# United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 10 2014

The Honorable Guy Gene Munroe
Chairman, Kaw Nation
698 Grandview Drive
Kaw City, Oklahoma 74641

Dear Chairman Munroe:

In 2005, the Kaw Nation (Nation) submitted an application to the Bureau of Indian Affairs (BIA) requesting a determination of gaming eligibility for approximately 21.54 acres, more or less, of land known as the Braman Tract (Site) located in Kay County, Oklahoma. The Nation seeks to have the Site acquired in trust pursuant to Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, for the purpose of establishing a class III gaming facility (Kaw Project).[1] The Nation is seeking to conduct gaming at the Site pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

On May 17, 2013, we determined, pursuant to Section 20 of IGRA, 25 U.S.C. § 2719 (b)(1)(A), that gaming on the proposed Site in Kay County would be in the best interest of the Nation and its members and would not be detrimental to the surrounding community (Secretarial Determination).[2] Section 20 also requires that the governor of the state in which the gaming activity is to be conducted concur in a Secretarial Determination before an applicant tribe may operate a gaming facility.[3] By letter dated May 23, 2013, Governor Mary Fallin of the State of Oklahoma provided the required concurrence.[4] With the positive Secretarial Determination and the Governor's concurrence, the Nation may lawfully conduct gaming on the Site pursuant to IGRA after the land is acquired in trust.

We have reviewed the Nation's application and the supporting documentation in the record, and are pleased to inform you that the Department of the Interior (Department) will acquire the Site in trust for gaming purposes. The Kaw Project will provide significant opportunities for

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[1] Application for Section 20 Determination: Newly Acquired Land (November 7, 2005) [hereinafter Kaw Nation Application], Binder 2, Book 1A-1C (Attachment 1).

[2] Letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs, to Mary Fallin, Governor of Oklahoma, regarding Secretarial Determination for the Kaw Nation (May 17, 2013) [hereinafter Secretarial Determination] (Attachment 2). The Secretarial Determination contains detailed analysis of the economic and financial benefits of the Kaw Project to the Nation, the State and the local community. We rely on and incorporate the analysis and findings of the Secretarial Determination into this decision.

[3] 25 U.S.C. § 2719(b)(1)(A).

[4] Letter from Mary Fallin, Governor, State of Oklahoma, to Kevin Washburn, Assistant Secretary – Indian Affairs, regarding Concurrence in Secretarial Determination regarding Kaw Nation's "Braman Tract" (May 23, 2013) [hereinafter Governor's Concurrence Letter] (Attachment 3).

economic development for the Nation and a means for the Nation to improve the governmental services offered to its members. The acquisition of the Site in trust is necessary to support these efforts.

**Background**

The Nation is a federally recognized Indian tribe headquartered in Kaw City, Kay County, Oklahoma. The Nation has 3,182 enrolled members.[5]

The Kaw Project will consist of an 11,100 square-foot class III gaming facility with 235 slot machines and 5 table games, and will include offices, secure counting and surveillance space, and a restaurant.[6] The Site was acquired in fee by the Nation in 1990 and is within the Nation's service area of Kay County, Oklahoma.[7] The Site is a commercially-zoned property[8] with a profitable travel plaza that provides refueling to interstate traffic and food and retail services.[9] The Site also includes a seven-unit motel that will be removed.[10]

The Site is located in a rural area at the junction of Interstate 35 and U.S. Highway 177 in north-central Oklahoma. The two highways form the western and northern boundaries of the property, and the eastern and southern property lines separate the property from adjacent farmland. The surrounding area consists of ranchlands and farms.[11] The Site is 1 mile north of the Town of Braman, 4 miles south of the Kansas border, and 107 miles north of Oklahoma City. The Site is 21 miles from the Nation's former reservation and 18 miles from Newkirk, the Nation's population center and the site of key governmental services for the Nation. The Town of Braman has a population of approximately 240.[12]

As discussed in the Secretarial Determination, there is significant support for the Nation and Kaw Project from the State and the local governments.[13] In her concurrence letter,

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[5] Secretarial Determination at 2.

[6] Kaw Nation Consulting Services, the Innovation Group (June 2011) at 3, Binder 2, Book 1, Tab 5E.

[7] Memorandum from Regional Director, Southern Plains Regional Office, to Assistant Secretary – Indian Affairs, regarding 25 C.F.R Part 292 Compliance Concerning the Proposed Findings of Fact as Required for the Application by the Kaw Nation for Acquisition in Trust of Land, Known as the "Braman Tract," for Purposes of Operating a Gaming Facility Pursuant to 25 U.S.C. 2719(b)(1)(A), and Title 25 C.F.R 151 (August 4, 2011) [hereinafter Regional Director's Recommendation for Part 292] at 9 – 10 (Attachment 4). The Nation's service area extends from the Arkansas River on the east to Interstate 35 on the west, and from the Kansas border on the north to Old Highway 60 approximately 22 miles south of the Oklahoma-Kansa border. *Id.* at 5.

