



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Eastern Oklahoma Regional Office

P.O. Box 8002

Muskogee, OK 74402-8002

IN REPLY REFER TO:

Real Estate Services

August 6, 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Dear Chief Wickliffe:

On May 2, 2008, the Bureau of Indian Affairs (Bureau), Eastern Oklahoma Region, requested a remand for reconsideration from the Interior Board of Indian Appeals (IBIA) for the *United Keetoowah Band of Cherokee Indians in Oklahoma v. Eastern Oklahoma Regional Director*, IBIA 06-68-A, in response to a directive issued by the Assistant Secretary – Indian Affairs. The Board subsequently issued an order vacating the April 7, 2006 Decision and remanded the case to the Bureau for reconsideration on June 4, 2008. Adhering to the deadline established by the Assistant Secretary on this matter, the Bureau has completed the reconsideration of the fee-to-trust acquisition request for the United Keetoowah Band of Cherokee Indians (UKB) for 76 acres located in Section 8, Township 16 North, Range 22 East, in Cherokee County, Oklahoma. For the reasons discussed below, the trust acquisition request is again denied.

The determination to acquire property in trust is made in the exercise of discretionary authority that is vested in the Secretary of the Interior (Secretary) and delegated to this office. The request was evaluated in accordance with the regulations contained in Title 25, Code of Federal Regulations, Part 151 (25 CFR 151) Land Acquisitions. The Region's evaluation of the remanded request is as follows:

1. §151.3 - Land acquisition policy

Land may be acquired in trust by the United States Government for Indians and Tribes only when there is statutory authority to do so. Section 5 of the Act of June 18, 1934 (48 Stat. 984; 25 USC 465), as amended, authorizes the Secretary to acquire land in trust for Indians. Section 2202 of the Indian Land Consolidation Act (ILCA), (96 Stat. 2517; P.L. 97-459), makes Section 5 of the Act of June 18, 1934, applicable to all Tribes.

25 CFR 151.3(a) states that land may be acquired in trust for a Tribe when (1) the land is located within the exterior boundaries of the Tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the Tribe already owns an interest in the land; or (3) when the

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

The Bureau finds that regulatory and statutory authority exists to accept property in trust for the UKB under 25 CFR 151.3 (a)(2) and (a)(3) based on the Tribe owning a fee interest in the property and the proposed acquisition according to the UKB is to facilitate Tribal self-determination.

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

The proposed acquisition is for Tribally-owned property. The Bureau finds that this section is not applicable to this request.

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

The property proposed to be acquired in trust is located in the state of Oklahoma. Section 5 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. §465), as amended, authorizes the Secretary to acquire land in trust for Indians. The *Indian Land Consolidation Act* (96 Stat. 2517; 25 U.S.C. §2202) makes Section 5 of the Act of June 18, 1934, applicable to all Indian Tribes. Therefore, the Bureau finds that this authority is applicable to the proposed acquisition as it was submitted by a Federally recognized Tribe.

4. §151.6 – Exchanges

The UKB is the sole owner of the property proposed to be acquired in trust. Accordingly, the Bureau finds that this section is not applicable to this request.

5. §151.7 – Acquisitions of fractional interests

The UKB is the sole owner of the property proposed to be acquired in trust. Accordingly, the Bureau finds that this section is not applicable to this request.

6. §151.8 - Tribal consent for non-member acquisitions

This regulation 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....” A “reservation” in Oklahoma is defined in 25 CFR 151.2(f) as “that area of land constituting the former reservation of the Tribe as defined by the Secretary.” The Bureau has consistently found that the former treaty lands of the Five Civilized Tribes are tantamount to “former reservations.” The subject property is located within Cherokee County, Oklahoma. Cherokee County is within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota, entered into on December 29, 1835 (7 Stat. 478.) The exterior boundaries were reduced by Tribal cessions pursuant to the terms of the Treaty of July 19, 1866, 14 Stat. 799. Since these cessions, the boundaries of this “former reservation” have not changed. While the Assistant Secretary – Indian Affairs had previously determined that the UKB may not acquire land in trust within the Cherokee Nation’s former, historic reservation without the consent of the Cherokee Nation

pursuant to §151.8, appropriations language enacted by the Congress modified this requirement. The 1999 appropriations language included in the Interior and Related Agencies Appropriations Act, P.L. 105-277, Sec. 101(e) modified the requirement as follows: “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.” Based on this provision, consultation occurred with the Cherokee Nation when the Bureau solicited its comments during the 25 CFR 151.10 phase of the process. Through this action, the Bureau has met the requirement of consultation with the Cherokee Nation as mandated.

