



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUL 30 2012

Honorable George Wickliffe
Chief, United Keetoowah Band of Cherokee
Indians of Oklahoma
P.O. Box 746
Tahlequah, Oklahoma 74465

Dear Chief Wickliffe:

On August 15, 2011, the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB) submitted to the Bureau of Indian Affairs (BIA) Eastern Oklahoma Region (EOR) an amended application to acquire in trust approximately 2.03 acres of land, known as the Keetoowah Casino Property (Property), located in Cherokee County, Oklahoma.

By memorandum dated April 19, 2012, the EOR transmitted to the BIA its recommendation that the property be accepted into trust along with the Tribe's request and supporting documentation.¹ We have completed our review of the UKB's request, and the supporting documentation in the administrative record. For the reasons set forth below, it is our determination that the Property will be taken into trust.

BACKGROUND

The UKB is a federally recognized Indian tribe, but it does not possess any land that is held in trust or restricted status by the Federal Government. Its status as a federally recognized Indian Tribe was confirmed in 1946 when Congress passed legislation recognizing the UKB as an Indian Band within the meaning of the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. § 503 (OIWA). As a tribe organized pursuant to the OIWA, the UKB is entitled to the same rights and privileges as tribes organized pursuant to the Indian Reorganization Act of 1934 (IRA).

The history of the UKB has been discussed at length in Assistant Secretary decisions, Associate Solicitor opinions and Federal court orders, such as that of March 3, 1992 in *Buzzard v. Oklahoma Tax Commission*, 1992 U.S. Dist. LEXIS 22864 (N.D. Okla., March 3, 1992), and thus only the background relevant to the limited question of whether the parcel is within the former reservation of the UKB within the meaning of Indian Gaming Regulatory Act (IGRA) and the Department's regulations at Parts 151 and 292 is discussed below.

¹ SPRO Transmittal Memorandum.

Since the 1800s, the Keetoowah Society of Oklahoma Cherokees existed as an organization of Cherokee Indians in Oklahoma. *Buzzard v. Oklahoma Tax Commission*, 1992 U.S. Dist. LEXIS 22864 (N.D. Okla., March 3, 1992), *aff'd Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993). The Keetoowahs sought federal recognition in the 1930s in order to organize as a separate band under OIWA. In an opinion dated July 29, 1937, the Solicitor found that the Keetoowahs were a society of full-bloods organized nearly a century before for the preservation of Indian culture and traditions. He found that the Keetoowahs did not constitute a band of Cherokee Indians within the meaning of the OIWA and therefore were not eligible to reorganize under it. Opinion of July 29, 1937, 1 *Op. Sol. on Indian Affairs* (U.S.D.I. 1979). In response, Congress enacted the Act of August 10, 1946, which provided that “the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936.” 60 Stat. 976; *see* S. Rep. No. 79-978 (1946). The Band formally reorganized under OIWA in 1950 by adopting a constitution, by-laws, and a corporate charter that were approved by the Assistant Secretary of the Interior on May 8, 1950, and ratified by the members on October 3, 1950.

The gaming parcel is located in the City of Tahlequah in the S1/2 NE1/4 SE1/4 and part of the N1/2 SE1/4 SE1/4 SW1/4 of Section 4, Township 16 North, Range 22 East, Cherokee County, Oklahoma. The Band submitted an amended application requesting that the gaming parcel be taken into trust for the United Keetoowah Band of Cherokee Indians, a federally chartered corporation (UKB Corporation) under Section 3 of the OIWA.

The gaming parcel is owned in fee by the Band. Neither the Band nor the UKB Corporation have any lands held in trust by the United States. The Band began to offer public bingo on the gaming parcel in 1986. The gaming parcel currently is utilized for an existing gaming facility for the benefit of the Band and its members. It is the Band’s only gaming facility and the gaming revenues support Tribal programs, including Human Services, Emergency Funds, Housing Rehabilitation, Family Services, Education, Clothing Voucher and Elder Assistance, all of which benefit the UKB Tribal members.

