



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

OCT 15 2020

The Honorable Bill Anoatubby
Governor, Chickasaw Nation
Post Office Box 1548
Ada, Oklahoma 74821

Dear Governor Anoatubby:

In 2016, the Chickasaw Nation (Nation) submitted an application to the Bureau of Indian Affairs (BIA) to transfer into trust approximately 248.09 acres of land known as the Ardmore Tract (Site) in the City of Ardmore, Carter County, Oklahoma, for gaming and other purposes.¹ The Nation also requested a determination of eligibility to conduct gaming on the Site. The Nation seeks to develop approximately 14.26 acres within the Site by constructing a casino-resort (Proposed Project).

We have completed our review of the Nation's request and the documentation in the record. As discussed below, it is my determination that the Site will be transferred into trust for the benefit of the Nation pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108. Once transferred into trust, the Nation may conduct gaming on the Site pursuant to Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719.

Background

The Nation historically occupied its homelands in what are today Mississippi, Alabama, Tennessee, and Kentucky. In 1832, following a series of land cessions, the Nation ultimately ceded the remainder of its lands in exchange for land west of the Mississippi River.² The United States established the boundaries of the Nation's reservation in Oklahoma in the Treaty of 1855.³ In 1897, under the authority of the General Allotment Act, the Nation joined the Choctaw Nation in negotiations with the Dawes Commission. The two Nations signed the Atoka Agreement that provided for the allotment of their lands.⁴

In 1906, Congress passed what became known as the "Five Tribes Act" to provide for further disposition of the Five Civilized Tribes' affairs.⁵ While the title of the Act suggested a general dissolution of the Tribes as they had existed up until that point, it nonetheless provided for the

¹ See Letter to Stephanie Large, Superintendent, Chickasaw Agency, Bureau of Indian Affairs, from Bill Anoanlbby, Governor, Chickasaw Nation (undated), transmitting *Application for Fee-to-Trust (Gaming Eligible) Pursuant to 25 C.F.R. Part 151, Ardmore Tract* (May 2016) [hereinafter Nation's Application].

² Treaty with the Chickasaw, Oct. 20, 1832, 7 Stat. 381.

³ Treaty with the Choctaw and Chickasaw, June 22, 1855, 11 Stat. 611.

⁴ Congress incorporated provisions of the Atoka Agreement into the Curtis Act of 1898, 30 Stat. 495.

⁵ 34 Stat. 137. The term "Five Civilized Tribes" had evolved over the 19th century in reference to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations.

continuation of tribal governance. Significantly, however, the Act curtailed the Five Tribes' autonomy by granting authority to the President of the United States to approve any ordinance, act, or resolution of a tribal council or legislature.⁶ The Act also established that the President would play a central role in the continuity of the Five Tribes' leadership.⁷ While Section 6 of the Five Tribes Act only authorized the President to become involved in the removal or selection of the Five Tribes' governors in limited circumstances, the governors would, in practice, not be directly elected, but rather appointed by the President or acknowledged by congressional action for much of the twentieth century.⁸ Underscoring the United States' pervasive role in exercising jurisdiction over the Nation in 1934, President Herbert Hoover directly appointed and re-appointed the Nation's governor, Ben H. Dwight, to serve terms from 1930 to 1936.⁹

The Nation once held patented title to 4,707,081.72 acres of land.¹⁰ As a result of the allotment process, the Nation and its citizens lost most of their tribal lands. The Nation currently has approximately 6,491.60 acres of trust land, which is only 0.13 percent of its land prior to allotment.¹¹

Description of the Property

The Site is located on the southern edge of the City of Ardmore in Carter County, on U.S. Highway 70. The majority of the Site is located within the City limits; however, the southeastern portion of the Site is located on unincorporated County land.¹² The Nation has held the Site in fee since 2015.¹³ Maps showing the location of the Site are included as Enclosure 1. The legal description of the Site is included as Enclosure 2.

Eligibility for Gaming Pursuant to the Indian Gaming Regulatory Act

Congress enacted the Indian Gaming Regulatory Act (IGRA) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.¹⁴ Section 20 of IGRA generally prohibits gaming activities on lands acquired in trust by the United States on behalf of a tribe after October 17, 1988. Congress expressly provided several exceptions to the general prohibition. One such

⁶ *Id.* at § 28.

⁷ *Id.* at § 6.

⁸ See *Chickasaw Nation v. Department of the Interior*, 120 F.Supp. 3d 1190, 1201-1207 (W. D. Okla. 2014), on reconsideration (Apr. 22, 2015) (describing the 1906 Act and succession of the Chickasaw Nation's leadership until the passage of the Act of Oct. 22, 1970, 84 Stat. 1091, which reaffirmed that the Nation's governor would be selected by popular vote).

⁹ *Id.* at 1204.

¹⁰ Regional Director's Findings of Fact at 11.

¹¹ *Id.*

¹² Environmental Assessment, Chickasaw Nation Ardmore Fee-to-Trust Project [hereinafter EA] (June 2020) § 1.2.

¹³ Regional Director's Findings of Fact at 3.

