



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 of Oklahoma (Nation) submitted to the Bureau of Indian Affairs (BIA) an application to transfer into trust two parcels of lands, totaling approximately 61.63 acres and collectively known as the Kingston Property, near the City of Kingston, Marshall County, Oklahoma (Site) for gaming and other purposes.¹ Nation also requested a determination of eligibility to conduct gaming on the Site. The Nation seeks to develop 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 the Indian Reorganization Act, 25 U.S.C. § 5108. Once transferred into trust, the Nation may conduct gaming on the Site pursuant to 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 Anoatubby, Governor, Chickasaw Nation (Sept. 8, 2017), transmitting *Application for Fee-to-Trust (Gaming Eligible) Pursuant to 25 C.F.R. Part 151, Kingston Site* (Sept. 2017) (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 approximately 3 miles east of the City of Kingston in Marshall County.¹² The Nation has held the Site in fee since 2017.¹³ The Site consists of two parcels - the approximately 11.71-acre west parcel and the approximately 49.92-acre east parcel. The west parcel, located a half a mile from the east parcel, will be used for treatment lagoons for wastewater generated by the casino-resort located on the east parcel. 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 2719 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 Memorandum to Deputy Director, Office of Indian Gaming, from Acting Regional Director, Eastern Oklahoma Region (Jan. 30, 2020) [hereinafter Acting Regional Director's Findings of Fact] at 15.

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.*

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).¹⁵

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 5 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 5 of the IRA.

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

Section 151.3(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.

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.

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.

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

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 Marshall County was 16,376 in 2018, with American Indians and Alaska Natives making up 7.5 percent of the population in the County.²⁰ At that time, the poverty rate of the general population in Marshall County was 15.9 percent. Of that, American Indians and Alaska Natives made up 19.7 percent despite making up only 7.5 percent of the population.²¹

Similarly, the population of the City of Kingston was 1,714 in 2018, with American Indians and Alaska Natives making up 11.7 percent of the population in Kingston.²² At that time, 14.1 percent of the general population of Kingston was below the poverty rate. Of that, American Indians and Alaska Natives made up 25.8 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, 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. 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

~~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 Acting Regional Director's Findings of Fact at 6.

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=Marshall%20County%20Oklahoma&tid=ACSDP5Y2018.DP05&hidePreview=false> (last visited September 1, 2020).

²¹ *Id.* (Poverty Status in the Past 12 Months) available at <https://data.census.gov/cedsci/table?q=Marshall%20County%20Oklahoma&t=Income%20and%20Poverty&tid=ACSST5Y2018.S1701&hidePreview=false> (last visited Sept. 1, 2020).

²² *Id.* (Demographic and Housing Estimates) available at <https://data.census.gov/cedsci/table?q=Kingston%20Oklahoma&tid=ACSDP5Y2018.DP05&hidePreview=false> (last visited Sept. 1, 2020).

²³ *Id.* (Poverty Status in the Past 12 Months) available at <https://data.census.gov/cedsci/table?t=Income%20and%20Poverty&tid=ACSST5Y2018.S1701&hidePreview=false> (last visited Sept. 1, 2020).

²⁴ Acting Regional Director's Findings of Fact at 8.

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

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.

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

²⁶ *Id.*

²⁷ *Id.*

²⁸ Acting Regional Director's Findings of Fact at 9-10.

²⁹ *Id.* at 11-12.

- 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 an 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

- 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.

³⁰ Nation's 2020 Needs Analysis at 2.

³¹ Acting Regional Director's Findings of Fact at 11-12.

- 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 found, 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 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

³² *Id.* at 11.

³³ *Id.* at 7.

³⁴ *Id.* at 14.

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 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,

³⁵ 25 U.S.C. § 5108.

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

³⁷ 555 U.S. 379 (2009) (*Carcieri*).

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>.

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.

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

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/or 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_ProceduresFor_Determining_EligibilityFor_land_into_Trust_under_Category_1.pdf.

⁴² 25 C.F.R. Part 83.

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 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

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/bia.gov/files/assets/bialots/pdp202008/2_DEP_SOL_to_SOL_Slip_Pages.pdf

⁴⁴ Solicitor's Guidance at 1.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Id.* at 2.

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:

[...] 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, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek and Seminole.⁵⁵

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.

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.

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.

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

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").

⁵⁷ Acting Regional Director's Findings of Fact at 15.

⁵⁸ *Id.* at 15-21.

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 Nation proposes to develop a casino-resort and associated facilities on the Site. Proposed facilities include a casino with a 9,633-square foot (sf) gaming floor with 300 gaming machines and five table games.⁵⁹ The casino will be open 24 hours a day, 7 days a week. The Site will also include a 40-room hotel, restaurant and retail space, meeting space, and back-of-house areas. Approximately 556 surface-level parking spaces will be constructed to accommodate patrons and employees. The Nation will also construct 10 rental cabins along Lake Texoma. The Proposed Project will create 174 direct and indirect new employment opportunities.