The gaming parcel is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota, 7 Stat. 478 (December 29, 1835), and the 1866 treaty between the Cherokee Nation and the United States, 14 Stat. 799 (July 19, 1866), in an area generally identified as the former Cherokee reservation. *See* April 19, 2012 Memorandum from Acting Regional Director, Eastern Oklahoma Region, Proposed Findings of Fact. This area has long been recognized as the former reservation of the Cherokee Nation of Oklahoma (CNO), a federally recognized Indian tribe. *United Keetoowah Band v. Secretary*, No 90-C-608-B (N.D. Okla., May 31, 1991); *United Keetoowah Band of Cherokee Indians v. Mankiller*, No 92-C-585-B (N.D. Okla., January 27, 1993), *aff'd* 2 F.3d 1161 (10th Cir. 1993).

DESCRIPTION OF THE PROPERTY

The 2.03 acres are located in Tahlequah, Cherokee County, Oklahoma and described as follows:²

A tract of land lying in and being a part of the S/2 NE/4 SE/4 SW/4 and part of the N/2 SE/4 SE/4 SW/4 of Section 4, T-16-N, R-22-E, Cherokee County, Oklahoma, more particularly described as follows, to-wit: BEGINNING at a point 175.0 feet South of the North boundary and 131.0 feet East of the West boundary of said S/2 NE/4 SE/4 SW/4; thence S 02°56'W, 159.80 feet; thence N 89°12'W, 24.80 feet; thence S 03°30'W, 171.40 feet to a point 175.00 feet South of the North boundary of said N/2 SE/4 SE/4 SW/4; thence S 89°49'E, 384.32 feet to a point on the West boundary of U.S. Highway No. 62; thence N 05°25'W, along the West boundary of U.S. Highway No. 62, 332.00 feet; thence N 89°49'W, 309.55 feet to the Point of Beginning. Containing 2.63 acres;

LESS AND EXCEPT A parcel of land BEGINNING 155.00 feet North and 84.80 feet East of the Southwest Corner of the N/2, SE/4 SE/4 SW/4; thence N3°30'E a distance of 161.90 feet; thence S89°49'E a distance of 161.90 feet; thence S3°30'W a distance of 161.90 feet; thence N89°49'W a distance of 161.90 feet to the Point of Beginning. Containing 0.60 acres more or less.

TITLE TO THE PROPERTY

The UKB owns the property in fee as evidenced by the Warranty Deed dated February 23, 2012.³ The Warranty Deed legal description excepts the 0.60 acre parcel because that parcel was part of the Keetoowah Justice Complex.

An updated commitment for title insurance policy dated November 30, 2011, was provided by the UKB. A preliminary title opinion has been issued by the Tulsa Field Solicitor's Office dated February 13, 2012. In his opinion, the Field Solicitor noted the Summary Appraisal Report dated January 9, 2012, states that the value of this property is \$1,080,000.00. However, the appraisal bases this value on the cost to reconstruct the casino on the property. The Summary Appraisal Report states that the value of the property itself, based on a comparison of sales of similar properties in the area is \$265,000.00. The BIA believes this "comparable sales value" of this property is the most accurate value to consider for purposes of determining the amount of title insurance to require under the peculiar circumstances of this case. Title Commitment No. T2011120146, issued by the Old Republic National Title Insurance Company, reflects a policy amount of \$91,250.00 which is the minimum amount of title insurance required under the DOJ Title Standards.

² UKB Application Tab 1C.

³ UKB Application Tab 9

COMPLIANCE WITH THE INDIAN GAMING REGULATORY ACT

The UKB is composed of Cherokee Indians, reorganized under a constitution approved by the Department expressly establishing its tribal headquarters in Tahlequah, Oklahoma. Tahlequah is the same town where the Property is located. We believe the former reservation of the CNO is also the former reservation of the UKB for the purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i), making this specific trust application a unique circumstance.

The IGRA prohibits gaming on Indian lands accepted by the Secretary into trust for the benefit of an Indian tribe after October 17, 1988, unless the lands fall within certain statutory exceptions. See 25 U.S.C. § 2719. One such exception arises if the Indian tribe has no reservation and the lands are in Oklahoma and within the boundaries of the Indian tribe's former reservation, as defined by the Secretary. 25 U.S.C. § 2719(a)(2)(A)(i).

