United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 01 2011

The Honorable Michael Toledo, Jr.
Governor, Pueblo of Jemez
P.O. Box 100
Jemez Pueblo, New Mexico 87024

Dear Governor Toledo:

I am writing concerning the Pueblo of Jemez's request for the Department of the Interior (Department) to acquire a parcel of land in Anthony, New Mexico in trust for gaming purposes. The Pueblo of Jemez (Pueblo) has requested this acquisition under the Indian Reorganization Act (IRA).[1]

Decision

I have considered the Pueblo's application pursuant to the IRA and the Department's regulations at 25 C.F.R. Part 151, which govern the process by which the Department acquires land in trust on behalf of tribes.

I regret to inform you that the Department has determined that it will not accept the 70.277-acre tract in Anthony, New Mexico (Anthony Parcel) in trust for the Pueblo. I have set forth the basis for my decision below.

Background

In 2004, the Pueblo requested the transfer of a 70.277-acre tract into trust for the purpose of developing a class III gaming facility.[2] The Pueblo plans to initially develop a temporary gaming facility on the Anthony Parcel, with a subsequent expansion to a permanent class III gaming facility consisting of 103,500 total square feet, and employing approximately 950 people. The Pueblo also plans to develop a hotel on an adjacent 31.855-acre parcel that will continue to be held in fee simple, and will consist of approximately 90,000 square feet. It projects that the gaming facility and hotel would attract 2.7 million patrons per year.

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[1] 25 U.S.C. § 461 *et seq.*

[2] The Department previously denied the Pueblo's application to take the Anthony Parcel into trust on January 4, 2008. The Pueblo subsequently supplemented and resubmitted its application on June 18, 2008, and the Department undertook a reconsideration of that application. My decision herein is based on this reconsideration.

The Indian Reorganization Act of 1934

Section 5 of the IRA authorizes the Department to acquire land into trust for Indian tribes, and states in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee is living or deceased, for the purpose of providing lands for Indians.[3]

Congress enacted the IRA to reverse, among other reasons, the destructive consequences of the General Allotment Act[4] and to promote tribal self-government and economic self-sufficiency.[5] Studies leading to the enactment of the IRA in 1934 found that the enormous loss of a tribal land base as a result of the government's allotment policy had weakened the fabric of Indian communities and had undermined the strength of tribal governments. When Congress passed the IRA, it established a new Federal policy intended to halt the erosion of the tribal land base and to promote the strengthening of the capacity of tribal governments, and the revitalization of tribal communities.

In the many decades following the passage of the IRA, the Department typically has taken lands into trust that are within, near to, or in the same region as existing reservations. This policy promotes tribal governance and cohesive tribal communities, as originally envisioned by the IRA.[6] In other instances, the Department has acquired land in trust for tribes that were reaffirmed or acknowledged by the United States as part of an effort to establish a land base for the tribe. In those instances, the Department typically has acquired lands in trust near the historic land base of the tribe or near areas where a significant number of tribal citizens reside. The Department remains committed to the restoration of tribal homelands through the acquisition of land in trust, provided that those trust acquisitions comply with the policies and processes established by Congress and the Department's regulations.

Since the passage of the Indian Gaming Regulatory Act (IGRA)[7] in 1988, the Department has been asked in a number of instances to acquire lands in trust on behalf of tribes for gaming purposes located a considerable distance from established reservations or tribal communities.

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[3] 25 U.S.C. § 465.
[4] 25 U.S.C 331 *et seq.*
[5] *See* 64 Fed. Reg. 17,574, 17,576 (April 12, 1999).
[6] *Id. at* 17,578, restating that: "Federal policy for many decades has viewed the existence of a tribal land base as integral to the cultural, political, and economic well-being of a tribe. For example, most federal programs for Indians are in one way or another tied to the tribal land base."
[7] 25 U.S.C. § 2701 *et seq.*

Indian Country Status

Generally, tribal jurisdiction is delineated according to the "Indian country" status of the land. This term is defined in the Federal criminal statutes, and also is applied in the civil jurisdiction context.[8] "Indian country" is defined in 18 U.S.C. § 1151 as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including any rights of way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including the rights-of-way running through the same.

