



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

DEC 16 2020

The Honorable Matthew Komalty  
Chairman, Kiowa Indian Tribe of Oklahoma  
P.O. Box 369  
Carnegie, Oklahoma 73015

Dear Chairman Komalty:

In 2018, the Kiowa Indian Tribe of Oklahoma (Tribe) submitted an application to the Bureau of Indian Affairs (BIA) to transfer into trust approximately 11.33 acres of land in the City of Hobart, Kiowa County, Oklahoma, (Site) for gaming and other purposes.<sup>1</sup> The Tribe proposes to construct a 17,000-square foot gaming facility with a restaurant and office space (Proposed Project). The Tribe also requested a determination whether the Site is eligible for gaming.

We have completed our review of the Tribe's request and the documentation in the record. As discussed below, it is my determination that the Department will transfer the Site into trust for the benefit of the Tribe pursuant to Section 5 of the Indian Reorganization Act (IRA).<sup>2</sup> Once transferred into trust, the Tribe may conduct gaming activities on the Site pursuant to Section 20 of the Indian Gaming Regulatory Act (IGRA).<sup>3</sup>

## Background

The Tribe has historically inhabited the Great Plains. In 1867, following earlier treaties that led to the Tribe's loss of land and removal and relocation,<sup>4</sup> the Kiowa, Comanche, and later Apache, Tribes entered into a treaty with the United States at Medicine Lodge Creek in Kansas.<sup>5</sup> The treaty established a reservation for the Tribes in Oklahoma. In 1892, the Tribes entered into the Jerome Agreement with the United States that allotted approximately 453,000 acres of the reservation to individual tribal members, leaving the remaining approximately 2.5 million acres opened for non-Indian settlement.<sup>6</sup>

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<sup>1</sup> Memorandum to Rose Roberson, Superintendent, Anadarko Agency, Bureau of Indian Affairs, from Matthew M. Komalty, Chairman, Kiowa Indian Tribe of Oklahoma (March 30, 2018) (hereinafter Tribe's Application).

<sup>2</sup> 25 U.S.C. § 5108.

<sup>3</sup> 25 U.S.C. § 2719.

<sup>4</sup> See Treaty with the Comanche, Kiowa, and Apache, 10 Stat. 1013 (1853) (authorized the government to establish roads and military posts within the Tribes' territory); Treaty with the Comanche and Kiowas, 14 Stat. 717 (1865)(removal of the Tribes from Kansas).

<sup>5</sup> Treaty with the Kiowa and Comanche, 15 Stat. 589 (1867).

<sup>6</sup> See Senate Executive Doc. No. 17, 52nd Cong., 2nd Sess., Serial Set No. 3055, Vol. 1, (Jan. 4, 1893), at 4. The Tribes challenged the disposition of their lands pursuant to the Jerome Agreement, but received an adverse ruling from the United States Supreme Court. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

## **Description of the Site**

The Site consists of approximately 11.33 acres of land located in the City of Hobart. The Tribe and the City of Hobart have entered into an intergovernmental agreement wherein the City, through the Hobart Economic Development Authority, will convey title to the Site to the United States, at no cost, for the benefit of the Tribe following approval of the Tribe's application.<sup>7</sup> Maps showing the location of the Site are included as Enclosure 1. The legal description of the Site is included as Enclosure 2.

## **Eligibility for Gaming Pursuant to the Indian Gaming Regulatory Act**

Section 20 of IGRA generally prohibits gaming on land transferred into trust after October 17, 1988. *See* 25 U.S.C. § 2719 ("Section 2719"). Congress expressly provided several exceptions to the general prohibition. Under Section 2719(a)(1), land that is located within reservation boundaries is exempt from the general prohibition. Similarly, land within the former reservation of an Oklahoma tribe that did not have a reservation on October 17, 1988, is also exempt from the general prohibition under Section 2719(a)(2)(A)(i) (Oklahoma exception).

The Regional Director found that Site is located within the exterior boundaries of the reservation established by the United States for the Tribe in 1867 in the Treaty with the Kiowa, Comanche, and Apache Tribes at Medicine Lodge Creek.<sup>8</sup> The Site is thus located within the former reservation of the Tribe under Sections 2719(a)(1) and (a)(2)(A)(i), and the Department's regulations at 25 C.F.R. §§ 292.4 and 292.2. We conclude, therefore, that upon acquisition into trust, the Site will be eligible for gaming.

## **Trust Acquisition Determination Pursuant to 25 C.F.R. Part 151**

The Secretary of the Interior's (Secretary) general authority for acquiring land in trust is found in Section 5 of the Indian Reorganization Act (IRA).<sup>9</sup> The Department's regulations at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5 of the IRA.

### **25 C.F.R. § 151.3 – Land acquisition policy.**

Section 151.3(a) sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe:

- (1) When the property 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

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<sup>7</sup> *See* Memorandum to Director, Office of Indian Gaming, from Regional Director, Southern Plains Region (Sept. 2018) [hereinafter Regional Director's Findings of Fact] at 3-4; Intergovernmental Agreement Relating to Conveyance of Unimproved Property (July 14, 2014), in Regional Director's Findings of Fact, Appendix 2L.