[8] *Id.* at 29.

[9] *Id.* at 7.

[10] *Id.*

[11] *Id.* at 6.

[12] *Id.*

[13] Secretarial Determination at 12-13.

Governor Fallin stated that she supported the expedient acquisition of the Braman Tract into trust status.[14] In August 2013, Mayor Barton of the Town of Braman reiterated the Town's support for the Kaw Project.[15] Mayor Barton stated that the Town "... fully support[s] the construction of the Kaw Project and is looking forward to the establishment of the Kaw Project at the earliest date possible."[16] Letters of support were also received in 2009 from three Kay County Commissioners,[17] the former Mayor of Braman,[18] and the Kay Electric Cooperative.[19]

*Description of the Property*

The Site is located in the Northeast Quarter and Northwest Quarter of Section 6, Township 28 North, Range 1 West of the Indian Meridian, Kay County, State of Oklahoma, more particularly described as follows:

> Beginning at the Southeast corner of said Northwest Quarter of Section 6; thence West (on an assumed bearing) along the South line of said Northwest Quarter a distance of 430.4 feet to a point on the East right-of-way line of U.S. Interstate 35

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[14] Governor's Concurrence Letter. Also, former Governor Henry submitted a letter of support for the Nation's application in December 2010, requesting that the Secretary complete the trust acquisition of the Site. *See* Letter from Brad Henry, Governor, to Secretary Ken Salazar and Assistant Secretary – Indian Affairs Larry Echo Hawk (December 23, 2010), Binder 2, Book 1, Tab 25 (Attachment 5a).

[15] *See* Letter from Michael Barton, Mayor of Braman, to Regional Director, Southern Plains Regional Office (postmarked August 12, 2013) (Attachment 5b). Mayor Barton's letter was received in response to the July 30, 2013, request for tax and jurisdictional information under 25 C.F.R. § 151.10 sent out by the Nation on behalf of BIA. *See* discussion *infra*.

[16] *Id.*at 1. Mayor Barton also wrote that, "... the Town of Braman has previously expressed its support for this acquisition for a gaming purpose and I can state that our enthusiasm for this project continues today. As we have stated before the Town of Braman has develop a positive ongoing relationship with the Kaw Nation and is in the process of coordinating with them and helping in any way we are able to related to this application and to any future Kaw Nation projects in our area in the future." *Id.*

[17] Letter from Commissioners Dee Schieber, Steve Austin and Laile Wilson, Board of County Commissioners, Kay County, Oklahoma, to Bureau of Indian Affairs (November 2, 2009), Binder 2, Book 1, Tab 25 (Attachment 5c). The County Commissioners stated that, "... it is the opinion of the Board of County Commissioners that the Kaw Project would greatly benefit not only the town of Braman but also Kay County as it would bring much needed employment opportunities to our County. The Nation has been a great partner with Kay County and we look forward to working with them in the future on additional projects." *Id.*

[18] Letter from Mayor Jerry Johnston to Bruce W. Maytubby, Acting Regional Director, Southern Plains Regional Office at 1 (October 27, 2009), Binder 2, Book 1A, Tab 25 (Attachment 5d). Mayor Johnston believed the effects on the local community would be positive, and that the Kaw Project would be the "economic catalyst to reverse the current downward trend in our population and our local economy, and might help save their school." *Id.*

[19] Letter from Joe Harris, CEO, Kay Electric Cooperative, to Southern Plains Regional Office (November 17, 2009), Binder 2, Book 1A, Tab 25 (Attachment 5e). The letter states that, "[t]he Town of Braman and northern Kay County would benefit greatly from the economic impact of the construction and operation of a casino by the Kaw Nation at this location," and that the Kay Electrical Board of Directors "enthusiastically supports the Nation's efforts for the Kaw Project." *Id.*