7. §151.9 – Request for approval of acquisitions

By correspondence dated June 9, 2004, the UKB submitted a written request and accompanying documentation for an acquisition of land to be held in trust by the United States Government for its benefit. The property consists of 76 acres located within Cherokee County, Oklahoma and is currently owned in fee by the UKB. The request stated that the acquisition will be for activities to facilitate self determination and self sufficiency of the UKB. On April 7, 2006, the Bureau initially denied approval of the trust acquisition request. The UKB appealed the denial to the IBIA. On May 2, 2008, in response to the directive of the Assistant Secretary – Indian Affairs, the Eastern Oklahoma Region requested a remand for reconsideration from the IBIA in *United Keetoowah Band of Cherokee Indians in Oklahoma v. Eastern Oklahoma Regional Director*, IBIA 06-68-A.

8. §151.10--On reservation acquisitions and §151.11 Off reservation acquisitions

The UKB has submitted its request as an “on-reservation” acquisition of land into trust. In the state of Oklahoma, the term *Indian reservation* means that area of land constituting the former, historic reservation of the Tribe as defined by the Secretary. 25 C.F.R. 151.2(f). The UKB does not have a “former reservation” of its own. A review of the Constitution and By-Laws and Corporate Charter of the UKB reveals no provisions therein establishing a UKB land base or any authority for determining that the UKB have an interest in the former Cherokee treaty lands. There are no treaties, statutes or Executive Orders that set aside lands for the UKB. The United States presently holds no land in trust for the UKB nor recognizes any dependent Indian communities as being under the jurisdiction of the UKB. Further, there are no individually owned restricted lands over which the UKB exercises jurisdiction. The Bureau has determined that the proposed acquisition should be denied for reasons applicable to both on and off reservation acquisitions. The following criteria must be considered in evaluating both on and off reservation acquisitions by Indian Tribes:

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

Land may be acquired in trust by the United States for Federally recognized Tribes when there is statutory authority to do so. Authority for the proposed acquisition is contained in Section 5 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. §465) which authorizes the Secretary, in his discretion, to acquire through “purchase, any interest in lands, within or without existing reservation,” for the purpose of providing land for Indians. The

Indian Land Consolidation Act (96 Stat. 2517; 25 U.S.C. §2202) makes Section 5 of the Act of June 18, 1934 applicable to all Tribes, subject to “any other provision of Federal law that authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).”

The Region finds that there is statutory authority to acquire land in trust for the UKB as a Federally recognized Tribe and the proposed acquisition request is included within the scope of 25 U.S.C. §465. The Region further finds that the UKB’s Corporate Charter authorizes the UKB to hold land and is silent on the status of said land (fee or trust.)

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

The UKB owns several tracts of property in fee, including the property that is the subject of this acquisition, but has no trust land. The UKB’s stated need for the fee-to-trust request is for activities to facilitate self-determination and self-sufficiency. In general, the Bureau finds that it does facilitate self-determination and self-sufficiency for the United States to take land in trust for a Federally recognized Tribe. However, as discussed below, the Region finds that the UKB’s need to have *this* property taken into trust is outweighed by the potential for jurisdictional problems, conflicts of land use and the additional burdens that would be placed upon the Region were it to be taken into trust, all as discussed in detail below.

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

The application states that the UKB intends to utilize the property for the operation of programs to provide services to its members. The purposes stated would not conflict with existing zoning and use patterns for the area or with state or Federal law. The Bureau finds that this request adequately described the purpose for which the land will be used. It is noted, however, that the property is being used to provide services to UKB members in its present fee state.

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

The proposed acquisition is for Tribal land. Accordingly, the Bureau finds this section is not applicable.

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

The UKB currently owns this land in unrestricted fee status. Comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes and special assessments were previously solicited from the state and local political subdivisions. By letters dated February 28, 2005, the Cherokee County officials and the Cherokee Nation were contacted for their views. Responses were received from the Cherokee County Commissioners, Cherokee County Treasurer, and the Cherokee Nation.