<sup>8</sup> Regional Director's Findings of Fact at 2.

<sup>9</sup> 25 U.S.C. § 5108.

- (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Although only one factor in Section 151.3(a) must be met, the Tribe's application satisfies the requirements of two subsections.<sup>10</sup> First, the Tribe's application satisfies subsection (a)(1) because the Site is located in Oklahoma within the Tribe's former reservation boundaries.<sup>11</sup> Second, the Tribe meets the criteria of subsection 151.3 (a)(3) because, as discussed below, the transfer of the Site into trust will facilitate tribal self-determination and economic development by generating revenue for the Tribe's governmental services.

The Regional Director determined, and we concur, that the Site is located within the exterior boundaries of the Tribe's reservation, and the acquisition of the Site in trust will facilitate tribal self-determination and economic development.<sup>12</sup>

### **25 C.F.R. § 151.10 – On-reservation acquisitions.**

Section 151.10 requires the Secretary to evaluate requests for the acquisition of land under the on-reservation criteria when the land is located within or contiguous to an Indian reservation.

The Site is located within the Tribe's former reservation boundaries. Section 151.2 defines "Indian reservation" as, "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma ... '*Indian reservation*' means that area of land constituting the former reservation of the tribe as defined by the Secretary." The Site meets these criteria.<sup>13</sup>

The Regional Director found, and we concur, that the Tribe's application is properly considered under the on-reservation criteria of Section 151.10.<sup>14</sup>

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

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<sup>10</sup> Although the Tribe does not currently own an interest in the Site, we note the Tribe has entered into an Intergovernmental Agreement wherein the City will gift deed the land to the United States in trust for the Tribe. *See Intergovernmental Agreement Relating to Conveyance of Unimproved Property between the City of Hobart and the Kiowa Tribe of Oklahoma* (July 14, 2014), in Regional Director's Findings of Fact, Appendix 2L. Additionally, the Department's land acquisition policy at 25 C.F.R. § 151.3 does not mandate tribal ownership prior to trust acquisition. Rather, if an applicant Tribe does not yet have title to the subject property, "the deed providing evidence of the transferor's title and a written agreement or affidavit from the transferor, that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust" will, in part, satisfy title evidence requirements. *See Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)*, available at [www.indianaffairs.gov/bia/ots/fee-to-trust](http://www.indianaffairs.gov/bia/ots/fee-to-trust).

<sup>11</sup> Regional Director's Findings of Fact at 3.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

Section 151.10(a) requires the Secretary to consider whether there is statutory authority for the trust acquisition and, if such authority exists, to consider any limitations contained in it.

### *Standard of Review*

#### Four-Step Procedure to Determine Eligibility

Section 5 of the IRA provides the Secretary discretionary authority to acquire any interest in lands for the purpose of providing lands in trust for Indians.<sup>15</sup> Section 19 defines “Indian” in relevant part as including the following three categories:

[Category 1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [Category 2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [Category 3] all other persons of one-half or more Indian blood.<sup>16</sup>

In 2009, the United States Supreme Court (Supreme Court) in *Carcieri v. Salazar* construed the term “now” in Category 1 to refer to the date of the IRA’s enactment.<sup>17</sup> Thus, the Secretary’s authority to acquire land in trust for Indian tribes under Category 1 extended only to those tribes that were “under federal jurisdiction” when the IRA was enacted on June 18, 1934. The Supreme Court did not consider the meaning of the phrases “under federal jurisdiction” or “recognized Indian tribe.”

For the reasons explained below, we conclude that there is evidence unambiguously demonstrating that the Tribe was “under federal jurisdiction” in 1934. As such, the Tribe is therefore eligible under Category 1 and, consequently, the Secretary has authority acquire land into trust for the Tribe.

To guide the implementation of the Secretary’s discretionary authority under Section 5 after *Carcieri*, the Department in 2010 prepared a two-part procedure for determining when an applicant tribe was “under federal jurisdiction” in 1934.<sup>18</sup> The Solicitor of the Interior (Solicitor) later memorialized the Department’s interpretation in Sol. Op. M-37029.<sup>19</sup> Despite this, however, uncertainty persisted over what evidence could be submitted for the inquiry and how the Department would weigh it, prompting some tribes to devote considerable resources to

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<sup>15</sup> 25 U.S.C. § 5108.

<sup>16</sup> 25 U.S.C. § 5129 (bracketed numerals added).

<sup>17</sup> 555 U.S. 379 (2009) (*Carcieri*).

<sup>18</sup> U.S. Dept. of the Interior, Assistant Secretary – Indian Affairs, Record of Decision, *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe* at 77-106 (Dec. 17, 2010) (Cowlitz ROD). See also Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs, Checklist for Solicitor’s Office Review of Fee-to-Trust Applications (Mar. 7, 2014), revised (Jan. 5, 2017).