¹⁴ See 25 U.S.C. § 2702(2).

exception exists for lands located within the former reservation of an Oklahoma tribe that did not have a reservation on October 17, 1988 (Oklahoma Exception).

The Department of the Interior's (Department) regulations at 25 C.F.R. Part 292, set forth the implementing procedures for Section 2719. Pursuant to these regulations, gaming on newly acquired lands is authorized under the Oklahoma Exception when (1) a tribe had no reservation on October 17, 1988, (2) the land is located in Oklahoma, and (3) the land is located within the boundaries of the tribe's former reservation, or is contiguous to other land held in trust or restricted status for the tribe in Oklahoma.¹⁶ The Site meets these requirements. Accordingly, once transferred into trust, the Nation may conduct gaming on the Site pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2719.

Trust Acquisition Determination Pursuant to 25 C.F.R. Part 151.

The Secretary of the Interior's (Secretary) general authority for acquiring land in trust for tribes is found in Section 5108 of the Indian Reorganization Act (IRA).¹⁷ The Department's regulations at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5108 of the IRA.

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

Section 15.13(a) sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe:

- (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
- (2) When the tribe already owns an interest in the land; or
- (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

¹⁵ See 25 U.S.C. § 2719(a)(2)(A)(i). The United States Supreme Court's ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) that the historical Muscogee (Creek) Reservation boundaries were not disestablished does not significantly alter the Department's gaming eligibility determinations for Oklahoma tribes. While future gaming parcels of the Muscogee (Creek) Nation or similarly situated tribes like the Chickasaw Nation could be deemed to fall within the first exception at §2719(a)(1) as being "within or contiguous to the boundaries of the reservation of the Indian tribe," the outcome would remain the same that such parcels would be eligible for gaming under either exception.

¹⁶ See 25 C.F.R. § 292.4(b)(1). As noted *supra* note 15 concerning the effect of *McGirt*, the outcome would be the same under Section 292.4(a).

¹⁷ 25 U.S.C. § 5108.

The transfer of the Site into trust satisfies Section 151.3(a)(3).¹⁸ The Proposed Project will generate revenue that will facilitate tribal self-determination by funding social, educational, and employment programs for the Nation's citizens.

The Nation has approximately 68,000 enrolled members.¹⁹ Approximately 32,372 citizens live in the Nation's 13-county jurisdictional boundaries. The population of Carter County was 48,406 in 2018, with American Indians and Alaska Natives making up 7.9 percent of the population in the County.²⁰ At that time, the poverty rate of the general population in Carter County was 16.9 percent. Of that, American Indians and Alaska Natives made up 16.1 percent despite making up only 7.9 percent of the population.²¹

Similarly, the population of the City of Ardmore was 24,892 in 2018, with American Indians and Alaska Natives making up 7.5 percent of the population in Ardmore.²² At that time, 19.7 percent of the general population of Ardmore was below the poverty rate. Of that, American Indians and Alaska Natives made up 20.1 percent despite making up only 7.5 percent of the population.²³

The Nation relies on its own economic resources to provide programs for its citizens. In 2018, gaming revenue provided 71.8 percent of the Nation's budget, while federal funds provided 28.2 percent.²⁴ The Nation would have to significantly reduce services to its citizens without the added revenue from its gaming activities.

Services

The transfer of the Site into trust will facilitate self-determination by providing funds to support the Nation's social services. The Nation provides over 200 programs and services to its citizens,

¹⁸ Although only one factor in Section 151.3 (a) must be met, the Nation's application also satisfies the criteria of subsections (a)(1) and (a)(2). The property is located within the exterior boundaries of the Nation's former reservation in Oklahoma meeting the regulatory definition of "Indian reservation" in Section 151.2 as relied upon in Section 151.3(a)(1). Additionally, the Nation owns the property in fee satisfying Section 151.3(a)(2).

¹⁹ Regional Director's Findings of Fact at 4.

²⁰ United States Census Bureau 2018: American Community Survey 5-Year Estimates (Demographic and Housing Estimates) available at

<https://data.census.gov/cedsci/table?q=Carter%20County,%20Oklahoma&g=0500000US40019&tid=ACSDP5Y2018.DP05> (last visited Aug. 6, 2020).

²¹ *Id.* (Poverty Status in the Past 12 Months) available at

https://data.census.gov/cedsci/table?g=0500000US40019&t=Income%20and%20Poverty&tid=ACSST5Y2018.S1701&hidePreview=false&vintage=2018&layer=VT_2018_050_00_PY_D1&cid=S1701_C01_001E (last visited Aug. 6, 2020).

²² *Id.* (Demographic and Housing Estimates) available at https://data.census.gov/cedsci/table?q=Ardmore,%20Oklahoma&g=1600000US4002600&tid=ACSDP5Y2018.DP05&layer=VT_2018_160_00_PY_D1 (last visited Aug. 6, 2020).

²³ *Id.* (Poverty Status in the Past 12 Months) available at https://data.census.gov/cedsci/all?g=1600000US4002600&layer=VT_2018_160_00_PY_D1&t=Income%20and%20Poverty&tid=ACSST5Y2018.S1701&hidePreview=false&cid=S1701_C01_001E&vintage=2018 (last visited Aug. 6, 2020).

