

Indian Gaming Management
MS 2070-MIB

SEP 27 1995

Memorandum

To: Ada E. Deer
Assistant Secretary - Indian Affairs.

Through: Deputy Commissioner of Indian Affairs

From: George T. Skibine
Director, Indian Gaming Management Staff

Subject: Application of the Mohegan Tribe of Connecticut for Acquisition of Fee-to-trust
Property for Gaming Use

INTRODUCTION

By memorandum dated February 27, 1995, the Eastern Area Director (EAD) transmitted to the Assistant Secretary - Indian Affairs (AS-IA), the request of the Mohegan Tribe of Indians of Connecticut (Tribe) to acquire fee property in trust for gaming purposes, and supporting documentation. The Tribe's request and the EAD's recommendation were submitted in accordance with a July 19, 1990 Secretarial directive, which requires that all land acquisitions for gaming be approved or disapproved by the AS-IA. The documents were referred to the Indian Gaming Management Staff (IGMS). The IGMS has completed its review of the request and the supporting documentation. The findings, analysis, and recommendations of the IGMS are set forth in this memorandum for your final consideration.

This memorandum documents the findings of the transaction's compliance with the requirements of Section 20 of the Indian Gaming Regulatory Act (IGRA), and the land acquisition regulations in 25 CFR Part 151.

I. PROPERTY TO BE ACQUIRED

The land is an irregularly shaped parcel on the southeasterly side of Sandy Desert Road, the southeasterly side of Connecticut Route No. 32, the northeasterly side of Broadview Avenue, and the northwesterly side of Fort Shantok Road in the Town of Montville, County of New London and State of Connecticut. The property is located within the Tribe's ancestral territory in eastern

Connecticut about 12 miles north of New London, Connecticut. It is generally bound by the Thames River to the east, Trading Cove to the north, and residences and roadways to the west and south. An existing facility uses approximately 20 acres of the property. The remainder of the land is generally wooded. The property is accessible from an existing network of nearby Interstate and state highways (Exhibit U, Pg. 22).

The Tribe's resolution 94-71281 (Exhibit M) incorporates "Exhibit A" as the approximately 240 acres to be acquired in trust. The copy of the attachment under the Exhibit M, although not marked "Exhibit A," is a Quit Claim Deed whereby United Nuclear Corporation quit claim to UNC Resources, Inc. all right and title to the described property. The legal description set forth in the Quit Claim Deed is not identical to the survey map (Exhibit K) nor the narrative description (Exhibit L) provided. The Quit Claim Deed does not state the number of acres in the parcel.

The property is also particularly shown and delineated on a map entitled "Harris & Clark, Inc. Land Surveyors - Civil Engineers Giswold, Connecticut Survey Plan Prepared For the Mohegan Tribe Of Indians (U.N.C., Inc. Property) Sandy Desert Road Montville, Connecticut Scale 1" = 200' Date December 1994 Ident. No. 94-1801," (Exhibits K & L).

The facility was formerly occupied by United Nuclear Corporation Naval Projects Manufacturing (UNC), a naval products manufacturer. The UNC facility is a 430,000-square foot single-level complex built between 1957 and 1989. The last products manufactured by UNC were delivered in late 1991, and since then the plant has been in the process of decommissioning (Exhibit U, Pg. 1 & 2).

II. TITLE TO THE PROPERTY

The property is owned by UNC Incorporated. Under an Option and Purchase Contract between UNC and The Mohegan Tribe, the Tribe proposes to purchase the property and all improvements for \$25,000,000. An agreement amendment raised the price to \$27 million. The option price was \$50,000 to April 1, 1994. An option extension to September 1, 1994, was exercised for \$25,000. The option payments are to be applied to the purchase price. An option period extension has been given the Tribe, but the terms have not been supplied as part of the application. The property is to be conveyed in fee simple title (Exhibit F). The Southeast Regional Office of the Office of the Solicitor (Solicitor) review indicates that the title to the subject lands was vested in UNC, Inc.

