



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

JUL 03 2014

The Honorable Steve Cadue  
Chairman, Kickapoo Tribe of Indians  
of the Kickapoo Reservation in Kansas  
1107 Goldfinch Road  
Horton, Kansas 66439

Dear Chairman Cadue:

On March 13, 2012, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas (Tribe) requested that the Department of the Interior (Department) acquire in trust several parcels of land collectively known as the Highway 75 Corridor Site (Site) in Brown County, Kansas. The Tribe asserts that it plans to construct and operate a hotel, restaurant, and gaming facility (Gaming Facility) on the Site. We have determined that the Department cannot accept the Site in trust for gaming purposes at this time because the Tribe has not submitted an application that meets the requirements of the Department's land acquisition regulations at 25 C.F.R. Part 151<sup>1</sup> or the Department's regulations governing gaming at 25 C.F.R. Part 292.<sup>2</sup>

We have reviewed the Tribe's application, supporting documentation, comments received from the State of Kansas and Brown County, and the recommendation of the Regional Director (Regional Director's Recommendation).<sup>3</sup> The materials submitted by the Tribe lack the specificity, consistency, and factual analysis required by Part 151 and Part 292. In order to approve the Tribe's request, we must have a record containing all necessary documents showing that the application meets all of the applicable regulatory requirements. The application materials provided by the Tribe do not provide a clear or complete record that presents basic information about the proposed acquisition and Gaming Facility. Without the basic information needed to analyze the criteria set forth in our governing regulations, we must disapprove the acquisition of the Site.

If the Tribe wishes to pursue gaming at the Site, its application materials must be significantly developed, and a new application must be submitted that meets the requirements of the

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<sup>1</sup> The Secretary of the Interior's general authority for acquiring land in trust is found in section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. The regulations found at 25 C.F.R. Part 151 set forth the procedures for implementing section 5.

<sup>2</sup> The Tribe seeks to conduct gaming pursuant to section 2719 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719. The Department's regulations at 25 C.F.R. Part 292 implement section 2719 and became effective on August 25, 2008.

<sup>3</sup> See Memorandum from Acting Regional Director and accompanying documents, Southern Plains Region Office, to Paula Hart, Director, Office of Indian Gaming (January 28, 2013), Office of Indian Gaming Materials, Tab 1 [hereinafter Regional Director's Recommendation].

regulations at Part 151 and Part 292. The Department's Fee-to-Trust Handbook (available at <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf>) provides helpful guidance on the information that must be included with the application. For example, the absence of application materials regarding the size, scope, and configuration of the project makes it difficult to analyze the effects and practical implications of such a project.

### **Discussion**

The deficiencies in the trust application are numerous. Because it will be necessary for the Tribe to address these issues if it seeks to re-apply in the future, we have identified many of the deficiencies below.

#### *Identification of parcels and acreage to be acquired*

As an initial matter, it is not clear from the Tribe's application which lands or how many acres are to be acquired. The Regional Director's Recommendation describes the acquisition as consisting of 259.92 acres, more or less, but the Environmental Assessment (EA) states that the acquisition consists of 265.5 acres. Additionally, the individual tracts are referred to inconsistently in the application and supporting documents. The Regional Director refers to five tracts labeled Tract A, Tracts B1, B2 and B3, and Tract C.<sup>4</sup> The Tribal Resolution refers to three tracts as Numbers 1 to 3, with two additional tracts not referred to either alphabetically or numerically. The EA refers to tracts identified as A1, A2, A3, Tract B, and Tract C.<sup>5</sup> The Title Commitment for Title Insurance contains legal descriptions for five parcels each referred to numerically.<sup>6</sup> Thus, the application must be revised to clarify which parcels are being discussed and to include an accurate description of the acreage to be acquired.<sup>7</sup>

#### *Compliance with the National Environmental Policy Act*

Further, the record does not contain sufficient information that allows the Department to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Department's regulations, particularly 25 C.F.R. § 151.10(h). Section 151.10(h) requires the applicant to provide information allowing the Secretary to comply with NEPA procedures.<sup>8</sup>

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<sup>4</sup> Regional Director's Recommendation; Superintendent's Recommendation, Tab 1.

