



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 08 2011

Honorable John D. Red Eagle
Principal Chief, Osage Nation of Oklahoma
P.O. Box 779
Pawhuska, Oklahoma 74056

Dear Principal Chief Red Eagle:

On December 28, 2010, the Osage Nation of Oklahoma (Nation) submitted to the Bureau of Indian Affairs (BIA) an application to acquire in trust approximately 15 acres more or less of land, known as the Osage Million Dollar Elm Casino Ponca City (OMDE Ponca City) Parcel, located in Osage County, Oklahoma. The 15 acres are currently used for a gaming facility.

By memorandum dated June 9, 2011, the Acting Regional Director, Eastern Oklahoma Region Office (EORO) transmitted to the Assistant Secretary -- Indian Affairs (AS-IA), his recommendation that the property be accepted into trust (EORO Transmittal Memo), along with the Nation's request and supporting documentation. We have completed our review of the Nation's request, the supporting documentation in the administrative record, and the EORO's recommendation. For the reasons set forth below, it is my determination that the 15 acres of land will be taken into trust.

BACKGROUND

The Nation is a federally recognized Indian Tribe located in northeast Oklahoma. The Nation's Constitution was ratified by the Osage People on March 11, 2006. The Nation's headquarters are located in Pawhuska, Oklahoma.

On December 28, 2010, the Nation submitted a written request to have the property known as the "OMDE Ponca City" taken in trust for the Nation pursuant to Resolution No. ONCR 11-03 dated November 12, 2010 (EORO Tab 5).

DESCRIPTION OF THE PROPERTY

The 15 acres are located in Osage County, Oklahoma and described (EORO Tab3) as follows:

A tract of land lying in the South Half of the Southwest Quarter (SW/4) of Section Thirty-six (36), Township Twenty-six (26) North, Range Two (2) East of the Indian Meridian, described as beginning at a point Twenty-five (25) feet West of the Southeast corner of the South Half of said Southwest Quarter (SW/4), thence North along the West line of the roadway theretofore granted to Osage County, Oklahoma, a distance of 808 feet, thence West 808 feet; thence South 808 feet; thence East along the South line of said Southwest Quarter (SW/4) distance of 808 feet to the place of beginning (together with the perpetual right of

ingress and egress over and across the 25 foot strip of ground adjoining on the East and now used as a public road under recorded easement held by Osage County), less and except the portion of property deeded to the State of Oklahoma as described in the deed recorded in Warranty Deed Book 106, Page 631, Osage County.

TITLE TO THE PROPERTY

The commitment for title insurance prepared by Old Republic Title Insurance Company (EORO Tab 3) dated April 7, 2011, reflects the title to be vested in the Nation, in the amount of \$458,139.00

On April 5, 2011, the Tulsa Field Solicitor issued a preliminary title opinion (EORO Tab 3). The Field Solicitor found the title to be vested in the Nation.

COMPLIANCE WITH THE INDIAN GAMING REGULATORY ACT

The 15 acres are owned in fee by the Nation and are currently used for a gaming facility offering class II and class III gaming. The Nation plans for construction of a larger casino and hotel on the property. Section § 2719 of Indian Gaming Regulatory Act (IGRA) prohibits gaming on land acquired in trust after October 17, 1988, but provides several exceptions to the general prohibition. Under § 2719 (a)(1) land that is located within the reservation boundaries is exempted from the general prohibition. Similarly, under § 2719 (a)(2)(A)(i) land within the former reservation of an Oklahoma tribe who did not have a reservation on October 17, 1988 is also exempt from the general prohibition.

It is not necessary for the Department to opine on the status of the Osage Reservation for purposes of this application. Although the United States Supreme Court has declined to review a decision by the Tenth Circuit Court of Appeals regarding the status of the Reservation, *see Osage Nation v. Irby*, 597 F. 3d 1117 (10th Cir. 2010), *cert. denied*, 564 U.S. ____ (2011), the United States has stated that it is unclear whether Congress has disestablished the Osage Reservation. *See* Brief for United States as Amicus Curiae in *Osage Nation v. Irby*, *Id.* The lands at issue are located within the exterior boundaries of the Reservation established by the United States for the Osage Nation and, thus, under the Indian Gaming Regulatory Act, at 25 U.S.C. §§ 2719(a)(1) and (a)(2)(A)(i), and the Department's regulations at 25 C.F.R §§ 292.4, 292.2, are located within the former reservation of the Osage Nation. I conclude, therefore, that these lands are eligible for gaming.

The Nation and the State of Oklahoma entered into a Class III Tribal-State Gaming Compact (Compact) which was approved by my Office on February 9, 2005. On March 21, 2005, the Department published a notice and the Compact took effect.

The Nation's Gaming Ordinance was approved by the National Indian Gaming Commission (NIGC) on April 16, 1998. The Ordinance was subsequently amended and approved by the NIGC on July 7, 2003, May 27, 2005, and February 27, 2007.