Thus, for jurisdictional purposes under the Indian country statute, the land must be a reservation, a dependent Indian community, or an allotment. Courts also have recognized that land taken into trust by Congress or the Secretary constitutes Indian country by virtue of becoming either informal reservations or dependent Indian communities.[9]

Tribes are presumed to possess jurisdiction in Indian country,[10] and they generally are "invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress."[11] The Supreme Court also has found a "significant territorial component to tribal power."[12] Finally, where the United States acquires land in trust on behalf of a tribe "outside an existing Indian reservation, [that act] establishes it as Indian country with all the jurisdictional consequences attaching to that status."[13]

There is no question that the Pueblo has authority to, as well as the capability of, exercising this power on its reservation. The question presented to the Department is whether it should acquire additional territory for the Pueblo 293 miles away from its existing reservation where the Pueblo's capability of exercising government functions necessarily will be attenuated.

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[8] *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 n.5 (1987); *DeCoteau v. District County*, 420 U.S. 425, 427, n.2 (1975).
[9] *United States v. John*, 437 US 634, 648-49 (1978); *United States v. McGowan*, 302 U.S. 535, 539 (1938); *Oklahoma Tax Comm'n v. Citizen Band*, 498 U.S. 505, 511 (1991).
[10] *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).
[11] *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140,142 (1982).
[12] *Id.*
[13] Cohen's Handbook of Federal Indian Law, § 15.07[1][a] (2005 ed.).

The Indian Gaming Regulatory Act

While the IRA authorizes the Department to take land into trust for tribes, it is IGRA that authorizes tribes to conduct gaming on their lands, subject to certain requirements. Congress did not define the applicability of IGRA in terms of "Indian country," but rather used the term "Indian lands."[14] "Indian lands" are defined as:

> (a) all lands within the limits of any Indian reservation; and
> (b) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. [15]

If land is not located within the boundaries of an Indian reservation, the Department must establish that a tribe exercises governmental power over the land in order for it to be considered "Indian lands" within the meaning of the IGRA.

In *Cheyenne River Sioux Tribe v. South Dakota*,[16] the Court stated several factors relevant to a determination of whether off-reservation trust lands constitute Indian lands. These factors are:

> (1) Whether the lands are developed;
> (2) Whether the tribal members reside in those areas;
> (3) Whether any governmental services are provided and by whom;
> (4) Whether law enforcement on the lands in question is provided by the tribe; and
> (5) Other indicia as to who exercises governmental power over those lands.[17]

As discussed below, these factors are relevant to our inquiry here.

Under IGRA, gaming is an essential governmental function; not simply a business venture.[18] In seeking to have the Anthony Parcel taken into trust, the Pueblo asks the Department to establish an isolated gaming facility and tribal jurisdiction almost 300 miles from its existing reservation. Moreover, the Pueblo will exercise very little of its own governmental authority at the site since it intends to contract with local governments

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[14] *See* 25 U.S.C. § 2703(4).
[15] *See* 25 U.S.C. § 2703(4)(B).
[16] 830 F. Supp. 523 (D.S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993).
[17] *Id.* at 528.
[18] Gaming under IGRA is a unique activity conducted only by Indian tribes in their distinctly governmental capacity. *See* 25 U.S.C. § 2701(1)(generating tribal governmental revenue); § 2701(4)(tribal self-sufficiency and strong tribal governments); § 2702(1) (promote strong tribal governments); § 2702(3)(generate tribal revenue); 2710(b)(1)(tribal power to license and regulate gaming); § 2710(b)(1)(B)(governing body to adopt ordinances); § 2710(b)(2)(B)(net revenues can only be used to fund governmental operations and programs, provide general welfare, promote tribal economic development, donate to charities, and help fund operations of local government agencies); and § 2710(d)(negotiate and compact with a state).

for the provision of necessary governmental services to the Anthony Parcel rather than provide such services directly.[19]

It is in this context, *i.e.*, an application for a parcel notably far from the Pueblo's reservation and the breadth of the delegation of the Pueblo's governmental power, that the Department has undertaken its Part 151 analysis of the Pueblo's application.