<sup>19</sup> Sol. Op. M-37029, *The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act* (Mar. 12, 2014) (hereafter M-37029), available at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

researching and collecting any and all forms of potentially relevant evidence, in some cases leading to submissions totaling thousands of pages. To address this uncertainty, in 2018 the Solicitor's Office began a review of the Department's eligibility procedures to provide guidance for determining relevant evidence. This prompted questions concerning Sol. Op. M-37029's interpretation of Category 1, on which its eligibility procedures relied.

On March 9, 2020, the Solicitor withdrew Sol. Op. M-37029 after concluding that its interpretation of Category 1 was not consistent with the ordinary meaning, statutory context, legislative history, or contemporary administrative understanding of the phrase "recognized Indian tribe now under federal jurisdiction."<sup>20</sup> In its place, the Solicitor issued a new, four-step procedure for determining eligibility under Category 1 to be used by attorneys in the Office of the Solicitor (Solicitor's Office).<sup>21</sup>

At Step One, the Solicitor's Office determines whether or not Congress enacted legislation after 1934 making the IRA applicable to a particular tribe. The existence of such authority makes it unnecessary to determine if the tribe was "under federal jurisdiction" in 1934. In the absence of such authority, the Solicitor's Office proceeds to Step Two.

Step Two determines whether the applicant tribe was under federal jurisdiction in 1934, that is, whether the evidence shows that the federal government exercised or administered its responsibilities toward Indians in 1934 over the applicant tribe or its members as such. If so, the applicant tribe may be deemed eligible under Category 1 without further inquiry. The Solicitor's Guidance describes types of evidence that presumptively demonstrate that a tribe was under federal jurisdiction in 1934. In the absence of dispositive evidence, the inquiry proceeds to Step Three.

Step Three determines whether an applicant tribe's evidence sufficiently demonstrates that the applicant tribe was "recognized" in or before 1934 and remained under jurisdiction in 1934. The Solicitor determined that the phrase "recognized Indian tribe" as used in Category 1 does not have the same meaning as the modern concept of a "federally recognized" (or "federally acknowledged") tribe, a concept that did not evolve until the 1970s, after which it was incorporated in the Department's federal acknowledgment procedures.<sup>22</sup> Based on the Department's historic understanding of the term, the Solicitor interpreted "recognition" to refer to indicia of congressional and executive actions either taken toward a tribe with whom the United States dealt on a more or less government-to-government basis or that clearly acknowledged a trust responsibility consistent with the evolution of federal Indian policy. The Solicitor identified forms of evidence that establish a rebuttable presumption that that an applicant tribe was "recognized" in a political-legal sense before 1934 and remained under

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<sup>20</sup> Sol. Op. M-37055, *Withdrawal of M-37029, The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (Mar. 9, 2020), available at [www.doi.gov/sites/doi.gov/files/uploads/m-37055.pdf](http://www.doi.gov/sites/doi.gov/files/uploads/m-37055.pdf).

<sup>21</sup> *Procedure for Determining Eligibility for Land-into-Trust under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act*, Memorandum from the Solicitor to Regional Solicitors, Field Solicitors, and SOL-Division of Indian Affairs (Mar. 10, 2020) (Solicitor's Guidance), available at [www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors\\_Procedures\\_for\\_Determining\\_Eligibility\\_for\\_Land\\_into\\_Trust\\_under\\_Category\\_1.pdf](http://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Solicitors_Procedures_for_Determining_Eligibility_for_Land_into_Trust_under_Category_1.pdf).

<sup>22</sup> 25 C.F.R. Part 83.

federal jurisdiction in 1934. In the absence of such evidence, the inquiry finally moves to Step Four.

Step Four assesses the totality of an applicant tribe's non-dispositive evidence to determine whether it is sufficient to show that a tribe was "recognized" in or before 1934 and remained "under federal jurisdiction" through 1934. Given the historical changes in federal Indian policy over time, and the corresponding evolution of the Department's responsibilities, a one-size-fits-all approach for evaluating the totality of a tribal applicant's evidence is not possible or desirable. Attorneys in the Solicitor's Office must evaluate the evidence on a case-by-case basis within the context of a tribe's unique circumstances, and in consultation with the Deputy Solicitor for Indian Affairs and the Associate Solicitor, Division of Indian Affairs.