Real property in Oklahoma is subject to state ad valorem taxes, which is collected by the respective counties to fund a variety of countywide services. The largest share goes to the local school districts. The subject property is currently carried on the Cherokee County Assessor's rolls as taxable. There are no special assessments or outstanding tax assessments. Property taxes are not the sole source of county support. Based on the information submitted with the request dated June 9, 2004, the ad valorem taxes for the property identified in the proposed acquisition for 2003 totaled \$5,081.98. Police, fire, water and sanitation services for the property are currently provided by Cherokee County, Oklahoma. No negative impacts from the loss of the property tax revenue were identified by the aforementioned officials.

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

If the subject property is taken in trust, it will become Indian country. The Supreme Court has found that lands held in trust by the Federal Government for the benefit of a Tribe are validly set apart for the use of the Indians under the superintendence of the Federal Government and, as such, constitute Indian country. *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991); see also, *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999), *cert. den'd Roberts v. United States*, 529 U.S. 1108 (2000.) A Tribe's territorial sovereignty extends to those areas recognized as being within the Tribe's Indian country. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n. 1 (1998.) "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Id.*

While there is statutory and regulatory authority for the UKB to acquire land in trust as a Federally recognized Tribe, the approval of trust lands located within the jurisdiction of the Cherokee Nation would only create jurisdictional problems between the UKB and the Cherokee Nation. The subject property is located within Cherokee County, Oklahoma within the treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota, entered into on December 29, 1835 (7 Stat. 478.) The 1835 Treaty provided that the Cherokee Nation relinquish all land east of the Mississippi River in exchange for land in Oklahoma and Kansas. By the terms of the Treaty of July 19, 1866 (14 Stat. 799), all land in Kansas and 6 tracts in Oklahoma were sold. Since the cessions of 1866, the Cherokee Nation boundaries set by the 1835 Treaty, which comprise all or a portion of 14 counties in eastern Oklahoma, have not changed. The Bureau has consistently recognized this area as the "former reservation" of the Cherokee Nation. The interest of the Cherokee Nation in its former reservation is well established. In *United Keetoowah Band v. Secretary*, No 90-C-608-B (N.D. Okla. Order May 31, 1991), the court stated "the Secretary of the Interior, or his designee, has determined that the subject lands of the old Cherokee Reservation are under the jurisdiction of the new Cherokee Nation, not the UKB." In *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B, (N.D. Okla. Feb. 24, 1992), *aff'd* 992 F.2d 1073, 1075 n. 5 (10th Cir. 1993), *cert. den'd sub nom United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Commission*, 510 U.S. 994 (1993), the court held that the UKB had "failed to show any treaty or Congressional act establishing UKB's inherited right or claim to reservation land within the boundaries of the old Cherokee Indian Reservation." In *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), the court stated "this court has previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation."

The Cherokee Nation has enacted laws to regulate the activities of Indians occurring on Indian country within the jurisdiction of the Nation. These laws include, but are not limited to, gaming, tobacco and taxation laws and regulations. The Bureau consulted the Cherokee Nation as part of its notice to political subdivisions and interested parties and pursuant to Section 101(e) of the Interior and Related Agencies Appropriations Act, 1999, *P.L. 105-277*. Having reviewed the Cherokee Nation's Comment Letter and the UKB's Reply thereto (IBIA 06-68-A), it is clear that both the UKB and the Cherokee Nation would assert jurisdiction over the subject property if it were taken in trust. The UKB's Land Into Trust Application stated:

Acquiring the land in trust will only confirm the jurisdiction of the UKB over these parcels of land, and the UKB is fully prepared to exercise such jurisdiction.

The Cherokee Nation's July 6, 2005, Comment Letter stated:

[T]he Department and the courts consistently have held that the Cherokee Nation has exclusive sovereign authority over Indian country within the boundaries of the Cherokee Nation Reservation. Because the 76-acre tract lies within the boundaries of the Cherokee Nation Reservation, if it is placed into trust it would become Indian country under the jurisdiction of the Cherokee Nation.

In its November 5, 2005, Reply to the Cherokee Comment Letter (IBIA 06-68-A), the UKB did not deny the potential for jurisdictional conflicts.

The Secretary has determined that the lands within the former treaty boundaries of the Cherokee Nation are the Cherokee Nation's service area for purposes of many Bureau programs, including the Bureau's law enforcement program. Thus, if the subject property were taken into trust for the UKB, under the Cherokee Nation self governance agreement with the Secretary, the Cherokee Nation Marshal Service would undertake the law enforcement responsibilities pursuant to 18 U.S.C. §1151.