Under the Indian canons of construction, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Courts have found that the Indian canon of statutory construction applies to IGRA. *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 848-49 (W.D. Mich., 2008); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). There is no question that the UKB occupied the former Cherokee reservation nor that the Keetoowah Society of Oklahoma Cherokees was formed out of the Cherokee Nation of Oklahoma. S. Rep. No. 79-978 at 2-3 (1946). The term "former reservation" in IGRA is ambiguous as applied to the facts at hand. Interpreting the provision to the benefit of the Band would permit the gaming parcel to be taken into trust pursuant to 25 U.S.C. § 2719(a)(2)(A)(i).

The Department's regulations define "former reservation" to mean: "lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." 25 C.F.R. § 292.2. Neither the text of IGRA, nor the Department's regulations implementing the exceptions to the general prohibition of gaming on lands acquired in trust after October 1988, 25 U.S.C. § 2719, address the question of whether two federally recognized tribes, one of which was formed under express congressional authorization from the citizens of the other, can share the same former reservation for purposes of qualifying for the "former reservation" exception in 25 U.S.C. § 2719(a)(2)(A)(i). The express language of the statute makes it clear, however, that the determination of whether the land is within the boundaries of a tribe's former reservation is a determination for the Secretary to make. *Id.*

In view of the origins of the Band as composed of Cherokee Indians, reorganized and separately recognized under express authorization from Congress and a constitution approved by the Assistant Secretary of the Interior expressly establishing its tribal headquarters in Tahlequah, Oklahoma, within the historic reservation boundaries, I believe the former reservation of the Cherokee Nation is also the former reservation of the UKB for the purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i).

We conclude that when taken into trust, the UKB 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 UKB's Gaming Ordinance was approved by the National Indian Gaming Commission on March 22, 1995.

COMPLIANCE WITH 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 authorizing legislation and in 25 C.F.R. Part 151. This acquisition is within the former reservation of the UKB. The Department, therefore, considers the factors contained in 25 C.F.R. § 151.10, "On-reservation Acquisitions" to be applicable.

A. 25 C.F.R. 151.3 Land Acquisition Policy.

Land may be acquired in trust for tribes only when there is statutory authority to do so. Section 151.3(a) states that land may be acquired in trust for a tribe when (1) the land 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. Here, the property is located within the former reservation of the UKB, the UKB owns a fee interest in the land, and the Secretary has determined the acquisition is necessary to facilitate economic development.

Although we have concluded that the former Cherokee reservation is also the former reservation of the UKB within the meaning of IGRA, historically, the Cherokee Nation of Oklahoma has been recognized as the "primary" Cherokee tribe. *See, e.g.,* Judge Brett's Amended Order in *Buzzard, supra*. The Department's regulations at 25 C.F.R. § 151.8 provide that an Indian tribe "may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition." Consistent with this regulatory provision, the Secretary has previously declined to take any lands into trust for the UKB within the boundaries of the former Cherokee reservation without the consent of the Cherokee Nation. The Cherokee Nation has consistently refused to grant its consent. (There is an extensive administrative record related to these matters.) However, now that we have determined the former reservation of the Cherokee Nation is also the former reservation of the UKB for the purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i), the regulatory requirement for consent of the Cherokee Nation is no longer applicable. By receiving and considering the comments of the Cherokee Nation on the instant acquisition, as well as in the case of the recent acquisition of the community services parcel, the Department has satisfied any requirements to consult with the Cherokee Nation.

The Assistant Secretary's June 24, 2009 Decision, remanded the application back to the Regional Director to apply the categorical exclusion checklist, as clarified by a July 30, 2009 Decision, Motion to Reconsider and Withdraw Decision requesting additional briefing from UKB and CNO on the issue of the import, if any, of the *Carciere v. Salazar* decision and concluded that alleged jurisdictional conflicts between the Band and the Cherokee Nation would not prevent the Secretary from taking land into trust for the UKB Corporation to be governed by the Band on the former Cherokee Reservation. *Id.* at 6-7, 11; *see also* Assistant Secretary's September 10, 2010 Decision (reaffirming a decision that land could be taken into trust on the former Cherokee reservation for the UKB Corporation.) This analysis supports the conclusion that the two tribes can avail themselves of the same former reservation for purposes of 25 U.S.C. § 2719(a)(2)(A)(i).