²⁴ Regional Director's Findings of Fact at 4.

most of which are fully or partially funded by tribal funds.²⁵ For example, The Nation reports that it has 14,900 members qualifying for senior programs. As the number of senior citizens increases, there will also be greater demands on the Nation's programs. The Nation reports that the use of its social service programs increases every year. As of January 2020, these increases include elderly energy assistance by 16%, elderly energy assistance services at large by 18%, burial assistance by 25%, computer distribution by 14%, services at large emergency energy assistance by 24%, holiday baskets by 38%, community health representatives by 15%, recreation by 8.10%, youth camps applications by 34.69%, youth camps wait list by 71.26%, transportation services by 4%, honor guard events by 24%, and toksoli smart program by 4%.²⁶

These increases demonstrate the need for additional economic development. Without increased funding, the Nation will not be able to provide services at the same level. Revenue from the Proposed Project will alleviate potential shortfalls.

Housing

The transfer of the Site into trust will facilitate self-determination by providing funds to support the Nation's housing programs. The Nation administers programs that provide financial assistance to its citizens to encourage them to assume financial responsibility to build family and community wealth. As of January 2020, however, there were 304 citizens on the waiting list for home rehabilitation, 308 waiting for assistance in the Low Rent Program, 126 citizens waiting for rental assistance, and 335 citizens waiting for low income homeownership assistance.²⁷ To address housing concerns, the Nation provides the following programs:²⁸

- When the Nation determined that 60 percent of its citizens' home loan applications were being denied, the Nation's Division of Housing created the Chuka Chukmasi, or "Beautiful Home, Home Loan Program," to provide home purchasing counseling, grants for repair and rehabilitation of existing homes, and the installation of storm shelters. In 2018, the Nation, through Chuka Chukmasi, provided loans to 58 families, and down payment and closing cost assistance to nearly 400 families.
- In 2018, the Nation funded weather related home improvements for 405 families. The Nation also installed storm shelters in another 87 homes, bringing the total to 4,700 storm shelters installed since the inception of the program in 2003.

The continuance and growth of housing programs rely on revenue generated from the Nation's gaming and other economic activities. Revenue from the Proposed Project will support these housing programs and assist in alleviating housing program shortfalls.

²⁵ *Id.* at 5; Memorandum to Governor Anoatubby, from Wayne Scribner, Secretary of Community Services (Jan. 16, 2020) (Nation's 2020 Needs Analysis).

²⁶ *Id.* at 1.

²⁷ *Id.*

²⁸ Regional Director's Findings of Fact at 5-6.

Health Services

The transfer of the Site into trust will facilitate self-determination by providing funds to support the Nation's health programs. Revenue from the Proposed Project will ensure that the Nation's citizens receive adequate health care. The Nation funds its health clinics and wellness centers, but still relies on federal/state funds to support various health programs and services. The Nation provides the following programs:²⁹

- In 2018, the Nation provided more than 930,000 patient visits through its Chickasaw Nation Department of Health, using 45.27 percent of its total expenditures.
- In 2018, the Nation began construction of a new pharmacy at its comprehensive 72-bed Chickasaw Nation Medical Center. The Nation also operates wellness centers in Ada, Ardmore, Tishomingo, and Purcell, Oklahoma, which have three nutrition centers, a diabetes care center, and an optical retail store that served more than 4,700 Chickasaw citizens and had more than 177,000 visits in 2018.
- The Nation's Virtual Medical Visit, a web-based telecommunication service provided more than 3,000 virtual patient visits in 2018, its first year of operation.
- The Nation's tribal health program allows medical and dental claims up to \$5,000 for each citizen per year. In 2018, the program served more than 1,750 medical clients and 4,500 dental clients.

With the number of Chickasaw elders increasing, the Nation's medical services play an increasingly important role. Revenue from the Proposed Project will ensure that these services remain open and lessen the Nation's dependence on federal funding.

Education

The transfer of the Site into trust will facilitate self-determination by providing funds to support the Nation's educational programs. Over the preceding four fiscal years, totals for the programs and services offered for youth and educational services have increased by approximately 34.69 percent.³⁰ The Nation invests heavily in the education of its citizens through initiatives such as early childhood development programs, scholarships, and adult learning. These educational and child development programs and services are administered through the Chickasaw Nation Division of Education. The Nation administers the following programs:³¹

²⁹ Regional Director's Findings of Fact at 8-9.

³⁰ Nation's 2020 Needs Analysis at 2.

³¹ Regional Director's Findings of Fact at 6-7.

- In 2018, the Nation awarded grants, scholarships, incentives, and other educational assistance to more than 5,200 students in higher education and career technology programs.
- During the 2017-18 school year, the Nation provided school supplies to 9,200 students and distributed funds to 52 public schools through its Johnson-O'Malley Program.
- The Nation assisted 388 Chickasaw citizens with their High School Equivalency certification.
- During the 2017-18 school year, the Nation awarded incentives to 2,500 students and distributed 9,100 awards through the Chickasaw Nation Honor Club.
- The Nation developed the Native Explorers program, which recruits, trains, and mentors younger citizens in earth science, natural science, biomedical science and medicine.
- During the 2017-18 school year, the Nation met the academic needs of 268 students attending colleges and universities in the greater Oklahoma City area by identifying campus and tribal resources, creating a support network on and off campus, and building connections to their Chickasaw culture.
- The Nation administers the Chickasaw Nation Early Childhood and Head Start Program with tribal and federal funding for programs in Ada, Ardmore, Sulphur, and Tishomingo.