To further assist Solicitor's Office attorneys in implementing this four-step procedure by understanding the statutory interpretation on which it relies, the Solicitor's Guidance includes a memorandum detailing the Department's revised interpretation of the meaning of the phrases "now under federal jurisdiction" and "recognized Indian tribe" and how they work together.<sup>23</sup>

### *Analysis*

#### Procedure for Determining Eligibility

As noted, the Solicitor's Guidance provides a four-step process to determine whether a tribe falls within Category 1 of Section 19.<sup>24</sup> It is not, however, necessary to proceed through each step of the procedure for every fee-to-trust application.<sup>25</sup> The Solicitor's Guidance identifies forms of evidence that presumptively satisfy each of the first three steps.<sup>26</sup> Only in the absence of presumptive evidence should the inquiry proceed to Step Four, which requires the Department to weigh the totality of an applicant tribe's evidence.<sup>27</sup>

This criterion derives from understanding the meaning of the phrase "under federal jurisdiction" as referring to the federal government's administration of its Indian affairs authority with respect to particular groups of Indians. Certain federal actions may constitute dispositive evidence of federal supervisory or administrative authority over Indians in 1934. These are: elections conducted by the Department pursuant to Section 18 of the IRA; approval by the Secretary of a constitution following an election held pursuant to Section 16 of the IRA; issuance of a charter of incorporation following a petition submitted pursuant to Section 17 of the IRA; adjudicated treaty rights; inclusion in 1934 on the Department's Indian Population Report; and land acquisitions by the United States for groups of Indians in the years leading up to 1934.<sup>28</sup> It also

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<sup>23</sup> *Determining Eligibility under the First Definition of "Indian" in Section 19 of the Indian Reorganization Act of 1934*, Memorandum from the Deputy Solicitor for Indian Affairs, the Associate Solicitor, Division of Indian Affairs, and the Counselor to the Solicitor, to the Solicitor (Mar. 5, 2020) (Deputy Solicitor's Memorandum), available at [https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/20200812\\_DEP\\_SOL\\_to\\_SOL\\_Slip\\_Pages.pdf](https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/20200812_DEP_SOL_to_SOL_Slip_Pages.pdf).

<sup>24</sup> Solicitor's Guidance at 1.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* at 2-4.

includes the continuing existence of treaty rights and federal legislation addressing a particular tribe.<sup>29</sup> Where any of these forms of evidence exist, then the Solicitor's Office may consider the tribe to have been under federal jurisdiction in 1934 and eligible under Category 1.<sup>30</sup> The Tribe, as explained below, provided unambiguous evidence under Step One that it was "under federal jurisdiction" in 1934 and, therefore, eligible for the benefits of Section 5 of the IRA.

### Dispositive Evidence of Federal Jurisdiction in 1934

#### *Background*

In October 1867, the United States entered into a series of treaties at Medicine Lodge, Kansas with the Kiowa, Comanche, Apache, Southern Cheyenne, and Arapaho. In exchange for cessation of hostilities with the Southern Plains tribes, the United States agreed to cede a 2.9 million acre tract in what would become the State of Oklahoma to be reserved for their undisturbed use and occupation.<sup>31</sup> In 1892, Congress authorized a Commission to negotiate with the Confederated Tribes of the Kiowa, Comanche, and Apache Indians for the cession of their reservation.<sup>32</sup> Although the resulting agreement was not initially acted upon, Congress enacted legislation in 1900 subjecting the reservation to allotment and non-Indian settlement (1900 Act).<sup>33</sup> While these lands were ceded to the United States without the tribes' full, informed consent, over their objection, and in abrogation of the Medicine Lodge Treaty, the Supreme Court held that the Tribes' title had been extinguished, citing congressional plenary authority to abrogate treaty protected Indian property rights.<sup>34</sup> In 1906 and 1913, Congress enacted additional provisions for the sale of certain reservation lands.<sup>35</sup>

After Congress enacted the IRA in 1934, the Department reviewed the property interests in the lands to which the United States assumed title under these acts. The Commissioner of Indian Affairs wrote to the Secretary concerning Section 3 of the IRA's restoration authority for reservations "where lands have been opened, the Indians to receive the proceeds of sale only as the tracts are disposed of" and identified those reservations.<sup>36</sup> He recommended that those reservations be temporarily withdrawn from disposal until the question of permanent restoration to tribal ownership could be considered. On September 19, 1934, the Secretary directed that "lands, the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians," be temporarily withdrawn from disposal of any kind.<sup>37</sup> This

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<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> 15 Stat. 581 (creation of reservation), 589 (Confederation of Apache with the Kiowa and Comanche tribes).

<sup>32</sup> 25 Stat. 180.

<sup>33</sup> 31 Stat. 672, 676-681.

<sup>34</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). *See also U.S. v. Kiowa, Comanche, and Apache Tribes*, 163 F. Supp. 603, 607 (Ct. Cl. 1958) (discussing the changes from the 1892 agreement to what was ultimately enacted by Congress in 1900).

<sup>35</sup> 34 Stat. 213; 38 Stat. 77, 92. For further discussion of the opening of the reservation under these statutes, *see Oklahoma v. Texas*, 258 U.S. 574, 592 *et seq.* (1922).

<sup>36</sup> 54 I.D. 559, Sept. 19, 1934 (Secretary approving Commissioner's recommendation of Aug. 10, 1934 for twenty-seven reservations) *as amended* on Nov. 2, 1934 (including three additional reservations).