One of the many issues arising from being defined as Indian country were outlined in the September 22, 2003 correspondence issued by the Bureau's (then) Office of Law Enforcement Services in response to the UKB's contract proposal under *P.L. 93-638*, as amended, for law enforcement services. The September 22, 2003 correspondence clearly outlines the multitude of issues in this area alone that would cause conflict not only for the two Tribes, but also for the Bureau in executing its responsibilities.

As a Federally recognized Tribe, the UKB can obtain a trust land base through the fee-to-trust acquisition process. The issue at hand is the location of the land acquisition request

and the jurisdictional conflicts which will arise from such a request to take land into trust in another Federally recognized Tribe's long-recognized historic jurisdiction. The Region takes no issue with the UKB's Corporate Charter allowing Tribal authorization for the UKB to acquire lands, however, the internal Tribal governing document does not override the longstanding position of the Bureau or the cited court rulings in this correspondence that affect this request in relation to the historic, former boundaries of the Cherokee Nation.

In the District Court, the UKB argued that it was an heir of the historic Cherokee Nation and shared jurisdiction within the former Cherokee Nation Reservation. The District Court rejected UKB's argument, finding that UKB had no reservation and did not exercise sovereign power over lands it had purchased and held in fee simple. The Court stated:

The UKB ... offers no authority to support its claim that it is heir to the original Cherokee Indian Reservation. The Act of August 10, 1946 [under which UKB was allowed to organize] simply recognizes the UKB as a "band of Indians residing in Oklahoma"; it does not set aside a reservation for the UKB or acknowledge the UKB's jurisdiction over the original Cherokee Indian Reservation. Also, while the Act's recognition of the UKB permitted the UKB to incorporate under Section 3 of the [Oklahoma Indian Welfare Act], nothing in Section 3 creates or recognizes the UKB's claim to the original Cherokee Indian Reservation. Neither does the UKB's Corporate Charter, Constitution or By-Laws grant the UKB jurisdiction over the reservation lands.

The District Court further held that the United States consistently has recognized that the lands within the original Cherokee Nation Reservation are under the jurisdiction and control of the Cherokee Nation:

Contrary to UKB's claim, the Secretary of the Interior has determined that the lands within the original Cherokee Indian Reservation are not under the jurisdiction of the UKB ... [T]he Secretary has recognized that the original Cherokee Indian Reservation is the former reservation of the Cherokee Nation, not the UKB

The District Court concluded "that UKB has failed to show any treaty or Congressional act establishing UKB's 'inherited' right or claim to reservation land within the boundaries of the old Cherokee Indian Reservation. While on appeal in *Buzzard*, the Court of Appeals affirmed the District Court's decision on different legal grounds. Yet, the opinion of the Tenth Circuit in *Buzzard* stated that UKB did not challenge the District Court's ruling "that the UKB is not an heir to the Cherokee Nation ...", 992 F.2d at 1075, n5. Further, the UKB is subject not only to the Tenth Circuit ruling on the issues UKB chose to appeal, but it is also bound by those portions of the District Court's decision that UKB chose not to appeal. See *Kansas v United States*, 249 F.3d 1213, 1230 (10th Circuit 2001.)

In other cases as *United Keetoowah Band v Mankiller*, No. 92-C-585-B (N.D. Okla. 1993), the *Buzzard* decision was reaffirmed as the UKB again challenged the Cherokee Nation's authority to enforce the Nation's tobacco tax and licensing requirement on individual allotments the UKB was utilizing for additional smokeshops. In *Mankiller*, the District Court held that it had "previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation." 1993 WL 307937 (10th Circuit Okla.) The *Mankiller* decision is not dependent on *Buzzard* and was affirmed by the Court of Appeals, 2 F.3d 1161 (10th Circuit 1993), after that court ruled on *Buzzard*.

The UKB does not provide law enforcement services on the property; law enforcement is provided by Cherokee County, a local jurisdictional entity. The UKB has a security force that works with the Cherokee County law enforcement officials. The administrative record reflects that the UKB will request additional funding for law enforcement from the United States Department of Justice. The record further reflects the UKB plans to exercise sole jurisdiction over the land rather than allow the Cherokee Nation to continue its jurisdiction over Indian lands within its historic, former reservation.