The Nation funds 85 percent of these programs supplemented by federal and state grants.³² With the additional revenue from the Proposed Project, the Nation will continue providing these educational programs and services.

The Regional Director determined, and we concur, that acquisition of the Site in trust will facilitate tribal self-determination and economic development.³³

25 C.F.R. § 151.10- On-reservation acquisitions

Section 151.10 requires the Secretary to evaluate requests for acquisition of land under the on-reservation criteria when the land is located within or contiguous to an Indian reservation.

The Site is located within the Nation's former reservation boundaries. Section 151.2 defines "Indian reservation" as, "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma ... 'Indian

³² Id. at 7.

³³ Id. at 4.

reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary."

The Regional Director found, and we concur, that the Nation's application is properly considered under the on-reservation criteria of Section 151.10.³⁴

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

Section 151.10(a) requires the Secretary to consider whether there is statutory authority for the trust acquisition and, if such authority exists, to consider any limitations contained in it.

Standard of Review

Four-Step Procedure to Determine Eligibility

Section 5 of the IRA provides the Secretary with discretionary authority to acquire land in trust for "Indians."³⁵ Section 19 of the Act defines "Indian" to include several categories of persons:

[Category 1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [Category 2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [Category 3] all other persons of one-half or more Indian blood.³⁶

In 2009, the United States Supreme Court (Supreme Court) in *Carcieri v. Salazar* construed the term "now" in Category 1 to refer to the date of the IRA's enactment.³⁷ Thus, the Secretary's authority to acquire land in trust for Indian tribes under Category 1 extended only to those tribes that were 'under federal jurisdiction' when the IRA was enacted on June 18, 1934. The Supreme Court did not consider the meaning of the phrases "under federal jurisdiction" or "recognized Indian tribe."

For the reasons explained more fully below, we conclude that there is evidence unambiguously demonstrating that the Nation was "under federal jurisdiction" in 1934. As such, the Nation is eligible under Category 1 and the Secretary has authority to transfer land into trust for the Nation.

To guide the implementation of the Secretary's discretionary acquisition authority under Section 5 after *Carcieri*, the Department in 2010 prepared a two-part procedure for determining when an

³⁴ Regional Director's Findings of Fact at 11.

³⁵ 25 U.S.C. § 5108.

³⁶ 25 U.S.C. § 5129 (bracketed numerals added).

³⁷ 555 U.S. 379 (2009) (*Carcieri*).

applicant tribe was "under federal jurisdiction" in 1934.³⁸ The Solicitor of the Interior (Solicitor) later memorialized the Department's interpretation in Sol. Op. M-37029.³⁹ Despite this, however, uncertainty persisted over what evidence could be submitted for the inquiry and how the Department would weigh it, prompting some tribes to devote considerable resources to researching and collecting any and all forms of potentially relevant evidence and, in some cases, leading to submissions totaling thousands of pages. To address this uncertainty, in 2018 the Solicitor's Office began a review of the Department's eligibility procedures to provide guidance for determining relevant evidence. This prompted questions concerning Sol. Op. M-37029's interpretation of Category 1, on which its eligibility procedures relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029 after concluding that its interpretation of Category 1 was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction."⁴⁰ In its place, the Solicitor issued a new, four-step procedure (Solicitor's Guidance) for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor (Solicitor's Office).⁴¹

At Step One, the Solicitor's Office determines whether Congress enacted legislation after 1934 making the IRA applicable to a particular tribe. The existence of such authority makes it unnecessary to determine if the tribe was "under federal jurisdiction" in 1934. In the absence of such authority, the Solicitor's Office proceeds to Step Two.

Step Two determines whether the applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such. If so, the applicant tribe may be deemed eligible under Category 1 without further inquiry. The Solicitor's Guidance describes types of evidence that presumptively demonstrate that a tribe was under federal jurisdiction in 1934. In the absence of dispositive evidence, the inquiry proceeds to Step Three.