<sup>37</sup> *Id.*

withdrawal order listed lands on numerous reservations, including the Kiowa, Comanche, and Apache Reservation.<sup>38</sup>

In 1945, the Solicitor opined that reservation lands set aside under the 1900 Act for school and agency purposes were properly included within the list of areas eligible for restoration on account of the tribes being credited for sale proceeds above a certain amount.<sup>39</sup> After these lands were restored to tribal ownership, the Solicitor later reaffirmed that conclusion.<sup>40</sup>

### *Step One and the Oklahoma Indian Welfare Act.*

As noted in the Solicitor's Guidance, *Carcieri* acknowledged that Congress could choose to expand the Secretary's acquisition authority to a tribe that may not necessarily meet Section 19's definition of "Indian" under Category 1.<sup>41</sup> Step One of the Solicitor's Guidance counsels that when Congress enacted legislation after 1934 that made the IRA applicable to a particular tribe, such legislation effectively moots the need to determine that tribe's eligibility under Section 19.<sup>42</sup> The Oklahoma Indian Welfare Act (OIWA) of 1936<sup>43</sup> is precisely such a statute, as it provides the Secretary with an explicit source of authority to take land into trust for Oklahoma tribes pursuant to Section 5 of the IRA. After the compilation of the Haas Report in 1947,<sup>44</sup> additional tribal entities also organized under the OIWA.

The BIA Southern Plains and Eastern Oklahoma Regional Offices confirmed that the Kiowa reorganized pursuant to OIWA in 1970, thus, satisfying Step One of the Solicitor's Guidance.<sup>45</sup>

### *Conclusion*

Consistent with Step One of the Solicitor's Guidance, the Kiowa Tribe's organization under OIWA unambiguously establishes that the United States considered the Tribe to be under federal jurisdiction in 1934. As such, the Tribe satisfies the definition of "Indian" contained in Category

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<sup>38</sup> *Id.* at 562 citing Act of June 5, 1908 [sic],\* 34 Stat. 213. \*Errata in original publication citing 1908 rather than 1906.

<sup>39</sup> Solicitor's Opinion M-33963, *Status of Remnant Lands of the Kiowa, Comanche, and Apache Reservations under the Taylor Grazing Act* (Oct. 9, 1945).

<sup>40</sup> Solicitor's Opinion M-36510, *Status of title to land reserved for school and agency purposes on the former Kiowa, Comanche, and Apache Indian Reservation, Western Oklahoma* (Jan. 15, 1960). Though these sites were set aside under cession terms that completely extinguished Indian title over the opened reservation lands, the 1913 act, 38 Stat. 77, 92, allowed the tribes to receive proceeds from any sale of these unneeded school lands if they exceeded \$1.25 an acre as a matter of gratuity. The Solicitor cited the tribal right to proceeds from sales as the "significant and controlling factor under the [IRA]," rather than the presence or absence of trust title. The Solicitor therefore found sufficient similarity with the established section 3 analysis to opine that restoration by Secretarial Order (Dec. 16, 1946) was authorized.

<sup>41</sup> 555 U.S. at 391-392.

<sup>42</sup> Solicitor's Guidance at 2.

<sup>43</sup> Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210.

<sup>44</sup> Theodore Haas, *Ten Years of Tribal Government Under the I.R.A.* at 28 (U.S. Indian Service Tribal Relations Pamphlets 1947). The Haas Report listed the name of the tribes as then known, organized by agency, along with their population and dates of constitution and charter ratification pursuant to the OIWA.

<sup>45</sup> Constitution approved by the Department on Mar. 13, 1970, ratified by voters May 23, 1970.

1. We, therefore, conclude that the Secretary has the authority to acquire land in trust for the Kiowa Indian Tribe of Oklahoma under Section 5 of the IRA.

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

Section 151.10(b) requires the Secretary to consider a tribe's need for additional land.

The Tribe seeks to restore part of its land base in its historical reservation. Following the Treaty of Medicine Lodge Creek in 1867 and the subsequent allotment of the reservation resulting from the Jerome Agreement, the Tribe lost more than 2.5 million acres of its reservation.<sup>46</sup> The majority of allotted lands ultimately left Indian ownership. The Tribe currently has approximately 1,750.66 acres of trust land.<sup>47</sup>

The Tribe needs additional land to generate revenue for tribal programs and decrease the Tribe's dependence on federal assistance. Approximately 30 percent of the Tribe's members live below the poverty level.<sup>48</sup> Further, the unemployment rate of Native Americans living in Kiowa County was 24.7 percent in 2017, compared to 6.1 percent for all residents Kiowa County.<sup>49</sup> With additional revenue, the Tribe would provide funds for its governmental services, including educational programs; cultural programs; child, senior, and community services; health and wellness; and public safety.<sup>50</sup> The Proposed Project would also provide employment opportunities for tribal members.