Two preliminary title opinions were issued by the Solicitor's Office (August 22, 1994, and July 28, 1995). The Solicitor's review indicates that title to the land was subject to a number of special exceptions. By letter dated September 6, 1994, the EAD notified the Chief of the Tribe of the curative actions required (Exhibit 5). The Chief of the Tribe responded by letter dated February 9, 1995, that the Tribe is working diligently to remove most of those exceptions from the title before closing takes place. He indicated that some had already been removed. By letter dated August 5, 1995, the EAD notified the Tribe of additional curative action required.

A *COMMITMENT FOR TITLE INSURANCE* has been issued by Chicago Title Insurance Company (Title Number 9541-40055A); the effective date is January 3, 1995. The description of the property insured is shown on Schedule A. The metes and bounds description on the two pages needs to be clarified. It appears that some of the pages of the legal description may be

"missing." At the onset, it appears that the legal description of the property conforms to the legal description of the property described in Quit Claim Deed whereby United Nuclear Corporation. executed to UNC Resources, Inc. on July 1, 1983; recorded August 10, 1984, at Volume 160, Page 552 of Montville Land Records (Exhibit 5). However, the description is disrupted and picks up again with the closing legal description of Quit Claim Deed.

RECOMMENDATION: The EAD should obtain verification from Chicago Title Insurance Company that the insured property conforms and includes all of the property which is to be acquired in trust. Also, the EAD should verify that the legal description of the property to be acquired in trust is within the legal limits of the law if the survey description is to be used rather than the description of the initial receiving conveyance document. Prior to any approval of an instrument taking the land in trust, the EAD should document the file of his awareness of the exceptions and other concerns indicated in the Solicitor's preliminary title opinions and indicate the disposition of each Special and General exceptions listed in the Solicitor's opinions.

III. IGRA FINDINGS OF FACT

Section 20(b)(1)(B)(ii) of the IGRA, 25 U.S.C. 2719(1)(B)(ii), provides that the prohibition against gaming on newly-acquired lands shall not apply if the lands are taken into trust as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." The Tribe did not have a reservation on October 17, 1988. However, a final determination that the Mohegan Indian Tribe of Connecticut, Inc. exists as an Indian Tribe was published in the FEDERAL REGISTER on March 15, 1994, 59 FR 12140. Section 5(a) of the Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L.

103-377, 25 U.S.C. 1775c, provides, with respect to certain lands acquired for the Mohegan Tribe, including the parcel involved here, that "[s]uch lands shall be held by the United States in trust for the use and benefit of the Mohegan Tribe as the initial Indian Reservation of the Mohegan Tribe." It is our conclusion that the parcel of land to be acquired is exempt from the prohibition against gaming on after-acquired lands.

IV. COMPLIANCE WITH LAND ACQUISITION REGULATIONS

Section 5(a) of the Mohegan Land Settlement Act, 25 U.S.C. 1775c provides as follows:

Subject to the environmental requirements that apply to land acquisitions covered under part 151 of title 25, Code of Federal Regulations (or any subsequent similar regulation), the Secretary shall take such action as may be necessary to facilitate the conveyance to the United States of title to lands described in exhibits A and B of the State Agreement. Such lands shall be held by the United States in trust for the use and benefit of the Mohegan Tribe as the initial reservation of the Mohegan Tribe.

In our opinion, an analysis of the demands under 25 CFR Part 151 is unnecessary in light of the statutory mandate which only requires compliance with environmental requirements. However, Part 151 requirements have been complied with by the EAD, and we offer the following analysis under Part 151 as a precautionary measure.

A. 25 CFR 151.10(a)-The existence of statutory authority for the acquisition and any limitation contained in such authority.

The statutory authority for the Tribe to acquire land in trust is the Mohegan Nation Connecticut Land Claims Settlement Act of 1994 (the Act of 1994), 25 U.S.C. 1775 (Tab C). The Tribe is a federally recognized Indian tribe located in the State of Connecticut. The Mohegan Tribe of Connecticut received its Federal acknowledgment on March 15, 1994, Vol. 59, No. 50, Federal Register, 12140-12141 (Exhibit A). The Tribe is governed by a Constitution (Exhibit P). This exhibit has no signatures, no dates, no approvals to indicate that it is a viable document. However, a certification of election results signed by Chief Sturges, and dated September 15, 1994, was submitted by the Tribe at our request.