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 October 10, 2017, the BIA solicited 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
- Marshall County Commissioners
- Marshall County Treasurer
- Marshall County Assessor
- Marshall County Sheriff

Prior to its sale in October 2016, the State owned the Site and collected no taxes. The Marshall County Assessor's office responded to the BIA's request for comments stating that property taxes in the amount of \$36,009 were assessed against the subject property for tax year 2017, there were no special assessments or governmental services being provided to the property, and there is no zoning in that part of the county.⁶¹ The BIA received no additional comments.

As discussed below, potential impacts from the loss of the state and federal **tax** revenue will be more than offset by increased economic output from the construction and operation of the Proposed Project.

⁵⁹ *Environmental Assessment, Chickasaw Nation, Kingston Casino Resort Project (EA)*, § 2.1.1.

⁶⁰ Acting Regional Director's Findings of Fact, Exhibit 18

⁶¹ See Letter to S. Ashley Large, Bureau of Indian Affairs, Eastern Oklahoma Regions, Chickasaw Agency, from Debbie Croasdale, Marshall County Assessor (Oct. 16, 2017), in Acting Regional Director's Findings of Fact, Exhibit 19.

Economic Output and Employment

The Proposed Project would result in a variety of benefits to the regional economy, including increases in overall economic output, and employment opportunities. Construction and operation of the Proposed Project would generate substantial temporary and ongoing employment opportunities and wages that would be primarily filled by the available labor force in Marshall County.⁶²

The total estimated economic impact on the regional economy in year one for the Proposed Project is estimated to be approximately \$58 million.⁶³ The five-year total estimated economic impact on the regional economy from the Proposed Project is approximately \$168 million.⁶⁴

The Proposed Project will impact the regional economy in three beneficial ways.⁶⁵ First, the direct impact of the initial construction spending and annual operating revenue of the casino and retail space. Second, the indirect impact of companies supplying the construction company, and companies supplying casino annual operations. Third, the induced impact of the employees of all the aforementioned companies receiving a paycheck and spending it in the regional economy.

Construction

The total construction costs for the Proposed Project are estimated to be \$19,420,000.⁶⁶ After including, 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, the total impact on regional economic output from initial construction of the development is estimated to be \$34,345,727.⁶⁷

New one-time employment opportunities throughout Marshall County would be generated during the construction phase of the Proposed Project.

Operations

Annual revenue from the operations is estimated to be \$15,862,427.⁶⁸ By including the direct impact of revenue from the casino and hotel, the indirect impact of spending from the casino and hotel suppliers, and the induced impact from spending from employees of these companies, the total impact on regional economic output from the development's annual revenue is estimated to be \$22,860,136.⁶⁹

⁶² EA § 4.6.1.

⁶³ Economic Impact Analysis of the Kingston Gaming Development at 2, in EA Appendix H (Economic Analysis).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Operation of the Proposed Project would generate 174 new full-time employment positions. These employment figures are net any loss of employees from the Nation's existing Texoma casino. Of the 174 jobs generated, 108 would be a direct result of the Proposed Project, while the remaining 66 consist of indirect and induced employment opportunities.

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 \$79,209.⁷⁰ An estimated \$367,919 in annual payments will be made to Social Security and Medicare through employer and employment contributions. In addition, annual federal income taxes withholdings from employees are estimated to be \$260,397, and annual State income taxes withholdings are estimated to be \$79,209.⁷¹

Conclusion

The Acting Regional Director found, and we concur, that any potential impacts 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.⁷² 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(1) - 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.

As discussed above, the BIA by correspondence dated October 10, 2017, requested comments regarding jurisdictional problems and potential conflicts of land use from state and local governments. The BIA received no comments in response.⁷³

Land Use

The Site consists of the approximately 11.71-acre west parcel and the approximately 49.92-acre east parcel. The west parcel is located approximately half a mile from the east parcel. The west parcel will be used for wastewater treatment and the east parcel will be used for the casino-

⁷⁰ *Id.* at 1.

⁷¹ *Id.* at 3.

⁷² Acting Regional Director's Findings of Fact at 24.

⁷³ *Id.* at 25.

resort. The entire Site is located on unzoned rural land outside of the incorporated limits of any municipalities in Marshall County.⁷⁴

From the 1950s to 2008, the east parcel was part of Lake Texoma State Park, and included park infrastructure including a lodge, cabins, campsites, picnic areas and shelters, boat rentals, and a gift shop.⁷⁵ The State authorized the sale of the park in 2005 to a developer who planned to build a hotel and water park on the site, but abandoned those plans and sold the Site back to the state.⁷⁶ The Nation subsequently purchased the Site in 2008.

Portions of the east parcel still contain unused park infrastructure such as paved surfaces and vacant buildings. Most of the east parcel is undeveloped and covered in natural vegetation. The west parcel is undeveloped and consists of cleared fields with a heavily wooded border.

