and Land Use Conflict Considerations*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Legal Results of a Transfer to Trust Status:	**103**	**92.79%**
• Criminal jurisdiction will remain with the state	101	90.99%
• The land will be removed from state and local civil jurisdiction; tribe will assert civil and regulatory jurisdiction	77	69.37%
• Only regulatory jurisdiction will be lost because land is already exempt from county zoning	2	1.80%
Factors that Contribute to Mitigation or Absence of Jurisdictional Conflict:	**64**	**57.66%**
• No change in land use	37	33.33%
• Reasons why land use will not be an issue (current use is consistent with current zoning; proposed use is consistent with current zoning; proposed use is consistent with surrounding use; proposed use is consistent with past use; propose use conforms to city-issued permit)	23	20.72%
• On-reservation acquisition	6	5.41%
• Zoning will not change	5	4.50%
• Land is not currently within city/county's jurisdiction, so will not affect city/county regulations	3	2.70%
How Services Will Be Provided:	**34**	**30.63%**
• Police service will continue by county sheriff	11	9.91%
• Tribe provides various services (safety patrol, fire safety check and protection, weed abatement, general maintenance, fencing the land to avoid security issues)	13	11.71%
• Fire services will continue as is (by county, tribe or Bureau of Land Management)	8	7.21%
• Emergency services will continue as is (by county or tribe)	6	5.41%

Table 12. *Factor 6 – Jurisdiction & Conflict Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Degree of Cooperation with and Support from Local Entities:	**29**	**26.13%**
• Tribe has long-standing working relationship with local entities to work out any jurisdictional issues	15	13.51%
• No adverse comments received	8	7.21%
• MOU or Cooperative Agreement in place	7	6.31%
• Local service providers indicate the acquisition will not adversely impact them (Fire chief indicated acquisition will not cause burden; sheriff indicated support—noted acquisition will not impact services; Cal Trans indicated traffic will not be a problem)	4	3.60%
• County supports the acquisition; letters of support from state, local, and national legislators	3	2.70%
• Governmental agencies have recognized special significance of the land to the tribe for many years	1	0.90%
• Under MOU tribe will pay millions for public safety in area	1	0.90%
Public Concern:	**14**	**12.61%**
• Tribe or individual applicant's contracts for utilities will not change, will still be paid as they are now	3	2.70%
• RE county concern about loss of civil jurisdiction: the very essence of trust and federal policy is to allow tribes to self-govern	2	1.80%
• RE concern that current contractual limitations on land use will not be honored: tribe will comply with these until the contract expires	2	1.80%
• RE concern about non-zoned use: mitigation measures will be taken, uses have been long-standing, recognition of tribe's struggle to re-establish land base, tribe's needs outweigh jurisdictional conflict	2	1.80%
• RE concern about potential commercial development: no documents exist that tribe has commercial development in mind; BIA cannot force tribe to waive sovereign immunity or restrict future development or alteration	2	1.80%
• RE comments that permit needed for proposed use: proposed use would only be allowed by permit if in fee, but not subject to zoning if in trust; appears permit will be issued without problem	2	1.80%
• RE city concern about water/sewer jurisdiction: will remain same whether in fee or trust	1	0.90%
• RE concern about gaming use: BIA has determined is not gaming use	1	0.90%
• RE concern about trust status terminating easements: easements will remain in place	1	0.90%
• RE comments: tribe's use does not preclude residential/agricultural use of surrounding land	1	0.90%

Table 12. *Factor 6 – Jurisdiction & Conflict Considerations (Continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Policy Considerations:	**10**	**9.01%**
• Tribe's need outweighs jurisdictional conflict	6	5.41%
• Tribe has established need for self-determination	5	4.50%
• Recognize tribe's ongoing attempts to restore land base	2	1.80%
• Tribe has responsibility to provide for welfare of its members; includes reestablishment of tribal jurisdiction over lands	1	0.90%
• Federal act encourages construction of low income housing like that proposed	1	0.90%
Total Considerations	363	