<sup>5</sup> Environmental Assessment at 2, section 1.3.

<sup>6</sup> Title Commitment for Title Insurance (June 24, 2010), Superintendent's Recommendation, Tab 3.

<sup>7</sup> The references to Tribe itself throughout the application materials should also be clarified. It is particularly important in this case for the Tribe to consistently refer to its federally recognized name as listed on the Department's list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs (list of federally recognized tribes) to avoid confusion with other tribes also identified as "Kickapoo." Indeed, there are three federally recognized tribes identified as "Kickapoo": "Kickapoo Traditional Tribe of Texas," "Kickapoo Indian Tribe of Indians of the Kickapoo Reservation in Kansas" and "Kickapoo Tribe of Oklahoma." 79 Fed. Reg. 4748 (January 29, 2014) at 4750. For any future fee-to-trust applications, the Tribe should make sure that its application and all supporting materials (including any tribal resolution that is submitted) make clear that the application is being submitted on behalf of the "Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas."

<sup>8</sup> The regulations state the Secretary will consider specific criteria in evaluating requests for acquisition of land in trust status, including: "the extent to which the applicant has provided information that allows the Secretary to

If an application does not include the necessary documentation to demonstrate compliance with NEPA and section 151.10(h), we cannot approve the application to acquire land in trust.

The Tribe's application materials include an EA analyzing the potential impacts of acquiring the Site in trust for gaming purposes.<sup>9</sup> The EA, however, does not provide sufficient information to permit us to determine the significance of potential impacts, such as the size and scope of the Gaming Facility and hotel, removal of fuel tanks, traffic impacts, socio-economic impacts and mitigation measures for identified significant impacts.

The EA generally identifies the preferred alternative as placing the Site in trust for the purpose of building a Gaming Facility, yet provides few details about the Gaming Facility itself.<sup>10</sup> For example, the EA fails to identify the size, scope, or specific location on the Site of the Gaming Facility. In fact, the EA states that no design for the Gaming Facility has yet been developed.<sup>11</sup>

In addition to the lack of basic information about the Gaming Facility, the determinations reached in the EA are vague, conclusory, and unsupported. For example, with regard to potential traffic impacts, the EA states, "it is anticipated that there will be an increase of vehicular travel on every roadway in the vicinity of the subject property."<sup>12</sup> The EA does not, however, identify which roadways other than Highway 75 will be impacted or analyze the significance of a traffic increase. While the EA provides data about expected future traffic counts, the source of the information is not cited.<sup>13</sup> It is, thus, unclear if this information can be used as support. Accordingly, we cannot determine if the potential traffic impacts are significant.

Similarly, the EA states that, "a new tribal gaming facility with [a] hotel will increase[] employment opportunities for tribal members and other individuals living in the vicinity."<sup>14</sup> The EA, however, contains no discussion of the size of the Gaming Facility or the hotel, the number of employment opportunities that will be created, or a description of the vicinity to be affected. While some speculation is inevitable in such projections, it is helpful to have a sound basis for such speculation. It is insufficient merely to identify a direct impact that may occur, while providing no specific information to support that conclusion. The EA contains numerous unsupported conclusions and provides insufficient information upon which to approve the Tribe's application.

The EA further indicates that if the preferred alternative is implemented, environmental consequences will occur, including incorporating the existing truck plaza into the Gaming

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comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations..." 25 C.F.R. § 151.10(h).

<sup>9</sup> See Environmental Assessment (October 10, 2012) [hereinafter Environmental Assessment], Superintendent's Recommendation, Tab 9.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> Environmental Assessment at 3, section 1.3.

<sup>12</sup> *Id.* at 26, section 4.10.2.

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

<sup>14</sup> *Id.* at 39, section 4.9.2.

enlargement of existing wastewater lagoons, 10 acres of additional parking, lighted signage to advertise the Gaming Facility, increased traffic count on nearby highways, and traffic control modifications to be installed on US Highway 75.<sup>15</sup> With regard to socio-economic impacts, the EA states that there will be a “significantly more intense (built-up) use of the subject parcel.”<sup>16</sup> Similarly, with regard to air quality, the EA states that, “there will be significant increases in visitation to the property and increased volume of vehicle traffic will increase the pollutant load in the ambient air.”<sup>17</sup> Because the EA lists specific significant impacts, we would expect to see the EA discuss mitigation measures for the identified significant impacts. The EA, however, includes mitigation provisions only for traffic and soil erosion.

The EA asserts that a Finding of No Significant Impact (FONSI) is appropriate for this acquisition. The EA, as written, does not support a finding of no significant impact. It is not clear from the EA whether an environmental impact statement (EIS) is required. The NEPA requires that an EIS be prepared for major Federal actions significantly affecting the quality of the human environment.<sup>18</sup> An EA is a less detailed document that may be used to determine whether an EIS is required.<sup>19</sup> If, based on an EA, it is determined that a proposed action will not significantly affect the quality of the human environment, the Department may fulfill the requirements of NEPA by issuing a FONSI.<sup>20</sup> Other issues that must be further addressed in the EA include the selection of reasonable alternatives, the description of the purpose and need, identification of affected resources, adequate mitigation measures, and analysis of indirect and cumulative impacts. It would be helpful if the EA is revised to address these issues and to address the reasons for whether an EIS is appropriate in this case.<sup>21</sup>

### **Compliance with 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), 25 U.S.C. § 465. The regulations found at 25 C.F.R. Part 151 set forth the procedures for implementing section 465. The Regional Director indicates that the acquisition should be processed under the regulatory requirements for an on-reservation acquisition in 25 C.F.R. § 151.10 because the Site is contiguous to a trust parcel which is contiguous to the Tribe’s reservation.<sup>22</sup> Given the issues with the land descriptions identified below, and particularly in light of disagreement with state and local governments about what should be clearly ascertainable facts, we are unable to make this determination at this time.

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<sup>15</sup> EA at 21, section 4.1.2.

<sup>16</sup> *Id.* at 26, section 4.9.2.

<sup>17</sup> Environmental Assessment at 23, section 4.5.2.

<sup>18</sup> 40 C.F.R. § 1501.4.

<sup>19</sup> 40 C.F.R. § 1501.3.

<sup>20</sup> 40 C.F.R. § 1501.4(e); *see also* 40 C.F.R. § 1508.13.

<sup>21</sup> The Superintendent’s 2013 Memorandum indicates there are no deficiencies in the EA and draft FONSI, however the memorandum does not address the identification of significant impacts or whether an EIS should ensue. Superintendent’s Memorandum to Director, Office of Indian Gaming (Jan. 30, 2013) at 8.

<sup>22</sup> Regional Director’s Recommendation at 6.

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

Section 151.3 sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian tribe. The Secretary may acquire land in trust for a tribe when the land to be acquired is within the exterior boundaries or is adjacent to a tribe's reservation, or it is within a tribal consolidation area; when a tribe already owns an interest in the land; or when the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.<sup>23</sup>

We are unable to conduct an analysis of section 151.3. As referenced above, it is not clear from the Tribe's application which lands are to be acquired because of inconsistent descriptions of the tracts, as well as conflicting information on the number of acres to be acquired. The Regional Director's Recommendation states that the acquisition consists of 259.92 acres, more or less,<sup>24</sup> which differs from the EA, which states that the acquisition consists of 265.5 acres.<sup>25</sup> Further, the individual tracts are not referred to consistently as explained above.

Identification of the correct parcels is made more difficult because the acreage for individual tracts appears to differ. For example, the Acting Superintendent, Horton Agency, states that Tract A contains 68.50 acres, more or less.<sup>26</sup> The Tribal Resolution, however, describes part of the land purchased by the Tribe as containing 74 acres, more or less.<sup>27</sup> Brown County identifies Tract A as having approximately 72.4 acres.<sup>28</sup> In addition, the Tribe's application includes a warranty deed for 0.16 acres which does not appear to be included in the Tribe's Resolution.<sup>29</sup> The warranty deed's inclusion in the Tribe's application materials makes it unclear if this land is also to be acquired in trust.<sup>30</sup>

We are unable to complete an analysis of the Tribe's application under section 151.3 because these discrepancies raise questions about which land is to be acquired and the fundamental soundness of the application materials overall. Precision is important in such matters because the Secretary would be undertaking certain responsibilities as to any land taken into trust. If the Tribe wishes to proceed with a new application, the uncertainty created by these discrepancies must be reconciled.

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<sup>23</sup> See 25 C.F.R. § 151.3(a)(1) – (a)(3).

<sup>24</sup> Regional Director's Recommendation at 1.

<sup>25</sup> Environmental Assessment at 2, section 1.3.

<sup>26</sup> Superintendent's Recommendation at 1.

<sup>27</sup> Tribal Resolution.

<sup>28</sup> Comment letter from Paula J. Jones, Brown County Appraiser, to Robin Bellmard, Superintendent, Horton Office (April 9, 2012), Superintendent's Recommendation, Tab 18.

<sup>29</sup> Warranty Deed conveyed by Bennie and Cathryn Finger to the Tribe (August 27, 1998), Superintendent's Recommendation, Tab 5.

<sup>30</sup> See Tribal Resolution.

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

Section 151.10(a) requires the Secretary to consider whether or not statutory authority exists for a trust acquisition and, if such authority exists, to consider any limitations contained therein.

The Secretary's authority to acquire land in trust for Indian tribes derives from section 5 of the IRA, 25 U.S.C. § 465. In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the United States Supreme Court held that the Secretary's authority to acquire land in trust for Indian tribes pursuant to section 5 of the IRA extends only to those tribes that were "under Federal jurisdiction" when the IRA was enacted on June 18, 1934. Here, no determination has yet been made whether the Tribe was under Federal jurisdiction in 1934. If the Tribe wishes to submit a new application for acquisition of the Site, we recommend that the Tribe prepare an analysis and provide supporting documentation demonstrating that the Tribe was under Federal jurisdiction in 1934.<sup>31</sup>

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

Section 151.10(b) requires the Secretary to consider the Tribe's need for additional land. The Tribe's application only provides general statements about the Site rather than reasons why the Tribe needs the land.

We are unable to complete our analysis of the Tribe's application under section 151.10(b) without more information regarding Tribe's need for additional land. If the Tribe wishes to re-apply, it would be helpful if the Tribe provides additional information regarding this section.

**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. The requirements of this section have not been met because the Tribe did not submit materials that adequately describe the purposes for which the Site will be used. The Tribal Resolution states that the acquisition of the Site "will increase the land base of the Kickapoo Tribe, expand the agricultural capacity of the Kickapoo Farm & Ranch and provide economic development [] with gaming opportunities."<sup>32</sup> However, there is no description of the agricultural uses proposed

<sup>31</sup> We note that in a recent M-Opinion, the Solicitor for the Department stated: "tribes that voted whether to opt out of the IRA in the years following enactment (regardless of which way they voted) generally need not make any additional showing that they were under Federal jurisdiction in 1934. This is because such evidence unambiguously and conclusively establishes that the United States understood that the particular tribe was under federal jurisdiction in 1934." Memorandum from the Solicitor to the Secretary of the Interior, March 12, 2014 (M-37029) (discussing the meaning of "Under Federal Jurisdiction" for purposes of the Indian Reorganization Act). The Solicitor's Opinion, M-37029, referenced the Haas Report which, in part, specified tribes that had either voted to accept or reject the IRA. *Id* at 20. The Haas Report lists the "Kickapoo in Kansas." See Theodore Haas, *Ten Years of Tribal Government Under IRA (1947)* at 16. It would be helpful to complete the record if the Tribe includes this type of analysis in its application.

<sup>32</sup> Tribal Resolution.

for the Site. Likewise, the application does not state what type of gaming will occur – class II and/or class III. Typically, the type of gaming to be offered influences the type and size of the facility to be constructed, affects the financial returns of the facility, and may affect the numbers of visitors to the Site.

The application includes a 3 year (2011–2014) business plan for a truck plaza on the Site.<sup>33</sup> The business plan consists of a very short narrative giving options for increased profitability of the truck plaza by either leasing the building or re-establishing a newly renovated truck plaza that advertises the business as under new management. The narrative indicates that the Tribe leased the establishment, but the lease was unprofitable. The business plan states the Tribe is currently seeking a lessee for the property.<sup>34</sup> The business plan contains no development plans or revenue projections consistent with using the property for gaming or agriculture. We suggest that the application and supporting materials provide additional context for us to evaluate this document. For example, we cannot determine if the business plan is applicable to the proposed Gaming Facility or if the Tribe intends to reopen the plaza facilities that already exist on the Site.

Without clarification on these issues, we cannot complete our analysis of the Tribe's application under section 151.10(c).

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

Section 151.10(e) requires the Secretary to consider the impact of removal of the land from the tax rolls if the land to be acquired is in unrestricted fee status.

By correspondence dated March 23, 2012, the BIA solicited comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes, and special assessments from the Governor of Kansas and County Commissioners of Brown County.<sup>35</sup>

The Brown County Appraiser (County) responded by letter dated April 9, 2012, stating that the 2011 taxes levied against Tract A were \$172.04, Tract B were \$18,543.96, and Tract C were \$1,051.10.<sup>36</sup> There are no special assessments noted for the Site and the Site is not subject to county zoning regulations.<sup>37</sup> The County's letter stated that its position regarding the trust

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<sup>33</sup> Business Plan for Highway 75 Corridor Development, Kickapoo Tribe of Kansas (2010), Superintendent's Recommendation, Tab 16.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> Letter from Robin R. Bellmard, Superintendent, Horton Office, to County Commissioners, Brown County (March 23, 2012) and to Sam Brownbeck, Governor of the State of Kansas, regarding Notice of Gaming On-reservation/Contiguous Land Acquisition – Request for Comments (March 23, 2012), Superintendent's Recommendation, Tab 19. An identical letter was sent to Michael Dougherty, Chairman of the Sac & Fox Nation of Missouri in Kansas and Nebraska, however, no response was received.

<sup>36</sup> Comment letter from Paula J. Jones, Brown County Appraiser, to Robin Bellmard, Superintendent, Horton Office (April 9, 2012), Superintendent's Recommendation, Tab 18.

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

acquisition of the Site is “mixed” because agriculture is a necessity for the tribal community and the County; however, the loss of \$18,670 in tax revenue from Tracts B and C is substantial and would be “devastating.”<sup>38</sup> The County stated that while its position was mixed, it nonetheless strongly opposed the acquisition of the Site in trust.<sup>39</sup>

The Office of the Attorney General stated its opposition to the acquisition in its letter dated June 6, 2012.<sup>40</sup> In its letter, the State echoed the County’s statement that the deprivation of property taxes will present a financial hardship to the County.<sup>41</sup> The Office of the Attorney General also stated that while the State does not object to the Tribe operating a truck stop on fee land, “nothing suggested by the Kickapoo Tribe shows any necessity of taking the land into trust, except for avoidance of property taxes.”<sup>42</sup>

On June 29, 2012, the Tribe submitted a response to the State’s comments.<sup>43</sup> In response to the State’s assertion that removal of the parcel from the tax rolls would be devastating, the Tribe states that local school districts currently receive impact aid under Federal law for land in trust in lieu of local levies.<sup>44</sup> The Tribe states that this aid is greater than the funds the County would receive from levies.<sup>45</sup> It is unclear whether the Tribe’s response is intended to assert that the prospective impact aid will also be greater than the funds the County would receive from levies. The Tribe’s response also notes that the County recently passed a budget that reduces property taxes from the current 36.967 percent to 36.343 percent, “a reduction of more than one-half Mill.” We therefore are unable to evaluate the impact of reducing the property taxes because the Tribe’s application does not clearly identified the land that is to be taken into trust and does not provide any context or explanation of the impact. It would also be helpful if the Tribe explains whether there are likely benefits to the County from the Gaming Facility that may outweigh lost tax income to the County.

We are unable to complete our analysis of the Tribe’s application under section 151.10(e) because the Tribe has not adequately described the property to be taken into trust or the impact of removal of the land from the tax rolls.

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<sup>38</sup> Comment letter from Paula J. Jones, Brown County Appraiser, to Robin Bellmard, Superintendent, Horton Office (April 9, 2012), Superintendent’s Recommendation, Tab 18 at 2.

<sup>39</sup> *Id.*

<sup>40</sup> Comment letter from Stephen Phillips, Assistant Attorney General, State of Kansas, to Antoinette Houle, Acting Superintendent, Horton Agency (June 6, 2012), Superintendent’s Recommendation, Tab 18.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1. The State discussed other concerns in its letter including its objection to the BIA not reviewing the cumulative effects of trust acquisition within a county over time, to the acquisition of the Site being treated as an on-reservation acquisition, and questions the constitutional authority to acquire land in trust. *Id.* at 1-2.

<sup>43</sup> Letter from Steve Cadue, Tribal Chairman, to Antoinette Houle, Acting Superintendent, Horton Agency, regarding Reply to Objection of State of Kansas to Taking of Property into trust – “Hwy 75 Corridor” (June 29, 2012), Superintendent’s Recommendation, Tab 17.

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.*



**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 any jurisdictional problems and potential conflicts of land use which may arise.

The requirements of this section have not been met because the Tribe's application materials do not adequately address potential jurisdictional problems or conflicts of land use. For example, the Tribe has not addressed which entity currently exercises criminal and civil jurisdiction over the Site and it is not clear if the Tribe or the County would provide law enforcement services to the Site if acquired in trust. The application materials do not identify other potential jurisdictional issues, such as the provision of emergency services to the Site or if the Tribe has entered into intergovernmental agreements with the County to mitigate potential impacts.

The Tribal-State gaming compact between the Tribe and the State of Kansas indicates that the Tribe will regulate all class III gaming at the facility, but that the State will exercise criminal jurisdiction over Indians concurrently with the Tribe and exclusive criminal jurisdiction over non-Indians.<sup>46</sup> The Compact further provides the Tribe will exercise civil jurisdiction over Indians and non-Indians involving transactions or activities which relate to class III gaming on the reservation.<sup>47</sup> A Tribal-State gaming compact applies only to class III gaming.<sup>48</sup> With no explanation in the record specifying whether the Tribe plans to conduct class II or class III gaming on the Site, we are unable to analyze the jurisdictional issues.

Without this information we are unable to complete our analysis of the Tribe's application under section 151.10(f) because the Tribe has not adequately described the potential jurisdictional problems and potential conflicts of land use that may arise.

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

Section 151.10(g) requires the Secretary to determine whether the BIA has the resources to assume additional responsibilities if the land is acquired in trust.

The Regional Director does not expect that the conveyance of this property into trust will incur any significant additional responsibilities. The Regional Director indicates that the Tribe has been managing its tribal lands with minimal guidance or assistance from the BIA. Without a better understanding of the use of the property, we cannot assess whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.<sup>49</sup>

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<sup>46</sup> Superintendent's Recommendation, Tab 22, Tribal-State Compact, section 13(A) and (B).

<sup>47</sup> Compact, section 14(A).

<sup>48</sup> 25 U.S.C. § 2710(d)(1).

<sup>49</sup> Regional Director's Recommendation at 8; Superintendent's Recommendation at 4.

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

Section 151.10(h) requires the Secretary to consider the availability of information necessary for compliance with NEPA and make a determination on the presence of hazardous substances.

As discussed above, the EA is deficient in numerous areas because it does not provide the necessary information to determine the significance of potential impacts as required by NEPA. We cannot, therefore, make a finding that there are no significant impacts or whether there are impacts that require the preparation of an EIS.

The Phase I Environmental Site Assessment was completed in December 2003 and updated on June 10, 2004.<sup>50</sup> The information in the 2004 update is almost 10 years old. An updated Phase I Environmental Site Assessment must be completed for a new application.

We are unable to complete our analysis of the Tribe's application because the Tribe has not provided enough information for us to comply with section 151.10(h).

**Compliance with the Indian Gaming Regulatory Act**

The Tribe seeks to conduct gaming on the Site pursuant to section 20 of the Indian Gaming Regulatory Act (IGRA), codified at 25 U.S.C. § 2719. Section 20 generally prohibits gaming on lands acquired in trust after October 17, 1988, subject to several exemptions and exceptions. One exemption is made for lands that are located within or contiguous to the boundaries of the reservation of an Indian tribe on October 17, 1988.<sup>51</sup> The Tribe is seeking to conduct gaming pursuant to this exemption. Prior to the Tribe's commencement of gaming, however, the Department must determine whether or not the Tribe meets this exemption.

The Department's regulations at 25 C.F.R Part 292 implement section 20. Section 292.3 requires that when a tribe is seeking to conduct gaming on newly acquired lands or when the request concerns whether a specific area of land is a reservation, the tribe must submit a request to the Office of Indian Gaming for an opinion determining whether the land to be acquired meets one of the exceptions to section 20. The Regional Director asserts the parcels in question are "contiguous" to the Tribe's reservation.<sup>52</sup> The Kansas Attorney General indicates that the tracts of land are "contiguous with, but outside, the boundaries of the reservation" and therefore objects to the land acquisition being analyzed under the "on-reservation" provisions of the Part 151 regulations.<sup>53</sup> The Tribe contradicts the Attorney General's assertion and argues that the parcels are "within the Tribe's reservation as defined by the Treaty with the Kickapoo of 1854," or, if

<sup>50</sup> Environmental Investigation, Final Environmental Assessment, Appendix N (June 10, 2004), Binder 5.

<sup>51</sup> See 25 U.S.C. § 2719 (a)(1).

<sup>52</sup> See Regional Director's Recommendation at 3 (the land is located contiguous to tribal trust tract 861 T 1021 which is contiguous to the reservation boundaries of the Kickapoo Tribe of Indians).

<sup>53</sup> Letter from Kansas Office of Attorney General to Superintendent (June 6, 2012), Tab 17.

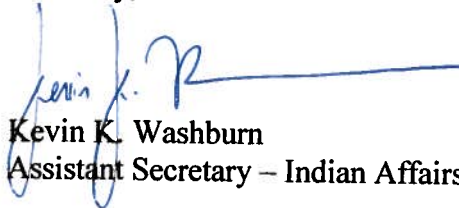
to the land acquisition being analyzed under the “on-reservation” provisions of the Part 151 regulations.<sup>53</sup> The Tribe contradicts the Attorney General’s assertion and argues that the parcels are “within the Tribe’s reservation as defined by the Treaty with the Kickapoo of 1854,” or, if not within the boundaries, are otherwise contiguous to the reservation because they are “adjacent to the Kickapoo Tribal Trust Tract 47A (which itself would be adjacent to the alleged 1862 reservation boundary).”<sup>54</sup> Due to the confusion over which parcels of land are the subject of this application, no determination has been made regarding whether or not the Site meets the on-reservation exemption in section 2719.

### Decision

Because the Tribe’s application and submitted materials are unclear, incomplete, and inconsistent, the regulatory requirements of Part 151 have not been satisfied. The Tribe’s materials are lacking certain required elements, undermining our ability to conduct a thorough evaluation of the Tribe’s request for the Site to be taken into trust for gaming.

If the Tribe wishes to pursue trust acquisition of the Site for gaming purposes, it must submit a new application containing sufficient information and analysis to support a determination for the Site to be taken into trust.

Sincerely,



Kevin K. Washburn  
Assistant Secretary – Indian Affairs

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<sup>53</sup> Letter from Kansas Office of Attorney General to Superintendent (June 6, 2012), Tab 17.

<sup>54</sup> Letter from Kickapoo Tribal Chairman to Superintendent (April 24, 2012), Tab 17.