COMPLIANCE WITH 25 C.F.R. PART 151

The Secretary's authority, procedures, and policy for accepting land into trust are set forth at 25 C.F.R. Part 151. Section 151.3 sets forth under what conditions land may be acquired in trust by the Secretary for an Indian tribe or individual Indian, but states that it is "[s]ubject to the provisions contained in the acts of Congress which authorize land acquisitions..."

A. 25 C.F.R. § 151.3. Land acquisition policy.

The Department's regulations concerning land acquisition at 25 C.F.R. § 151.2 define the term "Indian reservation" to include existing reservations as well as land in Oklahoma constituting the former reservation of a tribe. The lands at issue are within the exterior boundaries of the reservation that was established by the United States for the Osage Nation, and are, thus, located within the former reservation of the Osage Nation. I conclude, therefore, that this acquisition comes within Section 151.10 for on-reservation acquisitions.

B. 25 C.F.R. § 151.10(a). The existence of statutory authority for the acquisition and any limitations contained in such authority.

In *Carcieri v. Salazar*, 555 U.S.379 (2009) (*Carcieri*), the United States Supreme Court held that the Secretary's authority to take land into trust for an Indian tribe extends only to those tribes that were "under Federal jurisdiction" when the Indian Reorganization Act, 48 Stat. 984, codified at 25 U.S.C. § 461 *et seq.* (the IRA), was enacted on June 18, 1934.¹ We have evaluated the applicability of *Carcieri* to the Nation's application, and have determined that the Nation was under Federal jurisdiction in 1934, and is eligible to have land taken into trust pursuant to 25 U.S.C. § 465.

The IRA is a statute of general applicability. Congress provided an opt-out provision in Section 18 of the Act, where a majority vote of Indians on the reservation voting at a special election called by the Secretary of the Interior could opt out of the Act. To accommodate the unique situation of tribes in Oklahoma, in Section 13 Congress specified those provisions of the IRA that did not apply to listed tribes in Oklahoma, leaving the remaining provisions to apply.² Section 13 of the IRA provides in relevant part:

[...] That sections 2, 4, 7, 16, 17, and 18³ of this title shall not apply *to the*

¹ 129 S.Ct. at 1068.

² By 1934 specific statutes applied to the Five Civilized Tribes and Osages and to the land base of Oklahoma tribes. Similarly, specific provision in the IRA addressed Alaska where there were few reservations.

³ Section 2 (§ 462) extended the existing periods of trust and any restriction on alienation placed upon Indian lands. Section 4 (§ 464) limited sales, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of the tribe or corporation organized under the Act. Section 7 (§ 467) authorized the Secretary to proclaim new reservations, or add lands to existing reservations. Section 16 (§ 476) provided that any Indian tribe, or tribes, residing on the same reservation, the right to organize and adopt a constitution. Section 17 (§ 477) provides that the Secretary, upon a petition by at least one-third of the adult Indians, may issue a charter of incorporation to such tribe. Section 18 (§ 478) provided that the adult Indians on any reservation could vote in a special election to opt out of the IRA.

following named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, **Osage**, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole.

25 U.S.C. § 473 (emphasis added).

Significantly, this section of the IRA did two things. First, it specifically named the Nation as one of the Indian tribes to which certain provisions of the IRA would not apply. Second, it authorized the Secretary to take land into trust for those named Oklahoma Indian tribes pursuant to Section 5 of the IRA (25 U.S.C. § 465), because it did not include Section 5 in the list of IRA sections that would not be applicable to the named Oklahoma tribes. Thus, it is my opinion that those Oklahoma tribes specifically named in Section 13 of the IRA were “under federal jurisdiction on June 18, 1934,” and that the Secretary was authorized by Section 5 of the IRA to take land into trust for those tribes.⁴ The listing of the Nation in Section 13 is sufficient for purposes of finding the Nation to be under Federal jurisdiction in 1934.⁵

C. 25 C.F.R. § 151.10(b). The need of the individual Indian or Tribe for additional land.

The Nation is the sole owner of the property. The site is currently utilized for a gaming facility for the benefit of the Nation and its members. The Nation has an urgent need to have the property placed in trust. The Nation may suffer substantial financial loss due to the decision in *Osage Nation v. Irby*, 597 F. 3d 1117 (10th Cir. 2010), wherein the Tenth Circuit Court of Appeals held that the Osage Reservation had been disestablished. The Nation does not use its net gaming revenues to issue per capita payments to its members, but instead focuses the funds on the unmet needs of the Nation and its members. In addition, the gaming revenues also provide substantial funding for the Nation’s social, educational, health, and housing programs. The Nation also stated that the creation of additional jobs will provide employment and career opportunities for Tribal members and surrounding residents and will assist tribal members in moving toward self-sufficiency. Additional economic development will allow the Nation to support governmental functions, which should decrease dependence upon limited Federal and State funds. In order for the Nation to continue to sustain its programs and operations as a means to provide needed services and assistance to its members the acquisition would allow the Nation to continue to focus on the unmet needs of the Nation and its people without interruption.

⁴ Moreover, the Indian Land Consolidation Act, 25 U.S.C. § 2202, provided that “[t]he provisions of section 465 of this title shall apply to all tribes . . .” unless Federal law precludes land acquisition for a specific tribe. We find that there is no such preclusion applicable to the Nation.

