

MAY 13 1997

Memorandum

To: Ada E. Deer
Assistant Secretary - Indian Affairs

Through: Deputy Commissioner of Indian Affairs **Hilda A. Manuel**

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

Subject: Request of the Klamath Tribes of Oregon for Trust Acquisition of 42.31 Acres of Land for Gaming

I. INTRODUCTION

By memorandum dated February 6, 1997, the Portland Area Office (PAO) transmitted to the Assistant Secretary - Indian Affairs (AS-IA) the Klamath Tribes of Oregon's (Tribes) request and application dated October 29, 1996 (**Attachment 1**), to acquire 42.31 acres of land into trust pursuant to the Klamath Tribes Restoration Act, P.L. 99-398, (100 Stat. 850, 25 U.S.C. §§ 566-566h) enacted August 27, 1986. The 42.31 acres are located within the former Klamath Indian Reservation, and approximately 20 acres will be used for the purpose of construction and operation of a class III gaming facility. The remaining 22.31 acres will be held for future tribal social and economic development efforts.

The Tribe's request, and supporting documentation were submitted in accordance with a July 19, 1990 Secretarial Directive, which requires that all 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 review and 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.

II. AUTHORITY

The Klamath Tribes are composed of the three principal tribes: Klamath, Modoc and Yahooskin Band of Snake Indians, originally federally recognized by the "Treaty with the Klamath, etc. 1864", of October 11, 1854 (16 Stat. 707, Ratified July 2, 1866, Proclaimed February 17, 1870) (**Attachment 5**). The Klamath Tribes of Oregon were subsequently terminated from federal supervision by the Klamath Termination Act of August 13, 1954, (68 Stat. 718, 25 U.S.C. § 564 et seq.) (**Attachment 6**). Pursuant to P.L. 99-398, (100 Stat. 850, 25 U.S.C. § 566 et seq.) enacted August 27, 1986 the Klamath Tribes were restored to federal recognition (**Attachment 7**). The Constitution and Bylaws for the Klamath Tribes adopted on August 17, 1996, is a revision of the original constitution and bylaws dated February 3, 1950, July 30, 1976, and April 10, 1982.

Pursuant to Resolution No. 96-47, dated August 27, 1996, the Klamath Tribes requested the Bureau of Indian Affairs to take 42.31 acres, more or less, of fee land into trust on behalf of the Klamath Tribes to construct and operate a tribal gaming center and other social and economic development activities. The resolution was adopted by a vote of five (5) for and zero (0) against or abstaining. Article VI, Section I of the Constitution and Bylaws of the Klamath Tribes (**Attachment 8**) authorizes the Klamath Tribes Executive Committee to act in this matter.

III. PROPERTY TO BE ACQUIRED

A parcel of land containing 42.31 acres, more or less, situated in Government Lots 22, 23, 28 and 33, Section 16, Township 35 South, Range 7 East of the Willamette Meridian, Klamath County, Oregon, being more particularly described as follows (**Attachment 11**):

Beginning at a point, said point being the intersection of the North line of Government Lot 23, Section 16, Township 35, Range 7 East of the Willamette Meridian with the Easterly right of way line of Highway 97 and marked with a 5/8" pin, from which the 1/4 corner common to Section 15 and 16, said Township and Range, bears North 89° 33' 01" East 2203.55 feet; thence along the North line of said Government Lot 23 and the North line of Government Lot 22, said Township and Range, North 89° 33' 01" East 1423.15 feet to the Westerly mean high water line of the Williamson River; thence along said mean high water line the following bearings and distances: South 2° 23' 25" West 39.36 feet; thence South 17° 15' 25" East 52.99 feet; thence South 28° 02' 08" East 76.89 feet; thence South 39° 18' 40" East 130.02 feet; thence South 57° 22' 25" East 202.38 feet; thence South 16° 42' 10" East 142.95 feet; thence South 27° 47' 45" East 190.57 feet to a point on the South line of said Government Lot 22, said point being marked by a 5/8" pin; thence leaving said mean high water line along said South line of Government Lot 22 North 90° 00' 00" West 951.85 feet to the Northeast corner of Government Lot 28, said Township and Range, said corner being marked by a 1/2" pin; thence along the East line of said Government Lot 28 South 0° 08' 48" East 659.79 feet to the Southeast corner of said Government Lot 28, said corner being marked by a 1/2" pin; thence along the South line of said Government Lot 28 South 89° 49' 56" West 454.20 feet to a 1/2" pin; thence leaving said South line South 0° 10' 04" East 40.64 feet to a 3/4" iron pipe; thence South 61° 56' 56" West 629.30 feet to a point on said Easterly right of way line of Highway 97; thence along