The Tribe relies heavily on its own economic activities to fund its governmental programs. The Tribe reports that revenue from non-gaming sources has been decreasing with no revenue projected for fiscal year 2020.<sup>51</sup> Exacerbating the Tribe's budget needs is its growing membership. The Tribe reports that it experienced a population growth of 20 percent from 2011 to 2019. This growth combined with stagnant revenues has led to budget deficits in tribal programs.

The Tribe needs funding to support its new court system and other programs.<sup>52</sup> The Tribe lacks adequate funding to provide full-time law enforcement services, incarceration facilities, and juvenile programs. The Tribe reports that it also experienced funding deficits for programs such as education including a lack of scholarships, tutoring services, and cultural education. In addition, the Tribe experienced funding deficits in elder care that resulted in delayed or denied assistance in vision and dental programs, transportation, housing, and retirement programs.

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<sup>46</sup> See *supra* notes 4 and 5.

<sup>47</sup> See email to Maria Wiseman, Office of Indian Gaming, from Jerry Pau-Kune, Southern Plains Regional Office (Aug. 8, 2020).

<sup>48</sup> Letter to Maria K. Wiseman, Deputy Director, Office of Indian Gaming, from R. Daniel Carter, Conner & Winters (July 21, 2020).

<sup>49</sup> Environmental Assessment, Kiowa Tribe of Oklahoma Gaming Facility, Hobart, Oklahoma (June 2020) (hereinafter EA) § 3.6.1.

<sup>50</sup> EA § 1.4.

<sup>51</sup> Letter to Maria K. Wiseman, Deputy Director, Office of Indian Gaming, from R. Daniel Carter, Conner & Winters (July 21, 2020).

<sup>52</sup> *Id.*

The Proposed Project is expected to generate over \$11 million in net revenues after its second year.<sup>53</sup> After deducting for costs and expenses, the funds distributed to the Tribe will increase tribal revenue. With the expected increase in revenue from transferring the Site into trust for gaming, the Nation will address the needs of its members and prepare for future membership growth.

The Regional Director found, and we concur, that the Tribe needs additional land to facilitate self-sufficiency, and self-determination.<sup>54</sup>

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

Section 151.10(c) requires the Secretary to consider the purposes for which land will be used in evaluating a trust application.

The Proposed Project will include a 17,000-square foot (sf) gaming facility with approximately 297 gaming machines, a restaurant, office space, back of house operations, and a 310-space parking lot to accommodate patrons and employees.<sup>55</sup> The Proposed Project is expected to directly employ 156 people.<sup>56</sup>

**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 the land from the tax rolls.**

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

By correspondence dated April 26, 2018, the BIA solicited comments from the following state and local governments on the potential impact of the proposed acquisition of the Site on regulatory jurisdiction, real property taxes, and special assessments:<sup>57</sup>

- Governor of Oklahoma
- Oklahoma Tax Commission
- Oklahoma Tax Commissioner District #2
- Kiowa County Assessor
- Kiowa County Clerk
- Kiowa County Treasurer
- City of Hobart Town Clerk

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<sup>53</sup> Proposed Kiowa Casino, Market Study and Financial Projections (2011), Section VII-1, in EA, Appendix F.

<sup>53</sup> Regional Director's Findings of Fact at 6.

<sup>54</sup> Regional Director's Findings of Fact at 5.

<sup>55</sup> EA § 2.1.3.

<sup>56</sup> *Id.* at § 4.6.6.1.

<sup>57</sup> *See* Regional Director's Findings of Fact, Appendix 18. The BIA also notified the Chairmen of the following tribes: Comanche Nation, Oklahoma, Apache Tribe of Oklahoma, and Fort Sill Apache Tribe of Oklahoma. *Id.* The BIA received no responses.

On August 23, 2018, the Kiowa County Assessor replied stating that there are no special assessments on the Site and that it has been exempt from taxation since 2005.<sup>58</sup> The City of Hobart provided a similar response.<sup>59</sup> The BIA received no other comments. Accordingly, there are no potential impacts resulting from removal of the Site from the tax rolls.

The Proposed Project will provide substantial economic benefits for the local economy. Both the City of Hobart and Kiowa County support the Proposed Project because of the expected employment and economic development it will bring to the region.<sup>60</sup>

### *Employment and Economic Output*

The Proposed Project will result in a variety of benefits to the regional economy, including increases in employment opportunities and economic output.

The Proposed Project will directly employ an estimated 156 people, which will benefit the City of Hobart and Kiowa County by providing employment opportunities. The unemployment rate for the City in 2017 was 4.8 percent compared to the State rate of 3.5 percent.<sup>61</sup> The City's poverty rate in 2017 was 30.5 percent compared to 16.2 percent for the State.<sup>62</sup> Further, the median household income of the County in 2017 was \$38,191, compared to the State average of \$49,767.<sup>63</sup> Construction and operation of the Proposed Project will generate temporary and ongoing employment opportunities that will be filled by the available labor force in the City of Hobart and Kiowa County.<sup>64</sup>

Construction and operation of the Proposed Project will generate substantial economic output and create economic benefits for a variety of area businesses that support construction and operation activities. Area businesses will in turn increase their spending and labor demand, which will stimulate the local economy.<sup>65</sup> Operations are expected to result in approximately \$1 million paid each year in operational costs, including payroll expenses, fees, and other costs.<sup>66</sup> For example, the expected maintenance and facility operation costs, which include grounds keeping, maintenance payroll, and security personnel, will be over \$250,000 per year. This economic output will benefit the regional economy.