The Secretary has consistently opined that the Nation exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee treaty boundaries. Decision Letter of the Assistant Secretary, April 17, 1987; Decision Letter of the Regional Director, October 31, 2002; Decision Letter of Law Enforcement, September 22, 2003; Decision Letter of the Regional Director, September 26, 2003. On several occasions, the Federal courts have confirmed that view. *United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla. Order May 31, 1991); *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.) The Secretary has likewise determined that the lands within the historic, former treaty boundaries of the Cherokee Nation are the Cherokee Nation's service area. The 1835 Treaty provided that the Nation relinquish all lands east of the Mississippi River in exchange for lands in Oklahoma and Kansas. By the terms of the Treaty of July 19, 1866 (14 Stat. 799), all lands in Kansas and 6 tracts in Oklahoma were sold. Since the cessions of 1866, the Cherokee Nation boundaries set by the 1835 Treaty which comprise all or a portion of 14 counties in eastern Oklahoma have not changed.

The Region finds that the potential for jurisdictional problems is of utmost concern and weighs heavily against approval of this acquisition at this time.

(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 land proposed for trust acquisition is within the jurisdictional boundaries of the Bureau's Eastern Oklahoma Region. The Secretary has determined that the lands within the former treaty boundaries of the Cherokee Nation are the Cherokee Nation's service area for purposes of administering Bureau programs under the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended. The Cherokee Nation administers the program functions associated with the management of trust lands

formerly provided by the Bureau's Tahlequah Agency and Eastern Oklahoma Regional Office through a Self Governance Compact pursuant to 25 U.S.C. § 458aa, et seq. These programs include, but are not limited to, real estate services and Tribal court services, as well as the law enforcement services discussed in subparagraph (f) above. As a result of the Bureau's Self Governance Compact with the Cherokee Nation, the Bureau agency which had jurisdiction over Bureau programs within the treaty boundaries of the former Cherokee Nation—the Tahlequah Agency—was closed and the funds used to operate that agency, along with Regional Office funds utilized for direct services to the Cherokee Nation and all Indians within that area (regardless of Tribal affiliation), were transferred to the Cherokee Nation Compact. There are no remaining direct service funds in the Region that have not been previously provided to the Cherokee Nation in its Self Governance Compact. Although the Cherokee Nation has numerous full time employees available to provide Bureau services, the UKB would likely reject the authority of the Cherokee Nation employees and insist that the Region provide Bureau direct services as it has done in the past with respect to other Bureau services, e.g., processing of fee-to-trust acquisitions. However, with the Cherokee Self Governance Compact in effect, the Region has inadequate resources to allow direct supervision of the subject property if acquired in trust. Taking land into trust assumes additional responsibilities for the Bureau, in this case, additional responsibilities of the Bureau would include law enforcement, Tribal court, and realty-related functions.

While some argue that it is only 76 acres, the Secretary's responsibility for land once taken into trust is not dependent on the size of the acreage as the Secretary's trust responsibility is not defined by how large or small a trust acquisition encompasses in its request for trust status. Once taken into trust, the Region must exercise the Secretary's trust duties. With funds already transferred to the Cherokee Nation self governance compact, the Bureau cannot diminish a self governance compact unless it is by an act of Congress, i.e., across the board budget reduction, rescission or program elimination. Hence, there are no funds available at the Regional level to provide oversight responsibilities or direct program funding to the UKB for administration of trust property. Again, funds for the Bureau Agency, Tahlequah Agency, which provided agency services to the area in question were included in total with the Cherokee Nation self governance compact, resulting in closure and elimination of the Agency. Trust property administration goes beyond just taking the land into trust status. 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. Areas in which funds have been provided to the Cherokee Nation from Regional programs for inclusion in the Cherokee Nation's self governance compact.

Accordingly, the Region finds that it is not well equipped to discharge the additional responsibilities that would result for the acquisition of the land in trust status.

(h). The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM2, Land Acquisitions: Hazardous Substances Determinations.

A trust acquisition can be denied on the basis of less than all of the factors if the Bureau's analysis shows that factor or factors weighed heavily against the trust acquisition. *Johnnie Louis McAlpine v. Muskogee Area Director*, 19 IBIA 2 (1990.) There is no requirement that the Bureau reach a particular conclusion as to each factor and the regulation does not state how the agency should balance the factors in any particular case or what weight to assign to each factor. *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201 (2007.) "The ability of the BIA to discharge the necessary trust functions on newly acquired trust property is an important consideration in determining whether or not a trust acquisition should be approved." *McAlpine*, 19 IBIA at 9. The Board has held that the BIA is uniquely qualified to know what additional responsibilities it will have to assume in relation to land acquired in trust. *State of Iowa and Board of Supervisors of Pottawattamie County, Iowa v. Great Plains Regional Director*, 38 IBIA 42, 55 (2002.)