said Easterly right of way line of Highway 97; thence along said Easterly right of way line along the arc of a spiral curve to the right, the chord of which bears North 0° 53' 40" West 119.80 feet, to a 5/8" pin; thence continuing along said right of way line the following bearings and distances: South 86° 21'30" East 20.00 feet to a 5/8" iron pin; thence North 3° 47' 20" East 800.69 feet to a 5/8" iron pin; thence North 88° 44'24" West 20.00 feet to a 5/8" pin; thence North 3° 47' 54" East 743.27 feet to the point of beginning.

The PAO has determined that the parcel of land proposed to be acquired in trust is located within the boundaries of the former Klamath Reservation set aside under the 1864 treaty.

IV. TITLE TO THE PROPERTY

According to the 2nd Supplemental Preliminary Title Report for Standard Coverage Policy (Order No. 39733) dated November 8, 1996 (**Attachment 11**), title to the 42.31 acres is vested in Fee to: The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians (known as the Klamath Tribes) as of October 25, 1996. The preliminary title report is issued by Ticor Title Insurance Company by AmeriTitle of Klamath Falls, Oregon.

The Office of the Regional Solicitor, Pacific Northwest Region, issued a Preliminary Opinion of Title on December 16, 1996, on Order No. 39733. In this opinion, the Regional Solicitor concurred that title was vested in the Klamath Tribes, subject to the objections noted in Schedule B of the title report and three additional items (1) All taxes and assessments; (2) Rights of claims of persons in possession, if any, not shown of record and (3) mechanics' liens, if any, not shown of record. Additionally, the Regional Solicitor stated that prior to consummation of this purchase, "it should be definitely determined that the deed and the title evidence include all the land described in the option, purchase agreement, or application for acquisition."

The Tribes' headquarters are located in Chiloquin, Oregon. The Tribe exercises jurisdiction over 311.64 acres of rural property all scattered within the former reservation. The 42.31 acre parcel is located on U.S. Highway 97, a major north-south corridor in central Oregon, 1 mile north of the tribal headquarters, 23 miles north of Klamath Falls, 35 miles east of Crater Lake National Park and 5 miles southwest of Chiloquin. The Tribe has a membership of 3,096 members, of which 1,369 live in the service area of Klamath County, Oregon.

V. COMPLIANCE WITH INDIAN GAMING REGULATORY ACT

The Klamath Tribes and the State of Oregon entered into a Class III Gaming compact which was approved on February 24, 1995. The compact is site-specific identifying the proposed gaming site as "near Chiloquin, Oregon, East of the junction of Highways 97 and 62, on land that is currently being placed in trust for the Tribes by the United States." The application identifies the property as on Government lots 22, 23, 28 and Section 33, Section 16, Township 35 South, Range 7 East of the Willamette Meridian, Klamath County, Oregon. The language in the application includes the land described in the compact. On April 26, 1996, the Tribes submitted an amendment to the compact to extend the deadline for taking the land into trust from December 31, 1995 to December 31, 1996. The Tribes again submitted an amendment to the compact to extend the deadline for taking the land into trust from December 31, 1996 to July 1, 1997.

By memorandum dated November 14, 1996, the Office of the Regional Solicitor, Pacific Northwest Region, determined that gaming on the parcel of land proposed to be acquired in trust is exempt from the prohibition on gaming on lands acquired after October 17, 1988, contained in Section 20 of the IGRA, 25 U.S.C. § 2719, because the land is located within the boundaries of the Klamath Tribes' last recognized reservation and the Tribes had no reservation on October 17, 1988. **(Attachment 9).**

VI. COMPLIANCE WITH 25 CFR PART 151

By memorandum dated November 14, 1996 **(Attachment 9)**, the Office of the Regional Solicitor, Pacific Northwest Region, concluded that the acquisition is mandated by the provisions of the Klamath Indian Tribe Restoration Act, 25 U.S.C. §§ 566-566h, and that, therefore, the proposed trust acquisition is exempt from the requirements of 25 CFR §§ 151.10 and 151.11, except for the hazardous substance review required pursuant to Secretarial Order 3127 and 602 DM 2 (see discussion below). Applicable requirements in 25 CFR §§ 151.12 and 151.13 are discussed in Sections IV and X of this memorandum. Compliance with 25 CFR § 151.3 is discussed below.

A. Land Acquisition Policy (25 CFR § 151.3)

The proposed acquisition meets the requirements of 25 CFR § 151.3. The acquisition is authorized pursuant to Section 6 of Public Law 99-398 (100 Stat. 850, 25 U.S.C. § 566 et seq.), of the Klamath Indian Tribe Restoration Act enacted on August 27, 1986 **(Attachment 7)**, which provides as follows:

“The Secretary shall accept real property for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary. Such property shall be subject to all valid existing rights including liens, outstanding taxes (local and State), and mortgages. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe and shall be part of their reservation. The transfer of real property authorized by this section shall be exempt from all local, State and Federal taxation as of the date of transfer.”

The proposed acquisition also meets the requirements of 25 CFR § 151.3(a)(3) because it has been determined that the acquisition is necessary to facilitate economic development. **(Attachment 1, Tabs 5 and 11).**

B. Hazardous Substances Determination (25 CFR § 151.10(h))

A Phase I Site Assessment was conducted by American Environmental Solutions (AES) in the Spring of 1994. Based on results of their survey, AES concluded that there was no environmental health or safety hazards anywhere on the proposed acquisition **(Attachment 11, p.26)**. A Level I contaminant survey was also performed on October 24, 1996, by Terence E. O'Connor, the General Manager for the Klamath Tribes. The BIA conducted its own Level I contaminant survey in September, 1994. The survey was updated in November 1996. The Acting PAO Area Director signed the survey on May 6, 1997. **(IGMS Exh. I).**

C. Compliance with the National Environmental Policy Act (NEPA)

It is our determination that compliance with the requirements of NEPA is not required in this case because the trust acquisition is mandated by legislation, as explained above. Nevertheless, an Environmental Assessment (EA) of the proposed Klamath Tribes Indian gaming facility was prepared for the BIA by Western EcoSystems Technology, Inc., and delivered on July 27, 1996. A Finding of No Significant Impact (FONSI) was issued by the PAO Area Director on August 7, 1996. According to a letter of October 18, 1996, (**Attachment 1, Tab 11E**) to Mr. Jeff C. Mitchell, Chairman of The Klamath Tribes, the PAO Area Director has indicated that no public comments were received by the PAO on either the EA or the FONSI. According to the affidavit of publication, (**Attachment 1, Tab 11C**), the public was given a period of two weeks in which to comment.

Impacts that are deemed by the preparers of the EA (**Attachment 1, Tab 11**) to be most likely to occur because of the proposed action were described in the EA. They include the following: increased traffic at the site, the development of approximately 20 acres of currently undeveloped rural land, increases in noise and lighting at a rural location, change in the current aesthetics of the site, increased economic resources and employment opportunities for the Klamath Tribes, and increased economic resources for the surrounding area due to an influx in visitors and employees associated with the Indian gaming facility. The two main impacts listed in the EA are the impact of the construction on the traffic along U.S. 97, and the potential reduction of the area which can be used by bald eagles foraging and resting along the Williamson River. The EA discusses mitigation measures to address both of these concerns.