On July 28, 1994, the Tribe enacted Resolution No. 94-71281, to request that 250 acres be taken in trust status for the Tribe. The legal description of the property attached to the resolution is the description taken from the Quit Claim Deed rather than the survey map. However, the draft conveyance document for acceptance in trust status uses the legal description of the survey map.

B. 25 CFR 151.10(b) The Deed of the individual Indian or the tribe for additional land.

Currently the Tribe owns only the Church Property (0.4 acre lot). Unless land is acquired, the Tribe cannot realize benefits as contemplated in the State Settlement Agreement. This land must be acquired in trust for establishment of the reservation and to permit the Tribe to pursue an economic development effort of gaming. The site was chosen because of historical significance to the Tribe, its access to rail, water, and highway, and the existence of infrastructure and improvements which will permit economical conversion of the existing buildings.

C. 25 CFR 151.10(c) The purposes for which the land will be used.

This land establishes a reservation with a sufficient land base for the Tribe to pursue self-determination and economic development. The Tribe's immediate plan is, to develop the Mohegan Destination Resort, which will include class III gaming, and perhaps class II gaming at a later stage. The Mohegan Destination Resort will convert a 430,000 square foot vacant manufacturing plant into an innovative "must see" destination casino/hotel/resort complex. The casino will occupy approximately 100,000 square feet and will have 3,000 slot machines, 180 game tables, and a 2,500-seat bingo hall. Parking for 7,500 cars will be provided. A 200-room hotel may be constructed next to the gaming facility at a later stage. The hotel/resort will be a separate facility with no gaming.

The State and the Tribe have entered into a gaming compact. The Act of 1994 which incorporates the Agreement between the State and the Tribe contemplates the acquisition of additional lands to be included in the Tribe's reservation other than the property in this action. The agreement restricts gaming to a single site; accordingly, gaming will be limited to the property in this action. The compact for the conduct of class III gaming was signed by the parties on May 17, 1994, and approved by the AS-IA on December 5, 1994 (Exhibit I).

The EAD states, that the Tribe has entered into a Management Agreement with Trading Cove Associates to develop the gaming site (Area Transmittal Memo, Part 3, Pg. 3). The agreement has been executed by all parties and the Tribe submitted the document to the National Indian Gaming Commission on August 2, 1994, and is awaiting a decision. The Management Agreement was not provided for review in this action.

D. 25 CFR 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.

The EAD did not exercise the current policy of notice to the political subdivisions to ascertain adverse impacts of removal of the property from the tax rolls in light of the statutory requirements of the Mohegan Land Settlement Act. There is no indication of the current assessments on the property. Any adverse impact on the removal of the land from the tax roll is considered to be mitigated in this instance. The Tribe states that the agreements between the State and the Tribe and the Town and the Tribe demonstrate that the impacts are acceptable. In addition, in a letter to Secretary Babbitt dated March 31, 1995, the Mayor of the Town of Montville has expressed his support for the proposed acquisition.

The consequences of removing the land from the tax roll appears to be a minor consideration that is offset by the projected revenues and benefits expected from the casino as well as designated payments to be made to the State and Town from the gaming revenues.

E. 25 CFR 151.10(f) Jurisdictional problems and potential conflicts of land use which may arise.

Jurisdictional problems and potential conflicts are addressed by the agreements with the State and the Town of Montville. Under the State agreement the State exercises criminal jurisdiction (concurrent with tribal jurisdiction) within the Tribe's reservation. The State Traffic Commission exercises traffic regulatory authority. The Tribe agrees to enact tribal building and health codes comparable to those in force within the State of Connecticut. The Tribe agrees to cooperate with the Town planning staff regarding traffic patterns and planning and zoning issues arising from gaming activities and other developments on Tribal lands (Exhibit BB, Pg. 11 & 12).

The assumption of criminal jurisdiction by the State pursuant to subsection (a) shall not be construed as a waiver of the jurisdiction of the United States under Section 1153 of Title 18, United States Code (25 USC 1775d).

The potential is minimal for jurisdictional conflicts arising from the acquisition and use of the land for gaming purposes because of the agreements the Tribe has entered into with the State and Town of Montville.

