



Washington, D.C. 20240

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In reply, please address to:
Main Interior, Room 6513

To: Carl J. Artman
Assistant Secretary – Indian Affairs

From: Kaush Arha
Associate Solicitor, Indian Affairs

FEB 14 2008

Subject: United Keetoowah Band – land into trust

I have reviewed the April 7, 2006, decision of the Director, Eastern Oklahoma of the Bureau of Indian Affairs (BIA) to deny the United Keetoowah Band's (UKB) application to take a 76-acre parcel in trust under 25 C.F.R. Part 151. In that decision, she indicated that she denied the application because of jurisdictional conflicts that will arise between the UKB and the Cherokee Nation of Oklahoma (CNO), the inability of the BIA to discharge additional responsibilities resulting from the acquisition of the land in trust status, and the need for additional environmental documentation. We believe that her decisions on the first two grounds are mistaken. In addition, the Director should inform the UKB of the additional environmental evaluation that needs to occur in order for the application to be approved.

The Director's decision states that it is the position of the Secretary and the courts that the CNO possesses exclusive jurisdiction over the former Cherokee territory. The CNO's exclusive jurisdiction over the former Cherokee reservation is not as well established as she believes it to be. The Director wrote: "[T]he Secretary has consistently opined that the [CNO] exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee treaty boundaries. On several occasions, the Federal courts have confirmed that view."

The consistent opinion of the Secretary to which she refers includes two statements from the Regional Director and one statement from an Acting Assistant Secretary. None of the statements were accompanied or supported by any analysis. Moreover, they are based on a questionable legal assumption that the 1946 Act recognizing the UKB as a band eligible to organize under the Oklahoma Indian Welfare Act precludes the UKB from obtaining land in trust because the Act did not provide any land for the UKB. Moreover, the Federal court opinions to which she refers did not in fact determine authoritatively that the CNO had exclusive jurisdiction over the former Cherokee reservation. One of the opinions merely states that the Department's position is that the CNO has exclusive jurisdiction. *United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla. May 31, 1991). Another opinion was affirmed on a different ground so its authority is not sound. *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th

decided before the Court of Appeals decided the appeal. *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla., January 27, 1993), *aff'd* 2 F.3d 1161 (10th Cir. 1993). In short, the Federal courts have not addressed the merits of whether the CNO has exclusive jurisdiction over the former Cherokee reservation. The issue remains unsettled.

The fact that the UKB's charter, approved by the Secretary, authorizes the UKB to hold land for tribal purposes weighs heavily in favor of finding that the UKB can in fact have land taken into trust. The position in the April 7, 2006 decision completely vitiates those charter provisions authorizing the Band to have tribal land. In order to fulfill the terms of the UKB charter, therefore, the UKB should have land taken into trust within the confines of the former Cherokee reservation.

The second ground for Director denying the fee to trust application is that the BIA is not equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. The Director states in her decision, however, that the UKB, Cherokee County, and the CNO already provide law enforcement services within the proposed acquisition area. Taking the land into trust will have no bearing on that arrangement. Moreover, the proposed trust land is a small parcel of land with community program buildings and a dance ground on it. Supervision need not be extensive.

Finally, the Director concludes that the UKB's application should be denied because "additional environmental examination" is needed. She did not, however, identify just what examination still needs to take place. The UKB is preparing an Environmental Assessment (EA) for developments funded by Department of Housing and Urban Development (HUD) grants. Assuming the HUD EA is satisfactory, the UKB will have satisfied all environmental assessment requirements. The Director should identify for the UKB the "additional environmental examination" that she needs to see in order to grant its application. In the meantime, assuming there are no other issues with the application, she should publish a notice of intent to take the land into trust subject to satisfaction of the environmental evaluation requirement.

The Director's decision and the brief before the IBIA defending the decision did not take a clear position on whether section 151.8 requires consent of the CNO in order to take land into trust for the UKB or whether the 1999 appropriations rider providing that the Department shall not take land into trust without consulting with the CNO controls. As we previously advised you in our memorandum of January 31, 2008 (copy attached), we believe the 1999 appropriations rider controls and the Department may not take land into trust without consulting with the CNO. The consent of the CNO is not required. The Department has fulfilled its responsibility to consult with the CNO by giving the CNO an opportunity to comment on the UKB's Part 151 application. No further consultation is needed.

We recommend that you direct the Director withdraw her decision, request a remand from the Interior Board of Indian Appeals and reconsider her decision in light of

this memorandum. The Director should inform the UKB of the environmental requirements it must satisfy. If there are no other issues with the fee to trust application, we recommend that the Director publish a notice of intent to take land into trust subject to satisfactory fulfillment of the environmental evaluation requirements so that any interested party may comment on the proposed acquisition.

If you have any questions, please don't hesitate to call o us.

Attachment

cc: Regional Solicitor, Albuquerque
Field Solicitor, Tulsa