



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

NOV 10 2010

The Honorable Chadwick Smith  
Principal Chief, Cherokee Nation  
P.O. Box 948  
Tahlequah, Oklahoma 74465-0948

Dear Chief Smith:

On November 3, 2004, the Cherokee Nation (Nation) submitted to the Bureau of Indian Affairs (BIA) an application to acquire in trust approximately 16.61 acres of land located in Cherokee County, Oklahoma. The Nation intends to develop a gaming facility.

By memorandum dated May 2, 2008, the Regional Director, Eastern Oklahoma Region Office (EORO) transmitted to the Assistant Secretary - Indian Affairs (AS-IA), her recommendation that the property be accepted into trust (*EORO Tab 1*), along with the Nation's request and supporting documentation. We have completed our review of the Nation's request, the supporting documentation in the administrative record, and the EORO's recommendation. For the reasons set forth below, it is our determination that the 16.61-acres of land will be taken into trust.

## BACKGROUND

The Cherokee Nation is a federally recognized Indian Tribe located in eastern Oklahoma. In 1975, the Cherokee Nation reorganized its tribal government and adopted a new constitution, which was approved by the Secretary of the Interior on September 5, 1975, and ratified by the qualified voters of the Cherokee Nation on June 26, 1976. The tribal headquarters are located along Highway 62, approximately 3 miles south of Tahlequah, Oklahoma.

By letter dated November 3, 2004, the Cherokee Nation submitted a request and Council of the Cherokee Nation Resolution No. 23-04 dated March 15, 2004, (*Cherokee Nation Application, Tab 2*) requesting the Secretary to acquire in trust 16.61 acres for the benefit of the Nation. The resolution was adopted by a vote of thirteen yeas, zero nays and zero abstentions.

## DESCRIPTION OF THE PROPERTY

The 16.61 acres are located in Cherokee County, Oklahoma and described (*Cherokee Nation Application, Tab 3.1*) as follows:

A tract of land lying in and being a part of the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 16,

Township 16 North, Range 22 East, I.B.&M., Cherokee County, Oklahoma, more particularly described as follows, to-wit:

BEGINNING at the SE corner of said SE¼ SW¼ ; thence North 89°54' West along the South Boundary of said SE¼ SW¼, 420.68 feet to a point on the Easterly Boundary of Oklahoma State Highway No. 82; thence North 36°26'02" West along the Easterly Boundary of Oklahoma State Highway No. 82, 300.1 feet; thence in a Northerly direction, on a curve to the right, having a radius of 651.2 feet; an arc distance of 570.56; thence North 36°16'57" East, 283.22 feet; thence North 53°43'03" West, 55.0 feet to a point on the Easterly boundary of U.S. Highway No. 62; thence Northeasterly, along the Easterly boundary of U.S. Highway No. 62, on a curve to the left; having a radius of 3645.99 feet; an arc distance of 27.29 feet; thence South 42°55' East, 183.0 feet; thence North 34°10' East, 135.0 feet; thence North 32°03' East, 325.3 feet; thence South 89°53' East, 197.6 feet to the NE corner of said SE¼ SW¼; thence South 0°07' West, 1319.75 feet to the POINT OF BEGINNING; LESS AND EXCEPT:

A strip, piece or parcel of land lying in part of the SE¼ SW¼ of Section 16, Township 16 North, Range 22 East. Said parcel of land being described by meters and bounds as follows: BEGINNING at a point on the South line of said SE¼ SW¼ a distance of 399.49 feet (121.764 meters) West of the SE corner of said SE¼ SW¼; thence West along said South line a distance of 21.19 feet (6.457 meters) to a point on the present East rights of way line of State Highway No. 82. thence Northwesterly along said right of way line a distance of 449.32 feet (136.953 meters), thence South 38°18'29" East a distance of 460.63 feet (140.400 meters) to a POINT OF BEGINNING, containing 0.15 acres (0.061 hectares), more or less, of new right of way, the remaining area included in the above description being right of way occupied by the present highway. All bearings contained in this description are based on the Oklahoma State Plane Coordinate System and are not astronomical bearings.

### **TITLE TO THE PROPERTY**

The Cherokee Nation owns all interest in the property as evidenced by the Warranty Deed dated July 8, 2003 (*Cherokee Nation Application, Tab 3.1*), and recorded in the records of the Cherokee County Clerk's office on July 8, 2002, at Book 756, Pages 907-908.

The commitment for title insurance prepared by First American Title Insurance Company (*Cherokee Nation Application, Tab 3.4*) dated July 9, 2003, reflects the title to be vested in the Cherokee Nation, in the amount of \$615,000.

On May 18, 2006, the Tulsa Field Solicitor issued a preliminary opinion of title (*Cherokee Nation Application, Tab 6*). The Field Solicitor found the title to be vested in Cherokee Nation

## COMPLIANCE WITH THE INDIAN GAMING REGULATORY ACT

Section 20 of the Indian Gaming Regulatory Act (IGRA), prohibits gaming on land acquired in trust after October 17, 1988, but provides several exceptions. One exception is for lands “located in Oklahoma that are within the boundaries of the Nation’s former reservation, as defined by the Secretary.” The 16.61 acres are exempt from the prohibition on gaming on lands acquired after October 17, 1988 contained in Section 20, 25 U.S.C. § 2719, because the lands are located in Oklahoma and are within the boundaries of the Nation’s former reservation. We agree with the EORO’s conclusion and analysis, and have decided the Nation may conduct gaming on this property pursuant to 25 U.S.C. § 2719 (a)(2)(A)(i) and the implementing regulations set forth in 25 C.F.R. Part 292.

The Cherokee Nation and the State of Oklahoma entered into a Class III gaming compact which was approved on December 28, 2004. On January 27, 2005, the Department published a notice of effect of the Tribal-State Compact between the Nation and the State of Oklahoma

The Cherokee Nation’s Gaming Ordinance was approved by the National Indian Gaming Commission (NIGC) on June 2, 1994. The Ordinance was subsequently amended and approved by the NIGC on January 22, 2008.

## COMPLIANCE WITH 25 C.F.R. PART 151

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

### **A. 25 C.F.R. 151.3. Land acquisition policy.**

As a matter of statute and regulation, the Secretary may acquire land in trust for a tribe under 25 C.F.R § 151.3(a)(1) when the land is located within the exterior boundaries of an Indian reservation or adjacent thereto or within a tribal consolidation area.

The Regional Director has determined that the acquisition of the 16.61 acres satisfies 25 C.F.R § 151.3(a)(1) because the land is located within the boundaries of the Nation’s former reservation.

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

In *Carcieri v. Salazar*, \_\_U.S. \_\_, 129 S.Ct.1058, 172 L.Ed.2d 791 (2009) (*Carcieri*) the United States Supreme Court held that the Secretary’s authority to take land into trust for an Indian tribe extends only to those tribes that were “under Federal jurisdiction” when the Indian

Reorganization Act, 48 Stat. 984, codified at 25 U.S.C. §461 *et seq.* (the “IRA”), was enacted on June 18, 1934.<sup>1</sup> We have evaluated the applicability of *Carcieri* to the Nation’s application, and have determined that the Nation was under Federal jurisdiction in 1934, and is eligible to have land taken into trust pursuant to 25 U.S.C. § 465.

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

[...] That sections 2, 4, 7, 16, 17, and 18<sup>3</sup> 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.

25 U.S.C. § 473 (emphasis added).

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

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<sup>1</sup> 129 S.Ct. at 1068.

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

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

take land into trust for those tribes.<sup>4</sup> The listing of the Cherokee in section 13 is sufficient for purposes of finding the Nation to be under Federal jurisdiction in 1934.

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

The Nation currently owns fee and trust land within a mile of the proposed property in Cherokee County, Oklahoma. The proposed site is owned in fee simple status and is needed by the Nation for economic development. The site will be utilized for development of a gaming facility for the benefit of the Nation and its members. The revenue generated from the gaming facility will be utilized to build a strong Tribal government and improve Tribal services. In addition, the dividends from gaming revenues help fund education, health care, housing, and environmental programs. The gaming facility will provide additional jobs and will provide employment and career opportunities for Tribal members and surrounding residents and assist Tribal members in moving toward self-sufficiency. Additional economic development will allow the Nation to support governmental functions, which will decrease dependence upon the limited Federal and State funds.

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

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

The Nation intends to utilize the property for gaming purposes. Development as a gaming facility will provide jobs to the area, entertainment options, and economic advantages. Plans call for the construction of a 20,000 square foot casino, which will provide employment for approximately 250 individuals.