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

The EAD anticipates adding a general administrative officer to the Tribe's staff to oversee such activities as planning, traffic control, growth of the facility, adherence to zoning and building codes. The EAD says that the impact of the acquisition to the BIA Realty Office will be minimal. Guidance and oversight administration will be necessary, but will not appreciably add to the workload of the area office staff (Area Transmittal Memo, Pg. 7).

The Congress authorized the acquisition of this site as a component of the Tribe's initial reservation by passage of the Act of 1994. Implicit in that legislation is the determination that

resultant costs of administration, if any, are justified by the benefits produced by the settlement of claims accomplished by the legislation (Exhibit BB, Pg. 12).

V. REVIEW OF ENVIRONMENTAL DOCUMENTS RELATED TO PROPOSED MOHEGAN DESTINATION RESORT PROJECT

A. National Environmental Policy Act (NEPA) Compliance.

A Final Environmental Assessment of the Mohegan Destination Resort in Montville, Connecticut, prepared for the BIA and the NIGC on behalf of the Mohegan Tribe of Indians of Connecticut by Rizzo Associates, Inc., was issued on September 13, 1995.

Section 4.1 of the Environmental Assessment (EA) characterizes the Honey Hill Fault, which runs along the northern terminus of the proposed project, as being "essentially dormant." The IGMS Environmental Specialist disagrees with this characterization of the Fault. However, we have decided to accept the EA's determination in this instance because it is also supported by the environmental staff of the BIA's Eastern Area Office and the environmental staff of the NIGC. The EAD, the NIGC and the Solicitor's Office have prepared a Notice of Finding of No Significant Impact (FONSI) for the proposed Mohegan Destination Resort (copy attached). We have examined the EA and the proposed FONSI, and have determined that they comply with the requirements of NEPA. We recommend that you authorize the EAD to sign the FONSI.

B. Hazardous Substances Determination.

A Level I Contaminant Survey was prepared by the EAD in compliance with Secretarial Order No. 3127, 602 DM 2, the August 23, 1989, Interim Guidance on Land Acquisition issued by the Deputy Assistant Secretary, PBA. A memorandum to the Assistant Secretary - Policy, Management and Budget (AS-PMB), requesting approval of this survey was signed by the AS-IA on September 19, 1995. The AS-PMB must approve the survey before the property can be taken into trust because contaminants are present on the property. It is our understanding that this approval will be given.

It should be pointed out that the Nuclear Regulatory Commission has declared this site to be free of radioactive contaminants, although other types of hazardous wastes are still known to be present at a number of other sites on the property.

The letter of agreement dated October 5, 1994, (Exhibit G), between the Tribe and UNC requires UNC to undertake extensive remedial work at the site relative to hazardous contaminants. UNC has agreed to indemnify the United States for any subsequently discovered environmental hazards resulting from UNC's past use of the site. A document, ENVIRONMENTAL CERTIFICATION AND INDEMNITY AGREEMENT, has been prepared by the Solicitor's Office for review and execution by UNC and the AS-IA (Exhibit H). UNC has executed the document. We recommend that you execute this document on behalf of the Department of the Interior.

VI. REVIEW OF FINANCIAL AND LAND-RELATED COLLATERAL DOCUMENTS

The proposed financing structure for the Mohegan casino resort is as follows. The Tribe has formed a tribal governmental authority called the Mohegan Tribal Gaming Authority (Authority) for the purposes of holding and operating all of the Tribe's gaming assets and operations. The

Authority will be granted the exclusive right, under tribal law, to conduct all gaming operations for the Tribe. The Authority will lease the Property from the Tribe for an initial lease term of 25 years. The lease between the Tribe and the Authority will contain standard mortgage clauses which will provide lenders of the Authority with the right to cure defaults under the lease. Acquisition of the property and construction costs of the Mohegan Project are proposed to be funded by (i) a \$175 million offering of senior secured notes and (ii) a \$40 million subordinated loan from Sun International or one of its affiliates. Repayment of the Senior Secured Notes will be secured by a leasehold mortgage from the Authority to the Trustee. Payments of principal on the debt securities and the replenishment of cash reserves will be paid from the cash flow to be distributed to the Tribe pursuant to the Management Contract between the Tribe and Trading Cove and Associates.