Application of the Department's Land Acquisition Criteria: 25 C.F.R. Part 151

The procedures and policies governing the Secretary's exercise of discretion for acquiring lands in trust for Indian tribes and individuals are set forth in 25 U.S.C. § 465 and 25 C.F.R. Part 151. In reviewing an application to acquire off-reservation land in trust, the Department considers the factors contained in 25 C.F.R. § 151.11, "Off-reservation Acquisitions." This decision is appropriate at this time because we have received sufficient information to render a decision pursuant to 25 C.F.R. Part 151.[20]

Section 151.3(a), Land Acquisition Policy

The Secretary may acquire land in trust for a tribe under 25 C.F.R. §151.3(a)(3) when the acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing. The Pueblo has asserted that economic development is the primary purpose for the proposed acquisition of the Anthony Parcel.

Section 151.10(b), The Need of the Tribe for Additional Land

The acquisition of the Anthony Parcel and its gaming facility are proposed as an economic development initiative intended to improve the long-term financial and socioeconomic condition of the Pueblo.

Section 151.10(c), Purposes for Which the Land Will Be Used

The Anthony Parcel would be used solely for gaming and related purposes. The Pueblo has requested a Secretarial determination that the land would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community, pursuant to IGRA, 25 U.S.C. § 2719(b)(1)(A). Therefore, the Department must consider this proposed use in examining the Pueblo's application pursuant to other criteria.[21]

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[19] Here, the Pueblo will establish the Pueblo of Jemez Tribal Gaming Enterprise to oversee gaming operations under IGRA at the Anthony Parcel. In addition, the Pueblo of Jemez Tribal Gaming Ordinance approved by the National Indian Gaming Commission establishes the Pueblo of Jemez Tribal Gaming Commission to regulate the Pueblo's gaming activities.

[20] Not every factor of the Part 151 analysis is required to render this decision. *See Johnnie Louis McAlpine v. Muskogee Area Director*, 19 IBIA 2 (1990).

[21] I wish to note here that the Department's regulations at 25 C.F.R. Part 292 require us to consider a number of factors in determining whether the proposed off-reservation gaming facility would be in the best interest of the Tribe and its members under IGRA. Those factors include the distance of the proposed gaming site from the applicant tribe's government headquarters and the existence of the applicant tribe's significant historical connection to the proposed gaming site. *See* 25 C.F.R. § 292.17(g) and (i). Though

The IGRA requires tribes to exercise governmental power over trust lands in order for those lands to be considered eligible "Indian lands" on which they can conduct gaming. See 25 U.S.C. 2703(4)(B).

As a general policy, the Department encourages tribes to facilitate cooperative relationships with neighboring state and local governments. Such cooperative relationships are sometimes expressed through intergovernmental agreements between tribes and neighboring governments that clarify how jurisdiction and governmental power will be exercised on and near tribal lands. Nevertheless, it is important that tribes, through their governments, actually exercise, or control the exercise of, that jurisdiction and governmental power – even where some power has been contracted to other governmental authorities.

The Pueblo has indicated that it will contract a broad range of its non-gaming governmental power and jurisdiction to local, non-tribal jurisdictions. In the December 17, 2004, Intergovernmental Service Agreement between the Pueblo of Jemez and Dona Ana County (Service Agreement), it is clear that the Pueblo will provide almost no direct governmental services to the Anthony Parcel, and that the local jurisdictions will be assuming those responsibilities and the burdens associated with those responsibilities. The prefatory language of the Service Agreement states the proposed delegation of responsibilities:

> WHEREAS, the Pueblo and the [Pueblo of Jemez Tribal Gaming] Enterprise request that the Community of Anthony and Dona Ana County provide a complete range of governmental services to conduct the Class II and Class III gaming at the Jemez/Anthony Casino ...
>
> WHEREAS, the increased demand for governmental services will require additional financial resources to provide new improvements to the infrastructure required by the expanded activity in the vicinity of the Jemez/Anthony Casino to mitigate the costs of economic, social and other impacts arising out of gaming activities.
>
> WHEREAS, in accordance with IGRA, the Pueblo and the [Pueblo of Jemez Tribal Gaming] Enterprise have agreed to make certain payments to the County for the benefit of the Community of Anthony and the County in recognition of the demand for the complete range of governmental services, the new improvements to the infrastructure necessitated by the expanded activity in the vicinity of the

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these factors alone are not determinative, the Department gives them significant weight in that analysis. Here, these two factors would weigh heavily against the Pueblo's application for a positive Secretarial determination under IGRA, making it difficult to determine that the proposed gaming facility would be in the best interest of the Pueblo and its citizens.