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<sup>58</sup> See letter received by the BIA, from Buddy Jones, Jr., Kiowa County Assessor (Aug. 23, 2018), in Regional Director's Findings of Fact, Appendix 7; letter to United States Department of the Interior from Buddy Jones, Jr., Kiowa County Assessor (April 30, 2018), in Regional Director's Finding of Fact, Appendix 18; letter to Matthew Komalty, Kiowa Tribe of Oklahoma, from Buddy Jones, Jr., Kiowa County Assessor (March 7, 2018), in Regional Director's Findings of Fact, Appendix 2N.

<sup>59</sup> See letter to United States Department of the Interior, from Thomas W. Talley, Talley & Talley (May 2, 2018), in Regional Director's Findings of Fact, Appendix 18.

<sup>60</sup> See Letters to the Kiowa Tribe of Oklahoma from Jeff Allen, Mayor, City of Hobart (undated), Larry Adler, Hobart City Manager (March 7, 2018), and Tim Bingham, Chairman, Kiowa County Board of Supervisors (March 7, 2018), in Regional Director's Findings of Fact, Appendix 2N.

<sup>61</sup> EA § 3.6.1.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at § 4.6.1.1.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; Proposed Kiowa Casino, Market Study and Financial Projections (2011), Section VII-2, in EA, Appendix F.

The Regional Director concluded, and we concur, that there will be no negative impacts from removing the Site from the tax rolls.<sup>67</sup>

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

Section 151.10(f) requires the Secretary to consider whether any jurisdictional problems and potential conflicts of land use may arise.

In response to its request of April 18, 2018, the BIA received no comments from the State or local jurisdictions regarding jurisdictional problems or potential conflicts of land use.<sup>68</sup>

*Land Use*

The Site is located within the city limits of Hobart, bounded on the East by US Highway 183 (a four-lane highway) and less than one mile north of the intersection of US Highway 183 and Highway 9 (E. 11th Street).

The Site is primarily farmland located in a rural area. The City zoned the Site as general agriculture, but upon the approval of the Tribe's application, it will be zoned as general commercial.<sup>69</sup> This designation is consistent with the Proposed Project.

There are agricultural lands and developed properties near the Site. These include an Oklahoma Department of Transportation maintenance yard immediately to the north, agricultural land to the south, baseball fields to the east across Highway 183, and agricultural land to the west.<sup>70</sup> An abandoned road spur connecting State Highway 9 (E. 11th Street) with U.S. Highway 183 that bisects the western portion of the Site. The Proposed Project will not disrupt neighboring land use or prohibit access to neighboring parcels.<sup>71</sup>

*Law Enforcement, Fire Protection, and Emergency Services*

The City of Hobart stated that it would provide fire, police, and emergency health services to the Proposed Project.<sup>72</sup> The Tribe will enter into an intergovernmental agreement with local governments to provide law enforcement, emergency response, and other public safety personnel to the Site.<sup>73</sup> The Tribe will supplement the local government support with its own personnel, and in the unlikely event of a situation beyond its capabilities, will request federal assistance.<sup>74</sup>

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<sup>67</sup> Regional Director's Findings of Fact at 6.

<sup>68</sup> See Regional Director's Findings of Fact at 6.

<sup>69</sup> *Id.*; letter to United States Department of the Interior, from Thomas W. Talley, Talley & Talley (May 2, 2018), in Regional Director's Findings of Fact, Appendix 18.

<sup>70</sup> EA § 3.10.1.

<sup>71</sup> *Id.* at § 4.13.1.8.

<sup>72</sup> See letter received by the BIA from Ashley Slaughterback, Interim City Manager, City of Hobart (Oct. 30, 2018), in EA, Appendix A.

<sup>73</sup> Tribe's Application at 7.

<sup>74</sup> EA § 2.1.1.6.

The Tribe plans to work with the Kiowa County Sheriff's office to develop a cross deputization agreement under the umbrella of the statewide protocol developed jointly by the BIA and the State of Oklahoma. A cross-deputization arrangement is standard for tribes throughout Oklahoma. Such an arrangement would provide fast and effective response whenever needed.

The Tribe will also enter into an agreement with the Hobart Fire Department to serve as the primary fire and emergency medical responder for the Site.<sup>75</sup> If necessary, the Tribe could provide its own emergency response services, and plans to include an on-site emergency response team.

We conclude that no jurisdictional problems or potential conflicts of land use will arise.

**25 C.F.R. § 151.10(g) - If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.**

The Superintendent of the Anadarko Agency does not expect the transfer of the Site into trust to result in significant additional responsibilities. The Site is located near the western boundary of the Tribe's former reservation boundaries, and BIA staff will not be need to undertake additional travel outside of the area. The Regional Director found, and we concur, that the BIA has adequate resources to assume additional responsibilities resulting from the acquisition of the Site in trust.<sup>76</sup>

**25 C.F.R. § 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 DM 2, Land Acquisitions: Hazardous Substances Determinations.**

Section 151.10(h) requires the Secretary to consider the availability of information necessary for compliance with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and a determination on the presence of hazardous substances.

*602 DM 2, Land Acquisitions: Hazardous Substances Determinations*

In October 2018, Kent & Associates conducted a Phase I Environmental Site Assessment (ESA), in compliance with ASTM Standard E 1527-13.<sup>77</sup> Recognized Environmental Conditions indicate the presence of any hazardous substance or petroleum product that indicates a release, past release, or material threat of future release, including those hazardous substances and petroleum products that are permitted by law. The ESA found no current or historic Recognized Environmental Conditions. An updated ESA will be conducted prior to transferring the Site into trust.

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<sup>75</sup> EA § 2.1.1.7.

<sup>76</sup> Regional Director's Findings of Fact at 6.

<sup>77</sup> EA § 3.12.2, Appendix J (Phase I Environmental Site Assessment).

## *National Environmental Policy Act*

The BIA prepared an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C § 4321 *et seq.* The EA evaluated the transfer of the Site into trust and the subsequent development of the Site by the Tribe. The BIA made the EA available for public comment from August 28, 2019, through September 27, 2019. The BIA published notices of availability of the EA in the *Anadarko Daily News*, *Kiowa News*, and *The Carnegie Harold*. The Tribe also provided notices of availability on its Facebook page and at *kiawahobart.wordpress.com*. The EA is available at the same web address. The BIA received one comment on the EA from the Hobart Economic Development Authority, the agency that holds fee title to the Site. The agency stated that it has no environmental concerns and that it supports the Proposed Project.<sup>78</sup>

The EA analyzed two alternatives:

### Alternative A, Proposed Casino

Under Alternative A, the United States will transfer the approximately 11.33-acre Site into trust for the benefit of the Tribe. The Tribe proposes to construct an approximately 17,000-sf gaming facility with approximately 297 gaming machines, a restaurant, office space, back of house operations, and a 310-space parking lot to accommodate patrons and employees. Alternative A will directly employ 156 people.

### Alternative B, No Action Alternative

Under Alternative B, the United States would not transfer the Site into trust and the Hobart Economic Development Authority would retain title to the Site.

### *Selection of Preferred Alternative*

We have determined that the Department will implement Alternative A as the Preferred Alternative. This decision is based on the environmental analysis in the EA, a consideration of economic and technical factors, and the purpose and need for transferring the Site into trust. Of the alternatives evaluated in the EA, Alternative A will best meet the purpose and need for action because it best promotes the long-term economic development, self-sufficiency, self-determination, and self-governance of the Tribe.

### *Environmental Analysis*

The EA evaluated potential impacts to land resources; water resources; air quality; biological resources; cultural resources; socioeconomic conditions; transportation networks; land use; public services and utilities; visual resources; noise; hazardous materials; and cumulative and indirect impacts. The EA identified the Best Management Practices (BMPs) in Section 2.1.4 that

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<sup>78</sup> See email from Lou Sims, Chairman, Hobart Economic Development Authority, to Hunter Hegwood, Anadarko Agency, BIA (Sept. 10, 2019).

are incorporated into the project design to eliminate or substantially reduce environmental consequences to less-than-significant levels.

*NEPA Determination*

As discussed in detail in the EA and Finding of No Significant Impact (FONSI), I conclude that the development of the Proposed Project on the Site will not result in significant impacts to the human environment. The FONSI is included as Enclosure 3. In accordance with Section 102(2)(c) of NEPA, an environmental impact statement is not required. This fulfills the requirements of NEPA as set out in the Council on Environmental Quality Regulations for Implementing NEPA, 40 C.F.R. §§ 1500-1508, and the BIA NEPA Guidebook (59 IAM 3-H, August 2012).

**Decision to Approve the Tribe's Fee-to-Trust Application**

Pursuant to Section 5 of the IRA, 25 U.S.C. § 5108, the Department will acquire the Site located in the City of Hobart, Kiowa County, Oklahoma, in trust for the Kiowa Tribe of Oklahoma. Further, pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(a)(2)(A)(i), the Site will be eligible for gaming upon acquisition in trust. Consistent with applicable law, upon completion of the requirements of 25 C.F.R. § 151.13, an updated Phase I ESA pursuant to 602 DM 2, and any other Departmental requirements, the Regional Director shall immediately acquire the Site in trust. This decision constitutes a final agency action under 5 U.S.C. § 704.

Sincerely,



Tara Sweeney  
Assistant Secretary – Indian Affairs

Enclosures

cc: Regional Director, Southern Plains Region