Table 13. *Factor 6 – Jurisdiction and Land Use Conflict*
Minimal Analysis

	# of Decisions Considered In	% of 111 Total Decisions
Analysis *only* mentions criminal and civil/regulatory jurisdiction,* plus:	**26**	**23.42%**
• Criminal and civil/regulatory jurisdiction only	12	10.81%
• Criminal and civil/regulatory jurisdiction + No adverse comments received	4	3.60%
• Criminal and civil/regulatory jurisdiction + Police service will continue as is (by county or tribe)	3	2.70%
• Criminal and civil/regulatory jurisdiction + Emergency service will continue as is (by county or tribe)	2	1.80%
• Criminal and civil/regulatory jurisdiction + Tribe will conduct patrols and erect fencing	2	1.80%
• Criminal and civil/regulatory jurisdiction + Need for self-determination	1	0.90%
• Criminal and civil/regulatory jurisdiction + Fire will continue as is (by city or BLM)	1	0.90%
• Criminal and civil/regulatory jurisdiction + Sheriff wrote letter of support	1	0.90%

* *Criminal jurisdiction will remain with the state while the tribe will assert civil and regulatory jurisdiction*.

Table 14. *Factor 7 – Additional BIA Responsibility Considerations*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
No Significant Additional Burdens Because:	**102**	**91.89%**
• No change in land use	73	65.77%
• No leases, rights of way or other trust applications forthcoming	25	22.52%
• Tribe will assume development and day-to-day management	17	15.32%
• On-reservation acquisition	12	10.81%
• Conclusory statement of no significant additional burdens	12	10.81%
• Tribe already has land in trust and thus working relationship	3	2.70%
• Tribe currently accepts little help, expect less as projects grow	1	0.90%
Additional Burdens Are Minimal, and the BIA is Equipped to Handle Them:	**21**	**18.92%**
• Probate services	11	9.91%
• Lease or mortgage processing	6	5.41%
• Easement processing	4	3.60%
• Approval on housing development, construction loan	3	2.70%
• Road services (construction, maintenance)	1	0.90%
• Quarterly/semi-annual analysis of mitigation measures	1	0.90%
• BIA forested land needs mgmt plan - tribe will amend plan to include	1	0.90%
How Services Will Be Provided:	**19**	**17.12%**
• Account of how emergency and fire services will be provided (Federal, tribe, state)	14	12.61%
• Tribe will provide safety patrols, weed abatement and emergency services, maintain roads, pay for other services as required	8	7.21%
Policy Considerations:	**14**	**12.61%**
• Whole exercise would not even be required but for wrongful termination	9	8.11%
• Acquisition will result in increased tribal self-sufficiency and ultimately less dependence on BIA overall	5	4.50%
No Activities That Would Require BIA Involvement:	**14**	**12.61%**
• No logging or forestry resources to manage	13	11.71%
• No mining or mineral resources to manage	4	3.60%
• No plan to develop	2	1.80%
• No agriculture	2	1.80%

Table 14. *Factor 7 – Additional BIA Responsibility Considerations (continued)*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
Character of Land Analysis:	**9**	**8.11%**
• No riparian habitat	5	4.50%
• No structures	3	2.70%
• No hazardous waste removal	1	0.90%
• No environmental issues	1	0.90%
• No standing timber or dense vegetation	1	0.90%
• No historical sites	1	0.90%
• No critical habitat	1	0.90%
Degree of Cooperation/Support from Local Entities:	**4**	**3.60%**
• MOU in place	2	1.80%
• Tribe is taking mitigation measures	1	0.90%
• Proposed use is consistent with zoning	1	0.90%
Financial Considerations:	**4**	**3.60%**
• Development will be financed by tribe, not federal	2	1.80%
• HUD will sponsor development, so no immediate impact on BIA	2	1.80%
Total Considerations:	**248**	

Table 15. *Factor 8 – Environmental Compliance Considerations*
All Decisions

	# of Decisions Considered In	% of 111 Total Decisions
NEPA Satisfied:	**114***	**100.00%**
• No change in land use = categorical exclusion	69	62.16%
• Environmental Assessment (EA) prepared and distributed, Finding of No Significant Impact (FONSI) issued	45	40.54%
Hazardous Substances Determinations Satisfied:		
• Appropriate report (Phase 1 Contaminant Survey Checklist) submitted that reflects no hazardous materials or contaminants	111	100.00%
Public Concern:		
• Address public concern about potential use (BIA not required to consider speculative land use allegations in environmental review; tribe clarified proposed use; tribe stated not planning to build casino; BIA finds fully consistent with coastal protection regulations)	5	4.50%
Total Considerations:	**230**	

** NEPA was satisfied in 100% of decisions, but 3 decisions involved property in multipl parcels where NEPA was satisfied by an EA/FONSI for some parcels and by a categorical exclusion for others.*