³⁸ *U.S. Dept. of the Interior, Assistant Secretary, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 77-106 (Dec. 17, 2010) (Cowlitz ROD). See also Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Mar. 7, 2014), revised (Jan. 5, 2017).*

³⁹ *Sol. Op. M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act (Mar. 12, 2014) (M-37029), available at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.*

⁴⁰ *Sol. Op. M-37055, Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act (Mar. 9, 2020), available at www.doi.gov/sites/doi.gov/files/uploads/m-37055.pdf.*

⁴¹ *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 10, 2020) (Solicitor's Guidance), available at www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors_Procedures_for_Determining_Eligibility_for_Land_into_Trust_under_Category_1.pdf.*

Step Three determines whether an applicant tribe's evidence sufficiently demonstrates that the applicant tribe was "recognized" in or before 1934 and remained under jurisdiction in 1934. The Solicitor determined that the phrase "recognized Indian tribe" as used in Category 1 does not have the same meaning as the modern concept of a "federally recognized" (or "federally acknowledged") tribe, a concept that did not evolve until the 1970s, after which it was incorporated in the Department's federal acknowledgment procedures.⁴² Based on the Department's historic understanding of the term, the Solicitor interpreted "recognition" to refer to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy. The Solicitor identified forms of evidence that establish a rebuttable presumption that that an applicant tribe was "recognized" in a political-legal sense before 1934 and remained under federal jurisdiction in 1934. In the absence of such evidence, the inquiry finally moves to Step Four.

Step Four assesses the totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934. Given the historical changes in federal Indian policy over time, and the corresponding evolution of the Department's responsibilities, a one-size-fits-all approach for evaluating the totality of a tribal applicant's evidence is not possible or desirable. Attorneys in the Solicitor's Office must evaluate the evidence on a case-by-case basis within the context of a tribe's unique circumstances, and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

To further assist Solicitor's Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor's Guidance includes a memorandum detailing the Department's revised interpretation of the meaning of the phrases "now under federal jurisdiction" and "recognized Indian tribe" and how they work together.⁴³ In support of the following analysis, the background discussion contained in the Deputy Solicitor's Memorandum is incorporated herein by reference.

Analysis

Procedure for Determining Eligibility

As noted, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.⁴⁴ It is not, however, necessary to proceed through each step of

⁴² 25 C.F.R. Part 83.

⁴³ *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from the Deputy Solicitor for Indian Affairs to the Solicitor (Mar. 5, 2020) (Deputy Solicitor's Memorandum), available at https://www.bia.gov/sites/ia.gov/files/assets/bia/ots/pdf/20200812_DEP_SOL_to_SOL_Slip_Pages.pdf

⁴⁴ Solicitor's Guidance at 1.

the procedure for every fee-to-trust application.⁴⁵ The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.⁴⁶ Only in the absence of presumptive evidence should the inquiry proceed to Step Four, which requires the Department to weigh the totality of an applicant tribe's evidence.⁴⁷

Having identified no separate statutory authority making the IRA applicable to the Nation under Step One, our analysis proceeds to Step Two of the eligibility inquiry, which looks to whether any evidence unambiguously demonstrates that the Nation was under federal jurisdiction in 1934.⁴⁸ This criterion derives from an understanding of the meaning of the phrase "under federal jurisdiction" as referring to the federal government's administration of its Indian affairs authority with respect to particular groups of Indians. Certain federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934. These include elections conducted by the Department pursuant to Section 18 of the IRA; approval by the Secretary of a constitution following an election held pursuant to Section 16 of the IRA; issuance of a charter of incorporation following a petition submitted pursuant to Section 17 of the IRA; adjudicated treaty rights; inclusion in 1934 on the Department's Indian Population Report; and land acquisitions by the United States for groups of Indians in the years leading up to 1934.⁴⁹ It also includes the continuing existence of treaty rights and federal legislation addressing a particular tribe.⁵⁰ Where any of these forms of evidence exist, then the Solicitor's Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.⁵¹ The Nation, as explained below, provided unambiguous evidence under Step Two that it was "under federal jurisdiction" in 1934 and therefore eligible for the benefits of Section 5 of the IRA.

Dispositive Evidence of Federal Jurisdiction in 1934

By expressly referencing Chickasaw, Section 13 of the IRA provides dispositive evidence that the Nation was under federal jurisdiction in 1934. Though the IRA is a statute of general applicability, it includes provisions that are applicable to specific Indian groups.⁵² These include Section 13 of the IRA, which exempts specific tribes in the State of Oklahoma, including the Chickasaw, from the application of certain IRA provisions.⁵³ Section 13 provides in relevant part:

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 2-4.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 2.

⁵² See, e.g., IRA, § 3 (addressing Papago Tribe); *id.*, § 14 (addressing Sioux Indians); *id.*, § 13 (addressing Indians in the Territory of Alaska).

⁵³ By 1934, specific statutes applied to the Five Civilized Tribes and Osage Nation and to the land base of Oklahoma tribes. Similarly, specific provisions in the IRA addressed Alaska where there were few reservations.

[...] That sections 2, 4, 7, 16, 17 and 18⁵⁴ of this title shall not apply to the 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, Pottawatomie, Cherokee, Chickasaw, Choctaw, Creek and Seminole.⁵⁵

Thus, the Nation's inclusion in the list of tribes in Section 13 provides unambiguous evidence that Congress understood the Nation to be under federal jurisdiction at the time of the IRA's enactment in 1934. It is further worth noting that Section 13 did not exempt the named Oklahoma tribes from application of Section 5. As the IRA's legislative history shows, Congress understood that Section 5 would remain a source of authority for the Secretary to accept land in trust even for those Oklahoma tribes, including the Nation.⁵⁶

Conclusion

Consistent with Step Two of the Solicitor's Guidance, the inclusion of Chickasaw in Section 13 of the IRA unambiguously established that the United States considered the Nation to be under federal jurisdiction in 1934. As such, the Nation satisfies the definition of "Indian" contained in Category 1. We, therefore, conclude that the Secretary has the authority to acquire land in trust for the Nation under Section 5 of the IRA.