(l-35); thence North 8°54' East along the East right-of-way line of I-35 a distance of 284.3 feet to a point; thence North 2°25' West along said East right-of-way line of I-35 a distance of 102 feet; thence North 8°54' East along said East right-of-way line of l-35 a distance of 745 feet; thence Northeasterly along a curve to the right, along the East right-of-way line of I-35, having a radius of 2185.8 feet (said curve subtended by a chord which bears Nl9°14'E a distance of 835.82 feet) and an arc length of 841 feet to a point on the East line of said Northwest Quarter; thence continuing Northeasterly along a curve to the right, along the East right-of-way line of I-35, having a radius of 2185.8 feet (said curve subtended by a cord which bears N31°32'E a distance of 94.39 feet) and an arc length of 94.4 feet; thence North 33°26' East along said East right-of-way line of I-35 a distance of 212.7 feet; thence North 63°26' East along said East right-of-way line of I-35 a distance of 295.7 feet; thence Southeasterly on a curve to the right, along the South right-of-way line of U.S Highway 177, having radius of 1809.9 feet (said curve subtended by a chord which bears S63°50'E a distance of 461.65 feet) and an arc length of 462.91 feet; thence S68°06'E along the South right-of-way line of U.S. Highway 177, a distance of 114.49 feet; thence S09°15'W, a distance of 381.45 feet; thence N82°37'W a distance of 897.68 feet to a point on the East line of said Northwest Quarter; thence S00°00'E along the East line of said Northwest Quarter a distance of 1790.80 feet to the Point of Beginning. Said tract containing 21.54 acres more or less. Subject to all Easements and Rights of Way of record.[20]

The Nation owns the Site in fee as evidenced by the previous title insurance endorsements, the updated endorsement to the title insurance policy from First American Title Insurance Company dated March 22, 2011, and the Corrected Warranty Deed filed with Kay County dated July 15, 2011.[21]

**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 IRA.[22] The regulations found at 25 C.F.R. Part 151 set forth the procedures for implementing Section 5.

***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 of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or when a tribe already owns an interest in the land; or when

[20] Regional Director's Recommendation for Part 292 at 5-6 n.1.

[21] First American Title Insurance Company (March 22, 2012), Binder 2, Book 1, tab 12; Corrected Warranty Deed filed with Kay County (July 12, 2011), Binder 2, Book 1, Tab 5B.

[22] 25 U.S.C. §465.

the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[23]

The Nation is expected to use its increased income from the Kaw Project to promote economic development, improve self-sufficiency, and strengthen the Nation's government.[24] As discussed in detail in the Secretarial Determination, the Kaw Project will provide significant economic benefits to the Nation.[25] For example, in the first year, the net income from the Kaw Project is projected to be $3.175 million and increase to $3.8 million in year 5.[26] It is expected that the Nation will transfer $3 million of the net income to the Nation's General Fund for governmental operations and services to members with the balance retained by the Kaw Nation Economic Development Authority for reinvestment in economic development.[27] The projected net income from the Kaw Project will provide an estimated 70 percent increase to the Nation's available funding for self-financed governmental programs and services, as compared to the FY 2010 budget.[28] The income will be available for the expansion of program services as well as for tribal governmental functions and new tribal programs for the Nation's members.[29] The Kaw Project is also projected to create employment and job-training opportunities for tribal members.[30]

The Regional Director determined, and we concur, that the acquisition of the Site is necessary to facilitate economic development. Thus, the Secretary may acquire the land in trust pursuant to 25 C.F.R. § 151.3(a)(3).[31]

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[23] 25 C.F.R. §§ 151.3(a)(1) - (3).

[24] Memorandum from Regional Director, Southern Plains Regional Office, to Assistant Secretary – Indian Affairs, regarding Application by the Kaw Nation of Oklahoma for Acquisition of Land for Purposes of Operating a Gaming Facility, Pursuant to 25 U.S.C. 2719(b)(1)(A), and Title 25 C.F.R 151, known as the "Braman Tract"[hereinafter Regional Director's Recommendation for Part 151] (January 11, 2011) at 5-6 (Attachment 6); Letter from Guy Munroe, Chairman and CEO, Kaw Nation of Oklahoma, to Dan Derrinwater, Regional Director, Southern Plains Regional Office, regarding Kaw Nation Comments on the Section 20 Application for the Braman Property (November 2, 2009) at 1, Binder 2, Book 1, Tab 7B.

[25] *See* Secretarial Determination at 7-16.

[26] *Id.* at 7 – 8.

[27] *Id.* at 8.

[28] *Id.* at 11.

[29] *Id.*

[30] *Id.* at 8-10.

[31] Regional Director's Recommendation for Part 151. We note that the Nation owns the Site in fee, thus, also meeting the requirement of 25 C.F.R. § 151.3(a)(2). *See supra* note 21.

***25 C.F.R. § 151.11 Off-reservation acquisitions.***

Because the Site is 21 miles from the Nation's former reservation and not contiguous to any other lands held in trust for the Nation, and the proposed acquisition is not mandated, review of the Nation's application is subject to the requirements of Section 151.11.[32,]

Section 151.11(a) requires consideration of the criteria listed in sections 151.10(a) - (c) and sections 151.10(e) - (h). Each of these criteria is examined below.