Using the prudent investor standards for a trustee, the IGMS and the Eastern Area Office have reviewed the following documents that were submitted as part of the Tribe's acquisition package.

1. **Senior Secured Note Indenture** providing for the issue of \$175,000,000 Senior Secured Notes due 2002 by the Mohegan Tribal Gaming Authority to qualified institutional investors to finance the construction of a casino in Montville, Connecticut.
2. **Note Purchase Agreement** providing for the loan by Sun International Hotels Limited, 50 percent owner of the project Manager, to the Gaming Authority of \$40,000,000 to acquire land in trust in Montville, Connecticut, and providing working capital to the casino.
3. **Disbursement and Escrow Agreement** providing for the collection and disbursement of project funds by the Escrow Agent, Disbursement Agent, Trustee, Manager, Completion Guarantor, and Gaming Authority.
4. **Secured Completion Guarantee** providing for up to an additional \$50,000,000 in loans from Sun International to the Gaming Authority under the Note Purchase Agreement to ensure the completion of the project.
5. **Purchase Agreement** setting forth the representations and indemnifications of the Authority and the Initial Purchasers of the Senior Secured Notes.
6. **Open-End Construction-Permanent Leasehold Mortgage Deed, Assignment of Leases and Rents and Security Agreement** establishing a leasehold mortgage on the land lease from the Gaming Authority to the Trustee for the benefit of the holders of the Senior Secured Notes.
7. **Land Lease** in which the Mohegan Tribes leases the real estate in Montville, Connecticut to the Mohegan Tribal Gaming Authority for 25 years.
8. **Amended and Restated Gaming Facility Development & Construction Agreement** between the Tribe and the Manager setting forth terms for the scope and construction of the casino.

The NIGC has determined that these collateral documents to the Amended and Restated Gaming Facility Management Agreement were not subject to its approval under IGRA and implementing NIGC regulations. The Solicitor's Office has determined that documents 1 through 5 above were subject to the Secretary's approval authority under 25 U.S.C. 81, and documents 6

through 8 were subject to Secretarial approval under 25 U.S.C. 415 and implementing regulations in 25 CFR Part 162.

Amendments to the documents have been made by the parties thereto, ensuring that the trust asset is preserved and productive, and the trust responsibilities of the U.S. Government to the Indian tribe is fulfilled by the Secretary of the Interior. Copies of all letters and memoranda setting forth the BIA's concerns and requests for modifications of these agreements, and the Tribe's responses and corrective actions are attached. This office recommends that the above documents be approved by the Secretary as complying with the requirements of federal law under 25 U.S.C. 81 and/or 25 U.S.C. 415 and 25 CFR Part 162.

VII. AREA DIRECTOR'S RECOMMENDATION

The EAD, in its February 27, 1995, Memorandum, states that the application complies with the requirements of 25 CFR Part 151, and recommends that the land be taken into trust.

VIII. RECOMMENDATION

Our review indicates that the federal requirements for acquiring land in trust for gaming purposes have been satisfied by the EAD and the Mohegan Tribe of Connecticut. It is the recommendation of this office that the property be taken in trust for the benefit of the Tribe. We recommend that the EAD be authorized to approve the conveyance document accepting the property in trust for the Mohegan Tribe subject to any conditions set forth herein, including the approval of the Contaminant Survey by the AS-PMB and approval of all title requirements by the Office of the Regional Solicitor in Atlanta, Georgia. We also recommend that the EAD be authorized to approve the financing and land-related documents listed in Section VI, above. Finally, we recommend that the EAD be authorized to sign the FONSI prepared for the Environmental Assessment, and that you execute the Indemnification agreement.

If you concur with our recommendation to approve the trust acquisition, we have attached for your signature a memorandum to the EAD authorizing her to proceed with the conveyance to the United States in trust for the Mohegan Tribe of Indians of Connecticut, subject to satisfaction of all title requirements pursuant to 25 CFR. 151.12.

Attachments

cc: Eastern Area Office