⁵⁴ Section 2 (25 U.S.C. § 5102) extended the existing periods of trust and any restriction on alienation placed upon Indian lands. Section 4 (25 U.S.C. § 5107) 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 (25 U.S.C. § 5110) authorized the Secretary to proclaim new reservations or add lands to existing reservations. Section 16 (25 U.S.C. § 5123) provided that any Indian tribe, or tribes, residing on the same reservation, the right to organize and adopt a constitution. Section 17 (25 U.S.C. § 5124) 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 (25 U.S.C. § 5125) provided that the adult Indians on any reservation could vote in a special election to opt out of the IRA.

⁵⁵ 25 U.S.C. § 5118.

⁵⁶ Members of the Oklahoma Congressional delegation held a similar understanding at the time. *See* 78 Cong. Rec. 11125-26 (June 12, 1934) (remarks of Senator Thomas of Oklahoma) (offering amendment, adopted by Congress, so as to make Section 5 available to individual Indians "not only in my State for individual Indians but in other States where Indian lands have been allotted." *See also*, 78 Cong. Rec. 11739 (June 15, 1934) (remarks of Representative Hastings of Oklahoma) (noting exemption of Oklahoma tribes from certain sections of the IRA and not objecting "to assistance by the Government in the form of and to the extent of the purchase of land for landless and indigent Indians").

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

Section 151.10(b) requires the Secretary to consider the tribe's need for additional land.

The Nation currently has approximately 6,491.60 acres of land held in trust by the United States, which is only 0.13 percent of what it held prior to allotment.⁵⁷ The Nation needs additional land to reduce jurisdictional checkerboarding and expand its land base so that it can pursue economic development opportunities.

The Nation seeks to increase revenue for social, housing, education, and health services to improve the quality of life for its citizens. The acquisition of additional land will advance the Nation's initiatives to consolidate its land base and promote tribal self-determination, economic development, and associated self-sufficiency. For example, acquisition of the Site in trust will provide additional employment opportunities for the Nation's citizens. Development of the Proposed Project will provide capital for other economic development and investment opportunities, and facilitate economic self-sufficiency and self-determination.

The Regional Director found, and we concur, that the Nation needs additional land for economic development.⁵⁸

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

Section 151.10(c) requires the Secretary to consider the purposes for which land will be used in evaluating a trust application.

The 248.09-acre Site is currently vacant, rural land. The Nation's proposed 40,835-square foot (sf) gaming facility will be developed on approximately 14.26 acres within the Site. The facility will have a 20,830-sf gaming floor with approximately 700 gaming machines and eight table games.⁵⁹ The remainder of the facility will be comprised of a restaurant and sports bar, retail space, and back-of-house areas. Approximately 984 surface-level parking spaces will be constructed to accommodate both patrons and employees. The Proposed Project will create 213 direct and indirect jobs.

⁵⁷ Regional Director's Findings of Fact at 11.

⁵⁸ *Id.* at 11 - 14.

⁵⁹ EA § 2. 1. 1.

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 the land from the tax rolls

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

By correspondence dated June 27, 2016, the BIA solicited, but received no comments, from the following state and local governments regarding the potential impact of the proposed acquisition on regulatory jurisdiction, real property taxes, and special assessments:⁶⁰

- Governor of Oklahoma
- Oklahoma Tax Commission
- Carter County Commissioners
- Carter County Treasurer
- Carter County Assessor
- Mayor, City of Ardmore
- Chief of Police, City of Ardmore

Real property in Oklahoma is subject to state ad valorem taxes. The Carter County Assessor last assessed taxes on the Site in 2015 for \$5,301.00.⁶¹ Beginning in 2016, the Carter County Assessor's rolls listed the Site as non-taxable property.⁶² Since then, Carter County has assessed no taxes for the Site.

Economic Output and Employment

Carter County does not tax the Site, thus, there will be no impacts on the State and its political subdivisions from its removal from the tax rolls. Nonetheless, any potential impacts from the loss of the state and local tax revenue will be more than offset by increased economic output from the construction and operation of the Proposed Project. The total estimated economic impact on the regional economy in year one is estimated to be \$102,394,029.⁶³ This amount includes the multiplied effect from the construction of the casino, annual revenue from operations, total annual compact fees, and annual employee state income taxes. Construction and operation of the Proposed Project will generate substantial temporary and ongoing employment opportunities and wages that would be primarily filled by the available labor force in the city of Ardmore and surrounding communities in Carter County.⁶⁴

⁶⁰ Regional Director's Findings of Fact at 15 - 16.

⁶¹ *Id.* at 17.

⁶² *Id.*

⁶³ Economic Impact Analysis, Lake Murray/Ardmore Gaming Development at 1 (April 2016), in EA Appendix B [hereinafter Economic Analysis].

⁶⁴ EA § 4.6.1.