⁵ Moreover, there are a host of other indicia that the Osage Nation was under Federal jurisdiction on or before 1934 and that jurisdiction remained intact in 1934, including land held in trust or restricted fee for the Nation and its members, as well as treaties and statutes detailing Federal obligations and duties regarding the Nation.

Based on this information the Acting Regional Director has determined that the need for the additional land is adequately justified, and I concur.

D. 25 C.F.R. § 151.10(e). The purposes for which the land will be used.

The Nation intends to continue utilizing the property for gaming purposes. The Acting Regional Director finds that the request adequately describes the purpose for which the land will be used and I concur.

E. 25 C.F.R. § 151.10(e). If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of land from the tax rolls.

The Nation owns this parcel in fee simple. The property is currently on the Osage County Assessor's rolls as taxable. By letter dated January 4, 2011, the offices of Homer Law Chartered provided a copy of a Real Property Assessment Record to the Agency which stated the tax bill on December 22, 2010, was paid in the amount of \$4,501.98. There are no special assessments or outstanding tax assessments. By correspondence dated January 25, 2011, comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes, and special assessments were solicited from the following State and local political subdivisions (EORO Tab 9):

Governor of Oklahoma
Oklahoma Tax Commission – No response
Osage County Commissioners – No response
Osage County Assessor – No response
Osage County Treasurer – No response
Mayor of Ponca City – No response

Former Governor Brad Henry, on August 9, 2010 expressed his support of the project and requested the assistance of Secretary Salazar in completing the process to acquire the property in trust.

Real property in Oklahoma is subject to State ad valorem taxation which is collected by the respective counties to fund a variety of countywide services: the largest share goes to the local school districts. The Acting Regional Director concludes that the loss of the ad valorem revenues are very likely outweighed by the income and sales taxes generated by the 58 individuals presently employed at the OMDE Ponca City gaming facility.

F. 25 C.F.R. § 151.10(f). Jurisdictional problems and potential conflicts of land use which may arise.

No jurisdictional issues or concerns were raised or are foreseen from the use as proposed. Law enforcement services are provided by the Nation's Law Enforcement Department. Emergency Medical Services of Authority located in Ponca City provides ambulance coverage in the area.

Fire, water, ambulance, and sanitation services for the property are currently provided by Ponca City.

G. 25 CFR § 151.10(g). If the land to be acquired is in fee status whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The 15 acre parcel is within the jurisdictional boundaries of the Bureau of Indian Affairs (BIA), Osage Agency (Agency). The Agency provides technical assistance, review and approval of real estate transactions. The Agency has a staff of four Real Estate Services Program employees that are able to handle all business leases, easements and permitting that may need to be processed for the Nation once it is taken into trust. The mineral interest underlying the property is already held by the Osage Mineral Estate and the oversight with respect to mineral development, primarily oil and gas exploration and production, is handled by the Agency Minerals Department. Any environmental issue/concern that may take place can be dealt with by the Nation's Emergency Management Office in conjunction with the Nation's Environmental and Natural Resources Department. In the event that an oil and gas related problem or damage occurred on the property the Agency Field Operations staff would take action to respond to the incident. The Regional Office, Division of Environmental Safety and Cultural Resources Management is also available to provide any needed additional assistance. The Acting Regional Director finds that that no change would be necessary since the property is already within the jurisdiction of the EORO.

H. 25 CFR § 151.10(h). The extent of information to allow the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

An Environmental Assessment of the proposed property to be acquired in trust was completed in March 2011 (EORO Tab 6). We have determined that the acquisition complies with the National Environmental Policy Act, and a Finding of No Significant Impact (FONSI) will be issued by this Office.

Pursuant to 602 DM 2, a Phase I Environmental Site Assessment is currently under review for compliance with American Society for Testing and Materials Standard E 1527.05. An updated contaminant survey will need to be completed and certified before the land is taken into trust.

TWO PART DETERMINATION UNDER SECTION 20 OF IGRA

The two-part determination pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(A) is not applicable because the land at issue are within the exterior boundaries of the reservation that was established by the United States for the Osage Nation, and are, thus, located within either the Osage Reservation or the former reservation of the Osage Nation.

ACTING REGIONAL DIRECTOR'S RECOMMENDATION

By memorandum dated June 9, 2011, the Acting Regional Director, EORO recommends that the property be accepted in trust for the benefit of the Nation.

DECISION

My evaluation of the Nation's request indicates that the Federal requirements for acquiring this parcel of land into trust have been satisfied. The EORO will be authorized to approve the conveyance document accepting the property in trust for the Nation subject to any condition set forth herein, approval of all title requirements by the Office of the Regional Solicitor, and expiration of the 30-day period following publication in the *Federal Register* of the notice required in 25 C.F.R. § 151.12(h), and confirmation by the Solicitor's Office that no lawsuits have been filed challenging this decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Echo Hawk", written in a cursive style.

Larry Echo Hawk
Assistant Secretary – Indian Affairs