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

The Assistant Secretary's September 10, 2010 Decision which was clarified in a January 21, 2011 letter to the UKB, concluded that Section 3 of the OIWA, 25 U.S.C. § 503, implicitly authorizes the Secretary to take land into trust for the UKB Corporation.

C. 25 CFR 151.10(b) The need of the Tribe for additional land.

Neither the UKB nor the UKB Corporation currently have any lands held in trust by the United States. The proposed site is owned in fee simple status and the UKB states the need for the fee-to-trust request is for economic development.

The Property is the UKB's only gaming facility. The UKB has received a determination by the National Indian Gaming Commission that the facility is not located on Indian lands under Federal law; the UKB now has an urgent need to have the property placed in trust. The UKB may suffer substantial financial loss if the property is not placed in trust. In 2010, the UKB utilized \$1,234,933.30 of the gaming revenue for Tribal programs including Human Services, Emergency Funds, Housing Rehabilitation, Family Services, Education, Clothing Voucher and Elder Assistance which benefited the UKB Tribal members. Additional economic development will allow the UKB to support governmental functions, which should decrease dependence upon limited Federal and state funds. In order for the UKB to continue to sustain its programs and operations as a means to providing needed services and assistance to its members, the acquisition of the property into trust would allow the UKB to continue to focus on the unmet needs of the UKB and its people without interruption. The UKB's application has sufficiently justified the need for this additional land.

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

The application states that the UKB intends to continue utilizing the property for economic development for the benefit of the UKB and its members and the site will be utilized for gaming purposes. I find that this request adequately describes the purpose for which the land will be used.

E. 25 CFR 151.10(e) If the land to be acquired is in unrestricted fee status, the impact on the state and its political subdivision resulting from the removal of the land from the tax rolls.

The UKB currently owns this land in fee simple status. Comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes and special assessments were solicited from the state and local political subdivisions. By correspondence dated November 4, 2011, comments regarding the proposed acquisition were invited from the following State, County and City Officials:

Governor of Oklahoma – No Response
Oklahoma Tax Commission – No Response
Cherokee County Commissioners – No Response
Sheriff of Cherokee County – No Response
Mayor of Tahlequah – No Response
Chief of Police of Tahlequah – No Response
Principal Chief of the Cherokee Nation – No Response
Cherokee County Assessor – Response dated November 10, 2011
Cherokee County Treasurer – Response dated November 8, 2011

Cherokee County Assessor – By response dated November 10, 2011, a copy of the Real Property Assessment Record to the Region stated the tax on the property is assessed at \$1,709.00. There are no special assessments or outstanding tax assessments.⁴

Cherokee County Treasurer – By response dated November 8, 2011, the Treasurer provided information which reflects \$1,709.00 was paid for 2010 taxes.⁵

Real property in Oklahoma is subject to state ad valorem taxes, which is collected by the respective counties to fund a variety of countywide services; the largest share of these taxes goes to the local school districts. The subject property is currently carried on the Cherokee County Assessor's rolls as taxable.

In a letter dated May 17, 2011, the Attorney General of the State of Oklahoma wrote to express his concerns about the amount of time taken to reach a determination on these matters. We have reviewed the Attorney General's comments as well as all comments and information submitted to the Department on this matter. This decision is reached after full consideration of these issues and the administrative record.

The Regional Director finds that the impact on the state and local governments resulting from the removal of the subject property from the tax rolls will be insignificant, we concur.

⁴ EOR Application Tab 46

⁵ ERO Application Tab 45

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

The EOR is concerned that jurisdictional conflicts will arise between the UKB and the CNO if property is placed into trust for the UKB within the former reservation boundaries of the CNO. The Assistant Secretary has previously stated in the June 24, 2009 Decision that 25 U.S.C. § 476(g) mandates that the "department or agencies of the United States shall not ... make any decision or determination pursuant to the IRA, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." The Assistant Secretary found that this section of the IRA "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction," and "the UKB, like CN, possesses the authority to exercise territorial jurisdiction over its tribal lands."