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

The Cherokee Nation owns this parcel in fee simple. By letters dated February 11, 2008, comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes and special assessments were solicited from the following state and local political subdivisions (*EORO Tab 2*):

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<sup>4</sup> See, 78 Cong. Rec. 11125-26 (June 12, 1934), where Mr. Thomas of Oklahoma, discussing the land acquisition provision, offers an amendment that passes, that section 5 expressly reference the purchase of lands for individual Indians. He wants the money available “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), where Mr. Hastings of Oklahoma, points out that the amendment “exempts the various Indian tribes in Oklahoma” from various sections of the act and that he does “not object to assistance by the Government in the form of and to the extent of the purchase of land for landless and indigent Indians, and to additional appropriations for health work and for Indian education.” Thus, both Mr. Thomas and Mr. Hastings understood that section 5 was applicable in Oklahoma.



Cherokee Board of Commissioners

By letter dated February 19, 2008, the Cherokee County Commissioner responded that the annual property taxes levied on the property is \$5,536.72; there are no special assessments currently assessed against the property; there are no governmental services provided to the property and Cherokee County does not have zoning in the County (*EORO Tab 3*).

Oklahoma Tax Commission

No Response.

Cherokee County Courthouse

No response.

Governor of Oklahoma

No response.

Cherokee County Treasurer

By letter dated February 12, 2008, the County Treasurer provided a tax information sheet with a legal description and the amount of taxes (\$5,536.72) paid on the property for 2007 (*EORO Tab 42*).

Cherokee County Assessor

By letter dated February 19, 2008, the County Assessor provided information regarding who assesses the property and collects taxes for the property (*EORO Tab 5*).

United Keetoowah Band of Cherokee Indians

No response.

Real property in Oklahoma is subject to state ad valorem taxation which is collected by the respective counties to fund a variety of countywide services; the largest share goes to the local school districts. Police, fire, water, and sanitation services for the property are provided by Cherokee County and the City of Tahlequah. No negative impacts from the loss of the property tax revenue were identified by the aforementioned officials.

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

There are no special assessments currently assessed against the property. Cherokee County provides no governmental services and there is no zoning in the County (*EORO Tab 3*). No jurisdictional issues or concerns were raised or are foreseen from the use as proposed. Law enforcement services are provided by the Cherokee County and the Cherokee Nation Marshall Services.

**G. 25 C.F.R. 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 16.61 acre parcel is within the jurisdictional boundaries of the Eastern Oklahoma Region and the former, historic reservation area of the Cherokee Nation. The Cherokee Nation administers the program functions associated with the management of their trust lands formerly provided by the Bureau's Tahlequah Agency and Eastern Oklahoma Regional Offices through a Self Governance Compact pursuant to 25 U.S.C. 458aa, et seq. Technical assistance and review and approval of real estate transactions are provided by the EORO. Law enforcement services within the proposed acquisition are provided by the Cherokee County and the Cherokee Nation Marshall Service. The EORO finds that adequate resources are available to assume the additional responsibilities resulting from the acquisition of the land in trust status.

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

An Environmental Assessment (EA) of the proposed property to be acquired in trust was prepared by Analytical Environmental Sciences and completed in May 2007. We have determined that the acquisition complies with the National Environmental Policy Act, and a Finding of No Significant Impact (FONSI) will be issued by this Office.

A Phase I contaminant survey was completed on March 19, 2008, and it was concluded that no contaminants were present on the site, and that there are no obvious signs contamination. An updated contaminant survey will need to be completed and certified before the land is taken into trust because the existing contaminant survey is outdated.

## **VII. TWO PART DETERMINATION UNDER SECTION 20 OF IGRA**

The two-part determination pursuant to IGRA , 25 U.S.C. 2719(b)(1)(A), is not applicable because the land is "located in Oklahoma and are within the boundaries of the Nation's former reservation, as defined by the Secretary." 25 U.S.C. § 2719 (a)(2)(A)(i). See discussion under Section V, *supra*.

## **REGIONAL DIRECTOR'S RECOMMENDATION**

By memorandum dated May 2, 2008, (*OIG Exhibit 1*) the Regional Director, Eastern Oklahoma Region, recommends that the property be accepted in trust for the benefit of the Cherokee Nation of Oklahoma.

## DECISION

Our evaluation of the Nation's request indicates that the federal requirements for acquiring this parcel of land into trust have been satisfied. The Regional Director, Eastern Oklahoma Region, will be authorized to approve the conveyance document accepting the property in trust for the Nation subject to any condition set forth herein, approval of all title requirements by the Office of the Solicitor, and expiration of the thirty day period following publication in the *Federal Register* of the notice required in 25 CFR § 151.12(b) and barring legal challenge to this decision.

Sincerely,

A handwritten signature in black ink, appearing to read "LEH", with a stylized flourish at the end.

*For* Larry Echo Hawk  
Assistant Secretary – Indian Affairs