The Proposed Project will impact the regional economy in three beneficial ways: 1) the direct impact of the initial construction spending and annual operating revenue of the casino and retail space; 2) the indirect impact of companies supplying the construction company, and companies supplying casino annual operations; and 3) the induced impact of the employees of the aforementioned companies receiving a paycheck and spending it in the regional economy.

Construction

The total impact on regional economic output from initial construction of the development is expected to be \$44,214,375.⁶⁵ This includes the direct impact of construction costs, the indirect impact of spending from the construction company suppliers, and the induced impact from spending from employees of these companies.

Operations

The total impact on regional economic output from the Proposed Project's annual revenue is expected to be \$57,093,713.⁶⁶ This includes the direct impact of revenue from the Proposed Project, the indirect impact of spending from suppliers, and the induced impact from spending by employees of these companies.

The Proposed Project will create 213 jobs. Of those, 128 will be new jobs, and 85 will be filled by employees expected to transfer from other Chickasaw facilities.⁶⁷ In addition, the Proposed Project will create 78 indirect and induced positions at other businesses, resulting in the creation of 206 new direct and indirect jobs (128 direct and 78 indirect).

Tax Impacts

The Proposed Project will generate new tax revenue. Annual state income tax withholdings from employees in year one at the Proposed Project are estimated to be \$117,471.⁶⁸ An estimated \$545,645 in annual payments will be made to Social Security and Medicare through employer and employment contributions. In addition, annual federal income tax withholdings from employees are estimated to be \$386,184, and annual State income taxes withholdings are estimated to be \$117,471.⁶⁹

Conclusion

Carter County assesses no taxes on the Site, thus, there will be no impacts from removal from the tax rolls. Nonetheless, the Regional Director found, and we concur, that any potential impacts

⁶⁵ EA § 4.6.1.

⁶⁶ Economic Analysis at 1.

⁶⁷ EA § 4.6.1.

⁶⁸ Economic Analysis at 1.

⁶⁹ *Id.* at 3.

from the loss of the state and federal tax revenue from removal of the Site from the tax rolls would be more than offset by the contributions and economic development provided by the Proposed Project.⁷⁰ The Proposed Project will result in beneficial impacts to employment and the regional economy. Increased local, state and federal tax revenue resulting from construction and operation of the Proposed Project will offset potential impacts to state and local governments resulting from removal of Site from the tax rolls.

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

Section 151.10(f) requires the Secretary to consider whether any jurisdictional problems and potential conflicts of land use may arise.

The Site is located in Carter County, Oklahoma. As discussed above, the BIA by correspondence dated June 27, 2016, requested comments regarding jurisdictional problems and potential conflicts of land use from state and local governments. The BIA received no comments in response.⁷¹

Land Use

The Site is undeveloped land located approximately four miles south of downtown Ardmore and less than one mile from the western entrance to Lake Murray State Park. The majority of the Site is located within the City limits; however, the southeastern portion of the Site is located on unincorporated County land.⁷² The Site is bounded on the west by a gas station and Carter Road, on the north by U.S. Highway 70 and the Ardmore Downtown Executive Airport, on the east by a residential property and Lake Murray State Park, and on the south by the Lake Murray State Park and other private property. The Site is primarily zoned as agricultural with a portion in the southeast identified as un-zoned rural land.

Approximately 14.26 acres of the Site will be developed with the Proposed Project. The development will differ from adjacent agricultural land uses, but would not disrupt, prohibit access to, or conflict with neighboring land uses. The remaining 233.83 acres will remain undeveloped. The proposed site plan minimizes the potential for land use conflicts by locating the Proposed Project in the central portion of the Site, leaving large open space buffers around the Site's perimeter. A portion of the Site is located within the approach zone of the airport. An easement maintained by the City restricts the heights of structures and trees. The Proposed Project would not conflict with the height restrictions. The Ardmore Development Authority did not identify land use conflicts from the Proposed Project.⁷³

⁷⁰ Regional Director's Findings of Fact at 16

⁷¹ *Id.* at 17.

⁷² EA § 12.

⁷³ *Id.* at §4.8.1.

Law Enforcement and Fire Protection

The Chickasaw Nation Lighthorse Police Department currently provides law enforcement services to the Site. If necessary, additional law enforcement services will be provided through the deputization agreements between the Bureau of Indian Affairs law enforcement and the State of Oklahoma and its subdivisions, including the Nation and the City of Ardmore Police Department.⁷⁴

The Ardmore Fire Department currently provides fire and first responder services, and has committed to continue services as indicated in its will-serve letter to the Nation dated May 20, 2016.⁷⁵ The Southern Oklahoma Ambulance Service stated that the Proposed Project will not exceed its capacity or impair its ability to provide services, and that it will provide emergency services to the Site as indicated in its will-serve letter to the Nation dated May 19, 2016.⁷⁶

The Regional Director found, and we concur, that the transfer of the Site into trust would not cause conflicts of land use or other jurisdictional problems.⁷⁷

25 C.F.R. § 151.10(g) - If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

Section 151.10(g) requires the Secretary to determine whether the BIA has the resources to assume additional responsibilities if the land is acquired in trust.

The BIA Chickasaw Agency is responsible for the administration of the realty program functions associated with the management of trust lands within its administrative jurisdiction. The Regional Director determined that the Chickasaw Agency has adequate resources to assume the additional responsibilities resulting from the acquisition of the Site in trust.⁷⁸

25 C.F.R. § 151.10(h) - The extent to which the applicant has provided information that allows 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

Section 151.10(h) requires the Secretary to consider the availability of information necessary for compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and a determination on the presence of hazardous substances.

⁷⁴ *Id.*, Appendix E.

⁷⁵ *Id.*, Appendix K, no. 28.

⁷⁶ *Id.*, no. 29.

⁷⁷ Regional Director's Findings of Fact at 18

⁷⁸ *Id.*

602 DM 2, Land Acquisitions: Hazardous Substances Determinations

The BIA reviewed the Phase I Environmental Site Assessment (ESA) for the Site in August 2016.⁷⁹ The ESA identified no historic or current Recognized Environmental Concerns. The BIA found the ESA complied with the ASTM Standard E 1527-13. An updated ESA will be completed prior to transferring the Site into trust.

National Environmental Policy Act

The BIA prepared an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C § 4321 *et seq.* The EA evaluated the transfer of the Site into trust and the subsequent development of the Proposed Project by the Nation. The BIA made the EA available for public comment from February 15, 2019, through March 18, 2019.⁸⁰ The BIA received no comments from the public. The EA is available at www.ardmorecasinoea.com.

The BIA considered two alternatives:

Alternative A - Proposed Casino-Resort Alternative

Under the Alternative A, the Department will transfer the approximately 248.09-acre Site into trust for the benefit of the Nation. The Nation proposes to subsequently develop approximately 14.26 acres on the Site by constructing a 40,835 sf gaming facility that will contain 700 gaming machines and eight table games. The gaming facility will also include a restaurant and sports bar, retail space, and back-of-house areas. Approximately 984 parking spaces will be constructed to accommodate patrons and employees. Alternative A will provide 206 new direct and indirect jobs.

Alternative B - No Action Alternative

Under the No Action Alternative, the Department will not transfer the Site into trust for the benefit of the Nation, no development will occur, and the land will remain in its existing condition.

Selection of Preferred Alternative

We have determined that the Department will implement Alternative A as the Preferred Alternative. This decision is based on the environmental analysis in the EA, a consideration of economic and technical factors, and the purpose and need for action. Of the alternatives evaluated in the EA, Alternative A will best meet the purpose and need for action because it best

⁷⁹ See Regional Director's Findings of Fact, Attachment 28 (Memorandum to Superintendent, Chickasaw Agency, from Acting Regional Director, Eastern Oklahoma Region (Aug. 19, 2016)).

⁸⁰ *Id.* at 19-20.

promotes the long-term economic development and self-sufficiency, self-determination, and self-governance of the Nation.

Environmental Analysis

The BIA evaluated in the EA potential impacts to land resources; water resources; air quality; biological resources; cultural resources; socioeconomic conditions; transportation networks; land use; public services; visual resources; noise; and hazardous materials. The EA describes the Best Management Practices (BMPs) in Section 2.1.2 that are incorporated into the project design to eliminate or substantially reduce any environmental consequences to less-than-significant levels.

Findings

As discussed in detail in the EA and Finding of No Significant Impact (FONSI), we conclude that the development of the Proposed Project on the Site will not result in significant impacts to the human environment, and, therefore, an environmental impact statement is not required. The EA is available at www.ardmorecasinoea.com. The FONSI is included as Enclosure 3.

NEPA Determination

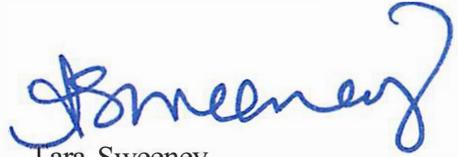
Based on the findings in the EA, I determine that transferring the Ardmore Tract into trust and the subsequent development of the Proposed Project by the Nation will have no significant impact on the quality of the human environment. In accordance with Section 102(2)(c) of NEPA, an environmental impact statement is not required. This fulfills the requirements of NEPA as set out in the Council on Environmental Quality Regulations for implementing NEPA, 40 C.F.R. Parts 1500-1508, and the BIA NEPA Guidebook, 59 IAM 3-H, August 2012.

Decision to approve the Nation's fee-to-trust application

Pursuant to Section 5 of the IRA, 25 U.S.C. § 5108, the Department will acquire the Ardmore Site in trust for the Chickasaw Nation. Further, pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(a), the Ardmore Site will be eligible for gaming upon its acquisition in trust. Consistent with applicable law, upon completion of the requirements of 25 C.F.R. § 151.13 and any other

Departmental requirements, the Regional Director shall immediately acquire the Ardmore Site in trust. This decision constitutes a final agency action under 5 U.S.C. § 704.

Sincerely,



Tara Sweeney
Assistant Secretary - Indian Affairs

Enclosures

cc: Director, Eastern Oklahoma Region, Bureau of Indian Affairs