The EOR identified a potential jurisdictional issue on a survey of the Property. Specifically, a portion of the casino building encroaches onto a separate tract of property owned in fee by the UKB ("parking lot tract"). While the UKB's ownership of the parking lot tract satisfies the Department that no legal liabilities will arise as a result of the encroachment, it recognizes the potential for jurisdictional issues given that a portion of the casino building would be subject to state jurisdiction. To address the concern, the UKB provided Tribal Resolution No. 12-UKB-33, stating that the UKB intends to make application to place the parking lot tract in trust in the near future and that, in the meantime, the UKB will not conduct gaming activities on the portion of the property that lies outside of the Property tract.

Fire, water, ambulance, and sanitation services for the property are currently provided by the city of Tahlequah. Law enforcement services for the property are currently provided by an informal agreement with the City of Tahlequah and Cherokee County law enforcement agencies whereby the Keetoowah Lighthorse, the UKB's security force, monitors tribally-owned land and reports any suspicious activities immediately to the City and County law enforcement agencies so that those entities can respond accordingly.

While there may be jurisdictional disputes in the future, the Regional Director believes that there is adequate foundation for resolving them, and we concur.

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

The land proposed for trust acquisition is within the jurisdictional boundaries of the BIA's EOR. The Secretary has determined that the lands within the former treaty boundaries of the CNO are the CNO's service area for purposes of administering BIA programs under Indian Self-Determination and Education Assistance Act, Public Law 93-638 (25 U.S.C. § 450 et seq.), as amended. The CNO administers the program functions associated with the management of trust lands formerly provided by the BIA's Tahlequah Agency and EOR Office

through a Self-Governance Compact pursuant to 25 U.S.C. § 458aa, et seq. These programs include, but are not limited to, real estate services and tribal court services, as well as law enforcement services. As a result of the BIA's Self-Governance Compact with the CNO, the BIA agency with jurisdiction over BIA programs within the treaty boundaries of the former CNO-the Tahlequah Agency-was closed and the funds used to operate that agency, along with Regional Office funds utilized for direct services to the CNO and all Indians within that area (regardless of tribal affiliation), were transferred to the CNO Compact. There are no remaining direct service funds in the Region that have not been previously provided to the CNO in its Self-Governance Compact. Although the CNO has numerous full time employees available to provide BIA services, the UKB would likely reject the authority of the CNO employees and insist that the Region provide BIA direct services as it has done in the past with respect to other BIA services, e.g., processing of fee-to-trust acquisitions. The additional duties may increase the workload on the Region unless additional appropriations or budget allocations are obtained to off-set the additional direct services to be provided by the Region. The EOR has concluded they are capable of providing services for UKB and we concur.

H. 25 CFR 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 DM2, Land Acquisitions: Hazardous Substances Determinations.

By memorandum dated October 6, 2011, the Chief, Division of Environmental Safety and Cultural Resources Management (DESCRM), EOR, determined the revised Phase I ESA was prepared in accordance with the American Society for Testing and Materials (ASTM) Standard for ESA's, ASTM Standard E 1527-05. Pursuant to the review by the DESCRM, the ESA was found to be in compliance with the ASTM Standard E1527-05.

This acquisition is considered to be categorically excluded under NEPA pursuant to 516 DM 10, Section 10.5-I, Land Conveyances and Other Transfers. A categorical exclusion checklist was completed by DESCRM on in accordance with NEPA and the BIA NEPA Handbook, 59 IAM 3-H. We concur with this finding.

TWO PART DETERMINATION UNDER SECTION 20 OF IGRA

The two-part determination pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(A) is not applicable because "such lands are located in Oklahoma and are within the boundaries of the Indian tribe's former reservation" 25 U.S.C. § 2719 (a)(2)(A)(i).

REGIONAL DIRECTOR'S RECOMMENDATION

By memorandum dated April 19, 2011, the Regional Director recommended that the property be accepted in trust for the benefit of the Tribe.

DECISION

Our evaluation of the Tribe's request indicates that the Federal requirements for acquiring this Property into trust have been satisfied. The Regional Director will be authorized to approve the conveyance document accepting the property in trust for the Tribe subject to any condition set forth herein, approval of all title requirements by the Office of the Regional Solicitor, and expiration of the thirty day period following publication in the *Federal Register* of the notice required in 25 C.F.R. § 151.12(b).

Sincerely,

A handwritten signature in black ink, appearing to read "Michael S. Black", with a large, sweeping flourish extending from the end of the signature.

Michael S. Black
Acting Assistant Secretary – Indian Affairs