> Jemez/Anthony Casino, and the mitigation of any economic, social, or other impacts arising out of gaming activities.[22]

Not only does the Service Agreement identify the services that will be provided to the Anthony Parcel, but also equates the gaming operation to a "commercial enterprise" without recognizing the governmental responsibilities of the Pueblo:

> Section 1. COMMITMENTS OF THE COUNTY
>
> A. Provide Services. The County shall provide the Jemez/Anthony Casino with services as are usually and customarily provided to other commercial enterprises. These services include, but are not limited to: law enforcement, fire protection, building code enforcement and inspection, traffic controls, emergency medical service, street and road maintenance and plowing of public County roads, emergency governmental services, public safety dispatch services, and personnel, etc.[23]

The Service Agreement later recognizes that the Pueblo could provide governmental services to the Anthony Parcel and allows for instances where the Pueblo could assume emergency medical services, fire responsibilities, and could explore dual or cross-deputization for law enforcement purposes.[24] The Pueblo has not, however, chosen to assume these direct governmental responsibilities, and instead has contracted with the Community of Anthony and the County to provide them. The potential re-assumption of jurisdiction at a date in the future is not sufficient if the scope of the initial delegation is so broad that at the time of acquisition, the Pueblo is exercising almost no governmental power.

Section 151.11(b), Location of the Land Relative to State Boundaries and its Distance from the Boundaries of the Pueblo's Reservation

This section requires, in relevant part, that the Secretary shall give greater scrutiny to a tribe's justification of anticipated benefits from an acquisition as the distance between the tribe's reservation and the land to be acquired increases.

There is little doubt that a class III gaming facility on the Anthony Parcel will generate significant revenues for the Pueblo, which is one of the primary objectives of IGRA. Although the Pueblo will benefit economically from operation of the proposed casino, here because of the given the significant distance between the Pueblo's existing reservation and the Anthony Parcel, the Department must apply great scrutiny to the Pueblo's justification of anticipated benefits.

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[22] Intergovernmental Service Agreement Between the Pueblo of Jemez and Dona Ana County, December 17, 2004 (Service Agreement), p. 2 – 3 (emphasis added).
[23] (emphasis added) *Id.* at p. 4.
[24] *See* Service Agreement, §§3B; 4H.

The Department has significant concerns about establishing additional tribal territory for the Pueblo 293 miles away from its existing reservation. In this case, the Pueblo's reliance on the Service Agreement is extensive and necessary to the provision of virtually all governmental services and the exercise of jurisdiction and governmental power over the Anthony Parcel.

In applying the greater scrutiny required by section 151.11(b), we have determined that the anticipated economic benefits to the Pueblo do not outweigh impacts on tribal governance.

Economic development is an important reason for taking land into trust. The Department must, however, balance the economic opportunities afforded by IGRA with other factors including the creation of an attenuated tribal governmental structure far from a tribe's reservation. Where that distance is exceptionally great, as here, tribes should conclusively demonstrate that they will actually control the exercise of jurisdiction and governmental power over the new lands, beyond simply delegating those essential responsibilities to non-tribal governments.

The goal of promoting strong tribal governance is not facilitated by approval of a gaming facility that would be managed at a considerable distance from the Pueblo's Reservation through agreements that contract away extensive governmental functions. The IGRA provides an exception to consider off-reservation gaming, but we must ensure that this exception is implemented in harmony with the broader Federal policy regarding the trust acquisition of lands for Indian tribes. As explained above, it is vitally important that tribal governments control the exercise of jurisdiction and governmental power over lands held in trust for their benefit.

Conclusion

I recognize that this decision represents a setback for the Pueblo. I would like to note that I am aware that the option of establishing a gaming facility on the Pueblo's existing reservation has been previous studied and considered and remains a possibility for future gaming development by the Pueblo.

Based on the foregoing analysis, the Department denies the Pueblo's application to have the Anthony Parcel acquired in trust for the proposed IGRA-related gaming purposes.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs