United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

United Keetoowah Band of Cherokee Indians	)	
v.	)	**Decision**
Director, Eastern Oklahoma Region, Bureau of Indian Affairs.	)	

Background

Congress recognized the Keetoowah Indians of the Cherokee Nation (UKB or Band) as a band of Cherokee Indians eligible to organize under the Oklahoma Indian Welfare Act (OIWA) in 1946. In 1950 the UKB completed the organization process under the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 *et seq.* While the UKB owns fee land, it does not have any trust land over which it can exercise governmental jurisdiction.

The UKB applied to the Regional Director, Eastern Oklahoma Region, to have a 76-acre Community Services Parcel taken into trust in June 2004. On April 7, 2006, the Regional Director denied the application, citing perceived jurisdictional conflicts with the Cherokee Nation of Oklahoma (CNO), the inability of the Bureau of Indian Affairs (BIA) to discharge additional responsibilities resulting from the acquisition of the land in trust status, and the need for additional environmental documentation. The UKB appealed the decision to the Interior Board of Indian Appeals (IBIA) in July 2006.

On April 5, 2008, the Assistant Secretary – Indian Affairs (ASIA) directed the Regional Director to request a remand from the IBIA and to reconsider her decision, to inform the UKB of the required additional environmental evaluation, and to substantiate the basis of her denial or arrive at a different conclusion based on the evidence before her. The ASIA instructed the Regional Director to pay particular regard to the provisions of the UKB charter which contemplate the UKB holding land and the grounds for concluding the BIA lacks sufficient resources to supervise the proposed trust acquisition.

The Regional Director issued her reconsidered decision on August 8, 2008, and again denied the UKB's application due to perceived jurisdictional conflicts with the CNO and the inability of the BIA to discharge the responsibilities that would accompany taking the land into trust. In

addition, the Regional Director concluded that the UKB's Community Services Parcel did not qualify for a categorical exclusion under the National Environmental Policy Act (NEPA). The Regional Director determined the documents submitted by the UKB did not satisfy NEPA requirements for the proposed fee-to-trust acquisition.

The UKB appealed this decision to the IBIA. On September 4, 2008, the Deputy Assistant Secretary for Policy and Economic Development informed the IBIA that he was taking jurisdiction of the appeal pursuant to 25 C.F.R. § 2.20(c). The UKB, the Regional Director, and the CNO have briefed the issues. In addition, the parties and the CNO have briefed the effect of the United States Supreme Court's decision in *Carcieri v. Salazar*, 2009 LEXIS 1633, 555 U.S. ____ (February 24, 2009), on the UKB's application.

The UKB application raises an issue that was not presented to or addressed by the *Carcieri* Court. The *Carcieri* Court had to decide whether the Secretary could take land into trust today for members of a tribe that was in existence in 1934, and still is, but that was not under federal jurisdiction in 1934. The UKB application raises the question whether the Secretary can take land into trust today for members of a tribe that was not in existence in 1934 if that tribe is a successor in interest to a tribe that was in existence and under federal jurisdiction in 1934. This question requires further consideration.

In the meantime, however, I reverse the Regional Director's decision as to the perceived jurisdictional conflicts with the CNO, the BIA's inability to administer the trust parcel, and the failure of the proposed fee-to-trust acquisition to qualify for a categorical exclusion. But, at this time, I cannot determine my authority under Section 5 of the Indian Reorganization Act because this appeal raises issues with national implications which the Department needs to study further. I therefore remand the application to the Regional Director to apply the categorical exception checklist. If the Regional Director finds that the proposed fee-to-trust acquisition satisfies the checklist, she will hold the application pending resolution of my authority to take the land into trust.

Decision

Standard of Review

Because the authority to take land into trust is an authority delegated to the ASIA, I review the Regional Director's decision *de novo*.

Analysis Under 25 C.F.R. Part 151

1. § 151.3 – Land acquisition policy

While the Deputy Assistant Secretary was considering the Regional Director's decision, the Supreme Court issued its decision in *Carcieri v. Salazar*, 2009 LEXIS 1633, 555 U.S. ____ (February 24, 2009). In *Carcieri*, the Court considered whether the Secretary could take land into trust for a tribe that was not under Federal jurisdiction in 1934. The Court determined that

section 19 of the Indian Reorganization Act (IRA), 25 U.S.C. § 479, "limits the Secretary's authority [under section 5 of the IRA] to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." Slip Op. at 2. The CNO and the Regional Director argue that because the UKB did not exist in 1934, it was not under Federal jurisdiction and the Secretary cannot take land into trust for its members.

This argument oversimplifies the issue. The historical Cherokee Nation (historical CN) as it existed in 1934 no longer exists as a distinct political entity. Congress closed its rolls in 1907. Act of April 26, 1906, 34 Stat. 137. After 103 years, few, if any, or its members are still alive. Even though the historical CN no longer exists, its sovereignty continues in the descendents of its members who have reorganized as the UKB and the CNO. They are successors in interest to the historical CN. The question here is different from the question in *Carcieri*. The question is whether a successor in interest stands in the place of its predecessor for the purposes of Section 5.[1]

A successor in interest is a tribe whose members descend from members of a historical tribe and that has maintained a governmental organization. *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Both the UKB and the CNO descend from the historical CN. *See Buzzard v. Oklahoma Tax Comm'n*, 1992 U.S. Dist. LEXIS 22864 at 3 (N.D. Okla. 1992) ("Another descendant of the old Cherokee tribe [other than the UKB] is the Cherokee Nation.") And both have maintained their governmental organizations since they formed – the UKB in 1950 and the CNO in 1975. Accordingly, both the UKB and the CNO are successors in interest to the historical CN.[2]

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[1] There is no doubt that provisions of the IRA applied to the historical CN, its members, and members of other tribes affiliated with it, except as specifically excluded by section 13. 25 U.S.C. § 473. The express terms of section 13 of the IRA make certain sections of that act inapplicable to named tribes in Oklahoma, including the historical CN. Section 5 is not among the excluded sections. Thus, the clear implication is that Congress intended the authority to acquire lands in trust under section 5 to extend to the historical CN, and that Congress considered the Cherokee located in Oklahoma to meet the definition section of the IRA as a tribe under Federal jurisdiction in 1934. The historical CN was under Federal jurisdiction in 1934 because the Secretary appointed the Chiefs and the President had to approve all legislative enactments. Accordingly, the Secretary could take land into trust for the historical CN.

[2] The CNO has long maintained there is no distinction between it and the historic CN. By closing the rolls in 1907, Congress effectively imposed a sunset provision on its relationship with the historical CN. The Federal relationship would exist so long as its members survived. This is consistent with Congress's expectation that the government of the historical CN, like the governments of the other Five Civilized Tribes, would not be permanent. *See, e.g.*, Act of April 26, 1906, 34 Stat. 137, § 11. Moreover, there are significant political differences in governmental organization between this historical CN and the CNO which render the CNO a new political organization. The Secretary of the Interior appointed the Chief of the historic CN to perform ministerial acts. The Secretary could remove the Chief for failure to perform his duties. Act of April 26, 1906, 34 Stat. 137, § 6. Tribal voters elect the Principal Chief of the CNO to perform all executive functions. The historic CN did not have a functioning legislature, and if it had, its enactments would have been subject to presidential approval. The CNO has an elected Tribal Council which is free of presidential oversight. The courts of the historic CN had been outlawed by Congress in the Curtis Act. The CNO has a functioning court system. The CNO is a new political organization, therefore, because the historical CN no longer exists and the CNO government is a new government.

It is well settled that a successor in interest enjoys the rights of the historical tribe. *See United States v. Washington*, 520 F.2d 676 (successors in interest enjoy treaty rights of predecessor tribes.) It is not clear whether a successor in interest steps into the place of the historical tribe for the purposes of Section 5.

This issue is not confined to the UKB and CNO. It implicates many tribes. The Department is in the process of analyzing this and other issues raised by *Carcieri*. I must defer final decision on whether I have authority to take this land into trust for the UKB until the Department has developed a more comprehensive understanding of *Carcieri* and its impact on tribes throughout the country.

2. § 151.4 – Acquisitions in Trust of Lands Owned in Fee by an Indian

This section is not applicable to this request because the proposed acquisition is for property owned by the Tribe.

3. § 151.5 – Trust Acquisitions in Oklahoma under Section 5 of the I.R.A.

As explained above, I have authority to take land into trust pursuant to Section 5 of the IRA.

4. § 151.6 – Exchanges

This section is not applicable to the UKB's request because the UKB is the sole owner of the property to be taken in trust.

5. § 151.7 – Acquisitions of Fractional Interests

This section is not applicable to the UKB's request because the UKB is the sole owner of the property to be taken in trust.

6. § 151.8 – Tribal Consent for Non-Member Acquisitions

This section provides 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." 25 C.F.R. § 151.2(f). The regulations define a reservation in Oklahoma as "that area of land constituting the former reservation of the Tribe as defined by the Secretary." The Department consistently has found the former treaty lands of the Five Civilized Tribes to be "former reservations." The UKB's property 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). Congress overrode this regulatory requirement with respect to lands within the boundaries of the former Cherokee reservation by including in the Interior and Related Agencies Appropriations Act of 1999 the following language: "until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation." 112 Stat. 2681-246. CNO does not need to consent to the acquisition in trust

of the UKB's land. It is only necessary that the Department consult with the CNO. The Department satisfied this requirement when it solicited comments from the CNO.[3]

7. § 151.9 – Request for Approval of Acquisitions

The UKB satisfied this requirement by submitting a written request and supporting materials on June 9, 2004, to have the 76-acre Community Services Parcel taken into trust.

8. §§ 151.10 & 151.11 – On and Off Reservation Acquisitions

The UKB submitted this application as one for an on-reservation acquisition. I need not decide whether this is an on- or off-reservation acquisition because the result is the same under both analyses.

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority.

I have statutory authority to take land into trust for the UKB pursuant to Section 5 of the IRA.

(b) The need of the Tribe for additional land.

The UKB has no land in held in trust. I therefore find that the UKB has a need for this land to be taken in trust.

(c) The purposes for which the land will be used.

UKB intends to use the property to operate programs which provide services to its members. This purpose does not conflict with existing zoning and use patterns or with state or Federal law. I find the purposes for which the land will be used are permissible.

(d) The amount of trust land owned by an individual Indian and the need for assistance in handling affairs.

This section does not apply because the application is for tribally owned land.

(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 record contains nothing to indicate that the state or any of its political subdivisions submitted comments on the UKB's fee to trust application. In her decision, the Regional Director stated that "No negative impacts from the loss of the property tax revenue were identified by" the Cherokee County Commissioners or the Cherokee County Treasurer.

[3] Letter from Jeanette Hanna to Chadwick Smith, Principal Chief, Cherokee Nation of Oklahoma, February 28, 2005.

(f) Jurisdictional problems and potential conflicts of land use which may arise.

The Regional Director's conclusion that there would be problematic conflicts of jurisdiction between the CNO and the UKB if this land were taken into trust for the UKB is premised on the conclusion that the CNO has exclusive jurisdiction over its former reservation. This conclusion, in turn, is premised on a narrow reading that the 1946 Act authorizing the Keetoowahs to organize as a band under the OIWA withheld from the tribe any territorial jurisdiction. This reading is incorrect.

The 1946 Act is silent as to the authorities that the Band would have. It provides: "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 [OIWA]." 60 Stat. 976 (August 10, 1946). This Act authorized the Keetoowah Cherokees to organize as a band under the OIWA. On its face, it imposes no limitations on the Band's authority. It merely recognizes the Band's sovereign authority. That authority extends "over both [its] members and [its] territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). There is no reason, on the face of the Act, that the Keetoowah Band would have less authority than any other band or tribe.

Section 476(f) of the IRA mandates this conclusion. That section provides:

> Departments 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.

25 U.S.C. § 476(f). This section, therefore, prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction. UKB, like CNO, possesses the authority to exercise territorial jurisdiction over its tribal lands.

The Regional Director relies on letters from an Acting Assistant Secretary, the Office of Law Enforcement Services, and two Regional Directors to state that "The Secretary has consistently opined that the [CNO] exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee treaty boundaries." The letter from the Acting Assistant Secretary was written in 1987, before Congress prohibited the Department from making distinctions as to the privileges and immunities of tribes. The Law Enforcement Services and Regional Director letters[4] are not binding on me. Moreover, their conclusions are suspect because they do not reveal their analysis and basis, and fail to address Section 476(f). The Regional Director maintains that the Federal courts have "confirmed" the view that the CNO exercises exclusive jurisdiction over the former Cherokee reservation. But the decisions she cites, *United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla.) Order May 31, 1991, and *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla.) Order January 27, 1993, *aff'd* 2 F.3d 1161 (10th Cir. 1993), were both decided before Congress passed section 476(f) and are based on the Department's position at that time that CNO had exclusive jurisdiction.

[4] The letters are dated September 22, 2003, October 31, 2002, and September 26, 2003.

The conclusion that the CNO does not enjoy exclusive jurisdiction over the former Cherokee reservation is consistent with the 1998 appropriations rider which provided that no appropriated funds shall be used to acquire land into trust within the former Cherokee reservation without consulting with the CNO. If CNO had exclusive jurisdiction over the former Cherokee reservation, Congress would have required consent of CNO, as the Department's land acquisition regulations, 25 C.F.R. Part 151, provide.

The fact that the UKB's charter, approved by the Assistant Secretary in 1950, authorizes the UKB to hold land for tribal purposes weighs heavily in favor of finding that the UKB can have land taken into trust. Section 1(b) of the charter identifies "the acquisition of land" as one of the corporation's purposes. The Regional Director commented the UKB's corporate charter "does not override the longstanding position of the Bureau or the cited court rulings . . . that affect this request in relation to the historical, former boundaries of the Cherokee Nation." The Regional Director has misperceived the relative significance of the charter approval and the more recent statements by acting and subordinate officials. It is beyond dispute that when the UKB organized in 1950, the Band and the Assistant Secretary, in approving the charter, anticipated that the UKB would hold tribal trust property. It is the statements of the acting and subordinate officials that can't be given weight over the approval of the corporate charter. Indeed, the approval statement signed by the Assistant Secretary on May 8, 1950, states in pertinent part:

> Upon ratification of this Charter all rules and regulations heretofore promulgated by the Interior Department or by the Bureau of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Charter and the Constitution and Bylaws will be inapplicable to this Band from and after the date of their ratification thereof [October 3, 1950].
>
> All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws, and the Charter.

Moreover, as demonstrated above, the Bureau's position that the CNO had exclusive jurisdiction within the former Cherokee reservation and the court decisions the Regional Director relies upon do not account for the congressional mandate to the Department not to distinguish between the privileges and immunities of different tribes. This fact further supports the conclusion that the CNO does not have exclusive jurisdiction within the former Cherokee reservation.

Both the UKB and CNO intend to assert jurisdiction over the UKB's trust land. I conclude, however, that this situation would not preclude me from taking the land into trust for the UKB. The UKB would have exclusive jurisdiction over land that the United States holds in trust for the Band. Moreover, even if the UKB had to share jurisdiction with the CNO, such shared jurisdiction would not preclude me from taking the land into trust. Shared jurisdiction is unusual; but it is not unheard of. Indeed, the Department anticipated that there would be situations in which two tribes must share jurisdiction. Solicitor's Opinion, M-27796 (November 7, 1934). 1 *Op. Sol. on Indian Affairs* 478 (U.S.D.I. 1979). The Regional Director reported in a memorandum dated April 12, 2009 that several tribes within the Eastern Oklahoma Region share

jurisdiction over parcels held in trust.[5] The Eastern Shawnee Tribe of Oklahoma, the Miami Tribe of Oklahoma, the Modoc Tribe of Oklahoma, the Ottawa Tribe of Oklahoma, the Peoria Tribe of Indians of Oklahoma, the Quapaw Tribe of Indians of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, and the Wyandotte Nation all share a 40.5 acre trust parcel. Those same tribes, except for the Modoc Tribe of Oklahoma, share a 114 acre parcel also. In a situation directly analogous the UKB, Thlopthlocco Creek Tribal Town has 19 parcels of trust land within the former Creek reservation. Outside the Eastern Oklahoma Region, the Caddo Tribe of Oklahoma, the Delaware Tribe of Western Oklahoma, and the Wichita Band share 2,306.08 acres of land held in trust. The Comanche, Kiowa, and Apache Tribes of Oklahoma also share jurisdiction. The Shoshone and Arapaho Tribes manage their shared reservation through a Joint Business Council. The UKB and the CNO should be able, as these other tribes have done, to find a workable solution to shared jurisdiction.

(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 in trust status.

In his directions to the Regional Director, the Assistant Secretary stated that the duties associated with this trust acquisition would not be significant and that she should either substantiate her decision or conclude that the BIA could discharge its duties. The Regional Director maintains that the BIA is not equipped to discharge the additional responsibilities resulting from this trust acquisition because the duties of the Talequah Agency have been contracted to CNO and the office has been shuttered. She wrote that there are no additional funds for providing services to this trust acquisition.

The Regional Director has failed to substantiate her decision. She fails to identify specific duties that the BIA will incur. As a general matter, the Regional Director wrote, "Responsibilities range from a multitude of areas beyond oversight of the trust property to such areas as trespass issues to agricultural issues to wildlife management to lease compliance." She fails to substantiate that those issues will arise with this trust parcel, or that they cannot be effectively administered by the Region or contracted to UKB. Because the Assistant Secretary found the BIA could discharge the duties associated with this trust acquisition and because the Regional Director has not substantiated her decision, the Assistant Secretary's finding stands.

(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 Acquisition: Hazardous Substances Determinations.

In her August 6, 2008, decision, the Regional Director found that the proposed fee-to-trust acquisition does not qualify for a categorical exclusion under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4371 *et seq.*, and the Bureau's categorical exclusions for land conveyances found in the Departmental Manual at 516 DM 10.5(I).

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[5] Memorandum re: "*Carcieri v. Salazar,*" to Acting Deputy Assistant Secretary for Policy and Economic Development, Director, BIA, and Deputy Bureau Director, Field Operations from Regional Director, Eastern Oklahoma Region, April 12, 2009.

Categorical exclusions are categories of actions which do not individually or cumulatively have a significant effect on the human environment, and for which neither an environmental assessment nor environmental impact statement is required. *See* Regulations for Implementing the National Environmental Policy Act, 40 C.F.R. § 1508.4. The categorical exclusion applicable to the Band's application is listed in the Departmental Manual at 516 DM 10.5(I):

Land Conveyance and Other Transfers. Approvals or grants of conveyances and other transfers of interests in land where no change in land use is planned.

If the Band plans no change in land use resulting from the acceptance of the Community Services Parcel in trust, this categorical exclusion may be used, and neither an environmental assessment nor an environmental impact statement is required. Because I find that there is no change in use planned, I conclude the proposed fee-to-trust acquisition qualifies for a categorical exclusion, reverse the Regional Director's decision on this factor, and remand the application to her to apply the categorical exclusion checklist.

In her August 6, 20008, decision, the Regional Director concluded:

The proposed fee-to-trust acquisition does not qualify for a categorical exclusion because the UKB plans to develop the subject property. The UKB has well established plans for the future development of the property that precludes taking it into trust without NEPA review.

In her decision, the Regional Director appears to identify two categories of development: 1) the Civil Service Defense Center and a Cultural Resource Center and Museum that are currently under construction, and 2) possible development of the entire 76 acres.

With regard to the first category, the construction of these two facilities predates the federal action of acquiring the land in trust which triggers NEPA review. The acquisition of land in trust is a major federal action requiring NEPA analysis. 25 C.F.R. § 151.10(h). Because these two construction projects were begun before the final decision has been made on whether the Community Services Parcel is to be acquired in trust, they fall outside of the scope of the NEPA review for the UKB fee-to-trust application. The construction of the Civil Services Defense Center and Cultural Resource Center and Museum, therefore, need not be analyzed under NEPA for this fee-to-trust application.

With regard to the second category, the possible development for the entire 76 acres, the Regional Director notes that the Environmental Site Assessment (ESA) shows planned development for the entire 76-acre site. The Regional Director relied on the site map of the Band's Community Services Master Plan contained in the July 30, 2008, ESA for the Civil Services Defense Center and Cultural Resource Center and Museum to conclude that "plans for the development of the property by the UKB are sufficiently established to require NEPA review." The Regional Director's determination is likely based on a prior determination contained in a memorandum dated December 22, 2005, from the Division Chief, Division of Environmental, Safety and Cultural Resources, which concluded that the Community Services Parcel does not qualify for a categorical exclusion. *See* Memorandum from Division Chief, Division of Environmental, Safety and Cultural Resources to Realty Officer, Division of Real

Estate Services, Admin. Rec. No. 43. In the memorandum, the Division Chief stated that the June 2004 Environmental Site Assessments "indicated there will be future development on the 76-acre parcel, so the current land use will not remain unchanged." *Id.*

The UKB's application of June 9, 2004, states that the acquisition of the Community Services Parcel qualifies for a categorical exclusion because the "current use of the land for tribal government programs and services [] will not change." *See* Application at 16, Admin. Rec. No.1. The Band confirmed its lack of plans for future development in a letter dated November 4, 2005, in which the Band's General Counsel reiterated that the Band's application states that "the Band has no specific plans to use the land for any purpose other than its current use." *See* Letter from Dianne Baker Harrold, UKB General Counsel to Jeanette Hanna, Area Director [sic] at 24, Admin. Rec. No. 39.

The Regional Director's conclusion is at odds with the Band's statements that no change in land use will occur. I must, therefore, determine whether there is sufficient evidence in the record to conclude whether the Band's plans are sufficiently well established and whether a categorical exclusion is available. Upon review of the administrative record, I conclude that the Band's plans for future development of the Community Services Parcel are not sufficiently well established and do not exclude them from a categorical exclusion.

The only evidence in the record of possible development for the Parcel are two single-page site plans contained in the ESA of the Civil Service Defense Center and a Cultural Resource Center and Museum submitted by the Band on July 30, 2008. *See* Environmental Site Assessment, Admin. Rec. No. 77. While these site plans show the location of possible future development, there is no other indication in the record that these plans have advanced further, or that there will be a change of land use resulting from the acquisition in trust.

The Department stated in the preamble to the Final Notice of Revised Procedures, 61 *Fed. Reg.* 67,845 (December 24, 1996), that the possibility of future plans does not preclude the use of a categorical exclusion:

Comment: Question as to whether the **categorical exclusion** of land conveyances where no change in land use is planned might still allow for some degree of planned development or physical alteration of the land without triggering NEPA review.

Response: It is unrealistic to expect land to be conveyed with no plan whatsoever for its future use. Whether or not the conveyance is categorically excluded is a matter of judgment by the BIA official responsible for NEPA compliance as to how well the plan is established. The **categorical exclusion** does not, however, allow for any development or physical alteration to actually take place.

The Band's site plans reveal the possibility of future development plans, but these site plans alone do not provide sufficient evidence of a well-established plan by the Band to change the land use of the Parcel following acquisition in trust.

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The Band's site plans reveal the possibility of future development plans, but these site plans alone do not provide sufficient evidence of a well-established plan by the Band to change the land use of the Parcel following acquisition in trust.

With regard to future development plans, in a letter dated May 9, 2008, counsel for the Band explained that the Band has thus far used federal funding from the Department of Housing and Urban Development (HUD) to develop its facilities on the Community Services Parcel. The Band's counsel also stated that there are no additional plans to construct new facilities because the Band does not have, and has not applied for HUD funding to further develop the Parcel. *See* May 9, 2008, Letter from Michael Rossetti to Jeanette Hanna at 2, Admin. Rec. No. 63. There is nothing in the record that contradicts these statements and the statements made in the Band's application.[6]

Given the lack of evidence in the record of well-established development plans, I conclude that the categorical exclusion found at 516 DM 10.5(I) is available to the Band for the acquisition in trust of the Community Services Parcels. In accordance with BIA procedures found at 59 IAM 3-H 32. (A), the Regional Director must complete the categorical exclusion checklist.

Conclusion

After considering all the factors in Part 151, I conclude that the perceived jurisdictional conflicts between the UKB and the CNO are not so significant that I should deny the UKB's application and that the Regional Director failed to substantiate her opinion that the BIA could not administer the subject land if it is in trust status. Finally, I conclude that the Regional Director was mistaken and that the Community Services Parcel qualifies for a categorical exclusion because the UKB does not have developed plans to change the use of the land. Accordingly, I remand the application back to the Regional Director to apply the categorical exclusion checklist and direct her to hold the application, unless the proposed fee-to-trust acquisition does not satisfy the checklist, pending resolution of my authority to take the land into trust.

Signed:

Date: JUN 24 2009

Larry Echo Hawk
Assistant Secretary - Indian Affairs

Distribution list

[6] *Cf. City of Isabel v. Great Plains Regional Director*, 38 IBIA 263 (2002) (possible error by Regional Director in concluding that a categorical exclusion for land conveyance was available when trust applicant stated that she intended to build a new home on the proposed trust site).

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