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 a NEPA review. The ESA showed that the property contained existing facilities and identified plans for development on the site for a Civil Defense Center and a Cultural Resource Center and Museum. The ESA also referenced Environmental Assessments and a Finding of No Significant Impact prepared for the Department of Housing and Urban Development (HUD) concerning the Civil Defense Center and the Cultural Resource Center and Museum. The Bureau subsequently requested copies of the HUD National Environmental Policy Act (NEPA) documents prepared for this site from the UKB to determine if the documents could be adopted to satisfy the Region's NEPA compliance requirements for the acquisition.

In response, the Bureau received copies of the UKB's Environmental Site Assessments (ESAs) prepared in compliance with provisions of the Comprehensive Environmental Response, Compensation and Liability Act to evaluate the two planned facilities for releases of hazardous substances. The documents submitted were determined not to be NEPA documents and were not the documents requested by the Bureau to support the request for the acquisition. The UKB stated in a transmittal letter to the Bureau for the ESAs that the two planned facilities "have already been the subject of a NEPA EA and a Findings of No Significant Impact by HUD" and references the submitted documents. The documents submitted were inconclusive for the Region to agree with the UKB's assertions. Further, contained in the ESAs for the two facilities are site maps of the UKB's Community Services Master Plan, which show planned development for the entire 76-acre site. Under the Bureau's response to comments in 61 Federal Register 67845, Final Notice of Revised Procedures, National Environmental Policy Act: Implementing Procedures (516 DM 6, Appendix 4), whether a land conveyance may be categorically excluded is a matter of judgment by the Bureau official responsible for NEPA compliance as to how well the plan is established. It is also the Bureau official responsible for NEPA compliance who must decide whether plans for development or physical alteration are established to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer. Clearly plans for development of the property by the UKB are sufficiently established to require NEPA

review. Again, the trust acquisition of the 76-acre property does not qualify for the proposed exclusion category as held by the UKB. The Bureau finds that the documents submitted do not satisfy the NEPA requirements for the fee-to-trust acquisition.

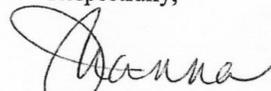
In conclusion, the Region's review and evaluation of the request and supporting documentation reveal that regulatory and statutory authority for the acquisition of the property in trust exists in 25 CFR §§151.3(a)(2) and (3) and Section 5 of the Act of June 18, 1934 for a Federally recognized Tribe's acquisition submission. Additionally, the Bureau has considered all relevant factors of 25 CFR Part 151. The property is located in Cherokee County, Oklahoma, within the former, historic reservation of the Cherokee Nation and is sought for a stated purpose that is not illegal or in conflict with existing land use. There would be a minimal and inconsequential loss of tax revenue to Cherokee County if this land were taken into trust. However, these findings do not outweigh those against approval of the trust acquisition. Jurisdictional problems and potential conflicts of land use would arise between the UKB and the Cherokee Nation concerning the jurisdiction over the property held in trust for the UKB and located within the treaty boundaries of the Cherokee Nation. These potential conflicts include, without limitation, conflicts between the Cherokee Nation and the UKB over criminal and civil judicial jurisdiction on the property and conflicts over the operation of Bureau programs by the Cherokee Nation on behalf of the UKB. Additionally, as a result of the Compact of Self Governance between the Cherokee Nation and the Secretary of the Interior, the Region is not equipped to discharge the additional responsibilities that would result from the acquisition of the subject property in trust status for the UKB. Based on the above discussion, it is the Region's decision to deny approval of the trust acquisition request.

This decision may be appealed to the Interior Board of Indian Appeals, U.S. Department of the Interior, 801 N. Quincy St., Suite 300, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340 (copy enclosed.) Your notice of appeal to the Board must be signed by you and must be mailed within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. Copies of the notice of appeal must be sent to (1) the Assistant Secretary - Indian Affairs, 4140 MIB, U.S. Department of the Interior, 18th and C Streets, N.W., Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. The notice of appeal sent to the Board of Indian Appeals must certify that copies have been sent to these parties.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Should there be any questions, contact Ms. Annette Jenkins, Realty Officer, Eastern Oklahoma Regional Office, Division of Real Estate Services, at (918) 781-4658.

Respectfully,



Regional Director