Table 16. *Factor 9 – Location Relative to State Boundaries*

		# of Decisions Considered In	% of 18 Decisions That Analyze Factor 9*
Location Relative to State Boundaries:		**18**	**100.00%**
	• Note miles from contiguous states and Pacific	11	61.11%
	• Does not cross state boundaries and is in same county as existing trust land	7	38.89%
	• Squarely in CA, considerable distance from other states or countries	1	5.56%
Other Considerations:		**12**	**66.67%**
	• Tribe has demonstrated requisite need	6	33.33%
	• Cite string of court cases which discuss tribe's history	2	11.11%
	• Land is within the tribe's aboriginal land	2	11.11%
	• Land is close to existing trust land = will not be burdensome for tribe to manage or constitute a burden on BIA	2	11.11%
	• Aboriginal land was over one million acres, but treaties were never ratified so tribe was never able to take title	1	5.56%
	• No adverse comments received	1	5.56%
	Total Considerations:	**33**	
Errors:		6	
	• Analyzed this factor, but did not need to because was on-reservation acquisition	5	27.78%
	• Did not analyze this factor, but should have because was off-reservation acquisition	1	n/a

** Only the 14 off-reservation acquisitions required Factor 9 analysis, but 18 decisions included Factor 9 analysis.*

Table 17. *Factor 9 – Distance From Other Trust Land*

Miles From Current Reservation:*	
Average:	6.60 miles
Median:	1.40 miles
Low:	0.08 miles
High:	30 miles

** Distances were noted in either miles or feet. All were converted to miles for analysis.*
*** While 18 decisions included Factor 9 analysis, only the distances from the correctly analyzed decisions were included in this table. The distances noted in decisions that included unnecessary Factor 9 analysis—because they were for on-reservation acquisitions—were not included since the correct distance on those acquisitions is 0 miles.*

Table 18. *Factor 10 – Expected Economic Benefits*

	# of Decisions Considered In	% of 7 Decisions That Analyze Factor 10*
Statement of Use:	**7**	**100.00%**
• Health facility (clinic, drug rehabilitation)	3	42.86%
• Business Plan attached	2	28.57%
• Commercial buildings	2	28.57%
• Storage and hardware store	1	14.29%
• Ceremonial and burial site	1	14.29%
Expected Benefits:	**4**	**57.14%**
• Lease income	2	28.57%
• Clinic has 4,300 clients, biggest healthcare provider in county = benefits are immeasurable	1	14.29%
• Alleviate housing shortage (describe housing situation, serious housing shortage, # on wait list, many multiple families sharing house)	1	14.29%
• Facility provides services to members and non-members	1	14.29%
Need for the Land:	**2**	**28.57%**
• Needed for self-determination	1	14.29%
• Needed because clinic operates on minimum budget	1	14.29%
• Needed so tribe can exercise and preserve cultural management over health care	1	14.29%
Other Considerations:	**2**	**28.57%**
• Tribe has invested over 20 years in its plan to use as an industrial park	2	14.29%
• RE concern about potential development: Cooperative Agreement with city is in place	2	14.29%
Total Considerations:	**21**	
Errors:		
• Missing Factor 10 Analysis (shopping plaza, commercial bison ranch)	2	n/a

** There were fourteen off-reservation decisions. Only seven analyzed factor ten. Five were not required to analyze because the acquisition was not for a business purpose. Two should of have analyzed the factor, but did not.*

Table 19. *Total Considerations v. State and Local Interest Considerations*

Categories Considered in General		
Factor	**Table**	**Considerations**
2 - Need for the Land	5	692
3 - Purpose	7	410
4 - Other Trust Land and Degree of Assistance Needed	9	27
5 - Tax Loss	11	414
6 - Jurisdiction and Land Use Conflict	12	363
7 - Additional BIA Responsibility	14	244
8 - Environmental Compliance	15	230
9 - Location Relative to State Boundaries	16	33
10 - Expected Economic Benefits	18	21
Total Considerations:		**2,438**
Categories that Demonstrate Consideration of State and Local Interests		
Factor	**Table**	**Considerations**
Ways Tribe Contributes to the Community	11	153
Degree of Cooperation with and Support from Local Entities	5, 7, 11, 12, 14, 16	107
Local Concern	11	28
Other	18	4
State and Local Considerations:		**292**

Table 20. *Acceptance Rate*

Accepted	**100%**
Denied	**0%**

***