Lake Texoma State Park, which has recreational amenities such as campgrounds, picnic areas, and boat docks, borders the east parcel to the south and east. Other nearby land uses include the Chickasaw Pointe Golf Course to the north, and Catfish Bay, a private marina, approximately one third of a mile southeast of the east parcel. A small local airstrip owned by the U.S. Army Corps of Engineers is located between the east and west parcels. The FAA determined there would be no hazard to air navigation from the Proposed Project.⁷⁷ An abandoned golf course lies to the southwest of the east parcel, a portion of which is located within the southern portion of the east parcel. The adjacent property south of the west parcel contains existing wastewater lagoons. A residential neighborhood is located approximately 500 feet west of the west parcel.

The Proposed Project will be compatible with regional recreational uses in the area, including golfing, fishing, boating, camping and tourism activities.⁷⁸ The addition of wastewater lagoons on the west parcel are consistent with the wastewater lagoons on the adjacent property. The Proposed Project would not introduce a new land use in the area that would be incompatible with neighboring land uses. The Proposed Project would not physically disrupt neighboring land uses, prohibit access to neighboring parcels, or otherwise significantly conflict with neighboring land uses.

Law Enforcement and Fire Protection

The Chickasaw Nation Lighthorse Police Department currently provides law enforcement services to the Site.⁷⁹ If necessary, additional law enforcement services will be provided through the cross-deputization agreements between the Chickasaw Nation, Bureau of Indian Affairs, and the State of Oklahoma and its subdivisions, including Marshall County Sheriffs Office and the City of Kingston Police Department.⁸⁰ The Kingston Fire Department provides fire response

⁷⁴ EA § 3.8.2.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ EA § 4.8. 1.

⁷⁸ *Id.*

⁷⁹ *Id.* at § 4.9.1.

⁸⁰ Acting Regional Director's Findings of Fact at 25, Attachments 45-49 (Cross Deputization Agreements between the BIA, Nation, State of Oklahoma, Marshall County, and City of Kingston).

services to the Site. Marshal County will provides emergency services to the Site. Both have committed to the continuation of services to the Site after its transfer into trust.⁸¹

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.⁸²

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.⁸³

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.

602 DM 2, Land Acquisitions: Hazardous Substances Determinations

The BIA reviewed the Phase I Environmental Site Assessment (ESA) for the Site in April 2016.⁸⁴ 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

⁸¹ EA § 4.9.1, Appendix C (will-serve letter provided to the Nation on February 14, 2017).

⁸² Acting Regional Director's Findings of Fact at 25.

⁸³ *Id.* at 25-26.

⁸⁴ *See id.* at 26.

available for public comment from March 12, 2020 to April 13, 2020.⁸⁵ The BIA received no comments from the public. The EA is available www.kingstoncasinoea.com.

The BIA considered three alternatives:

Alternative A - Proposed Project

Alternative A consists of the transfer of the approximately 61.63-acre Site into trust.⁸⁶ The Site consists of two parcels - the approximately 11.71-acre west parcel and the approximately 49.92-acre east parcel. Under Alternative A, the Nation proposes to develop a casino-resort and associated facilities on the west parcel. Proposed facilities include a casino with a 9,633-square sf gaming floor with 300 gaming machines and five table games.⁸⁷ The Proposed Project would also include a 40-room hotel, restaurant and retail space, meeting space, and back-of-house areas. Approximately 556 surface-level parking spaces would be constructed to accommodate patrons and employees. The Nation would also construct 10 rental cabins along Lake Texoma. The west parcel would be used for treatment lagoons for wastewater generated by the casino-resort. The casino-resort would be open 24 hours a day, 7 days a week.

Alternative B - Reduced Intensity Alternative

Alternative B consists of the transfer of the Site into trust and the subsequent development of a casino-resort on the east parcel. The west parcel would be used for treatment lagoons for wastewater generated by the casino-resort. Alternative B is similar to Alternative A, except that the casino resort and associated facilities would be reduced in size and no cabins would be developed.

Alternative C - No Action Alternative

Under the No Action Alternative, the Department would not transfer the Site into trust, no development would occur, and the land would 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 promotes the long-term economic development and self-sufficiency, self-determination, and self-governance of the Nation.

⁸⁵ Email to Maria Wiseman, Deputy Director, Office of Indian Gaming, from Gus Porter, Realty Office, Chickasaw Agency (May 11, 2020).

⁸⁶ We note that the Acting Regional Director identifies the Site as consisting of approximately 61.63 acres (east parcel 49.92 acres and west parcel 11.71 acres), whereas the EA rounds the acreage up to 61.7. See Memorandum to Deputy Director, Office of Indian Gaming, from Acting Regional Director, Eastern Oklahoma Region (Jan. 30, 2020), Acting Regional Director's Findings of Fact at 6.

⁸⁷ EA § 2.1.1.

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.kingstoncasinoea.com. The FONSI is included as Enclosure 3.

NEPA Determination

Based on the findings in the EA, I determine that transferring the Kingston Site 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 Kingston Site in trust for the Chickasaw Nation. Further, pursuant to Section 2719 of IGRA, 25 U.S.C. § 2719(a), the Kingston 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 Kingston 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