There is a bald eagle nest within one mile of the site which has been proposed for this project, within a Bald Eagle Consideration Area (BECA) for the inhabitants of that nest, which has historically been the most productive such nest site in Oregon. (**Attachment 1, Tab 11, p. 21**). There seems to be a difference of opinion on whether the proposed gaming establishment will have a detrimental impact on the feeding area along the Williamson River for the bald eagles between the authorities who have been consulted for this report. For example, the wildlife biologist for the Klamath Tribe (**Attachment 1, Tab 11, p. 39**), Steve Lewis of the U.S. Fish and Wildlife Service (**Attachment 1, Tab 11, p. 39**), and John Fortune, Oregon District Fish Biologist, (**Attachment 1, Tab 11, letter of September 23, 1994**) declare that no significant impacts are anticipated. On the other hand, Beth Waterbury, a wildlife biologist for the Oregon Department of Fish and Wildlife, has expressed concern (**Attachment 1, Tab 11, p. 39**) regarding the impacts to the bald eagle nesting habitat in the area; and Ralph Opp, another wildlife biologist for the Oregon Department of Fish and Wildlife, has stated, (**Attachment 1, Tab 11, letter of December 28, 1994**) that access to, and use of, the Williamson River by increased numbers of people may require special management considerations to control adverse impacts, and that the Williamson River adjacent to the proposed site is the key feeding area for the pair of nesting bald eagles and their young. The Klamath Basin is also known to be one of the most important wintering areas for bald eagles in the lower U.S. (**Attachment 1, Tab 11, page 21**). The EA acknowledges that there will be an impact on bald eagles, but also acknowledges that the extent of the impact is not known because the use of the area in question by bald eagles has not been monitored. (**Attachment 1, Tab 11, page 49**). The EA states that a bald eagle monitoring plan will be formulated in conjunction with the Oregon Department of Fish and Wildlife to determine the extent of bald eagle use of the project area, and mitigation measures will be put into place to minimize impacts if eagles are found to use the area (**Attachment 1, Tab 11, page 49**). On May 8, 1997, we obtained written confirmation from the Fish and Wildlife Service that it concurs with the EA and the FONSI determination that the proposed gaming establishment is not likely to adversely affect threatened and endangered species (**IGMS Exh. 3**).

The Oregon Department of Transportation (ODOT) identified several concerns with expected traffic patterns associated with development of the gaming establishment, and has issued a road approach permit for the gaming facility subject to several conditions. (**Attachment 1, Tab 11, pp. 44-46**). By letter dated April 30, 1997 (**IGMS Exh. 2**), the Tribes have agreed to abide by these conditions. In addition, the Tribes commissioned a traffic study to address the ODOT concerns, and mitigating measures were identified as a result.

We note the following minor deficiencies with the EA: 1) A source should be given for the statement (**Attachment 1, Tab 11, p. 42**) that there are currently 500-600 houses for sale or rent in the area. The boundaries of the area for which this statement is true should have also been given; and 2) Carl Burkhardt, the Klamath County Sheriff, has indicated (**Attachment 1, Tab 11, p. 43**) that the increased numbers of visitors associated with the casino could be handled if the presence of the facility will not result in a significant increase in the number of disturbances, and other criminal activity. However, no evidence is presented to indicate that there will be no such significant increase. We do not believe that these minor issues undermine the decision of the PAO Area Director to sign a FONSI based on the EA.

VII. TWO-PART DETERMINATION UNDER SECTION 20 OF IGRA

Not applicable. See discussion under Section V, supra.

VIII. OTHER REQUIREMENTS

None.

IX. AREA DIRECTOR'S RECOMMENDATION

By memorandum dated February 6, 1997, the POA Area Director has recommended that the application be approved and the decision be made to take this particular parcel into trust for gaming by the Klamath Tribes of Oregon.

X. IGMS RECOMMENDATION

Our review indicates that the federal requirements for acquiring land in trust for gaming have been satisfied. It is the recommendation of this office that the identified parcel of land be taken into trust for the benefit of the Tribes. We recommend that the PAO be authorized to approve the conveyance document accepting the property in trust for the Tribes subject to any condition set forth herein, including approval of all title requirements identified by the Office of the Regional Solicitor, Pacific Northwest Region, and expiration of the thirty-day period following the publication in the FEDERAL REGISTER of the notice required in 25 CFR § 151.12.

If you concur with our recommendation to approve the trust acquisition of the identified parcel of land, we have attached for your signature a proposed notice for publication in the FEDERAL REGISTER proposing to take this property in trust for the Tribes following expiration of the thirty-day waiting period as required pursuant to 25 CFR § 151.12, and a memorandum to the PAO Director authorizing him to proceed with the conveyance to the United States in trust for the Tribes, subject to satisfaction of all title requirements pursuant to 25 CFR § 151.13.

Attachments