***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 there is statutory authority for a trust acquisition and, if such authority exists, to consider any limitations contained in it.

In *Carcieri v. Salazar,* 555 U.S. 379 (2009), the United States Supreme Court held that the Secretary's authority to take land into trust for an Indian tribe extends only to those tribes that were "under Federal jurisdiction" when the IRA was enacted on June 18, 1934.[33] We have evaluated the applicability of *Carcieri* to the Nation's application, and have determined that the Nation was under Federal jurisdiction in 1934, and is eligible to have land taken into trust pursuant to Section 5 of the IRA.

The IRA is a statute of general applicability. Congress provided an opt-out provision in Section 18 of the Act, where a majority vote of Indians of the reservation voting at a special election called by the Secretary of the Interior could opt out of the Act. To accommodate the unique situation of tribes in Oklahoma, Congress specified in Section 13 that certain provisions of the IRA did not apply to listed tribes in Oklahoma, leaving the remaining provisions of the IRA to apply.[34] Section 13 of the IRA provides in relevant part:

> [...] That sections 2, 4, 7, 16, 17, and 18[35] of this title shall not apply ***to the following named Indian tribes***, the members of such Indian tribes, together with

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[32] See 25 C.F.R. §151.11 (applying "when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated").

[33] 555 U.S. at 395.

[34] By 1934, specific statutes applied to the Five Civilized Tribes and Osages and to the land base of Oklahoma tribes. Similarly, specific provisions in the IRA addressed Alaska where there were few reservations.

[35] Section 2 (§ 462) extended the existing periods of trust and any restriction on alienation placed upon Indian lands. Section 4 (§ 464) limited sales, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of the tribe or corporation organized under the Act. Section 7 (§ 467) authorized the Secretary to proclaim new reservations or add lands to existing reservations. Section 16 (§ 476) provided that any Indian tribe, or tribes, residing on the same reservation, the right to organize and adopt a constitution. Section 17 (§ 477) provides that the Secretary, upon a petition by at least one-third of the adult Indians, may issue a charter of incorporation to such tribe. Section 18 (§ 478) provided that the adult Indians on any reservation could vote in a special election to opt out of the IRA.

members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, **Kaw**, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole.[36]

Significantly, this section of the IRA did two things. First, it specifically named the Nation as one of the Indian tribes to which certain provisions of the IRA would not apply. Second, it authorized the Secretary to take land into trust for those named Oklahoma Indian tribes pursuant to Section 5 of the IRA, because it did not include Section 5 in the list of IRA sections that would not be applicable to the named Oklahoma tribes. Thus, those Oklahoma tribes specifically named in Section 13 of the IRA were "under Federal jurisdiction on June 18, 1934," and that the Secretary is authorized by Section 5 of the IRA to take land into trust for those tribes.[37] The listing of the Nation in Section 13 is sufficient for purposes of finding the Nation to be under Federal jurisdiction in 1934.

***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.

In acquiring the land, the Nation seeks to restore a tribal land base in a region it has historically inhabited.[38] The Nation also seeks to develop a long-term, viable, and sustainable revenue base that will strengthen the Nation's government and provide funding for a variety of social programs and capital for other economic development and investment opportunities.[39]

In 1825, the Kanza Tribe, one of the historical names of the Kaw Nation, ceded over 18 million acres of land in northern Kansas while retaining a reservation of 6,559,040 acres.[40] Through

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[36] 25 U.S.C. § 473 (emphasis added).

[37] *See* 78 Cong. Rec. 11125-26 (June 12, 1934), where Mr. Thomas of Oklahoma, discussing the land acquisition provision, offers an amendment that passes, that section 5 expressly reference the purchase of lands for individual Indians. He wants the money available "not only in my State for individual Indians but in other States where Indian lands have been allotted." *See also* 78 Cong. Rec. 11739 (June 15, 1934), where Mr. Hastings of Oklahoma, points out that the amendment "exempts the various Indian tribes in Oklahoma" from various sections of the act and that he does "not object to assistance by the Government in the form of and to the extent of the purchase of land for landless and indigent Indians, and to additional appropriations for health work and for Indian education." Thus, both Mr. Thomas and Mr. Hastings understood that Section 5 was applicable in Oklahoma.

[38] Finding of No Significant Impact for the Proposed Trust Acquisition of Approximately 21.25 Acres of Fee Land Owned by the Kaw nation in the Vicinity of Braman, Oklahoma, and Determination that the Land is Eligible for Gaming under the Indian Gaming Regulatory Act (Dec. 12, 2009) [hereinafter FONSI] at 3, Binder 1, Tab 2 (Attachment 7).

[39] *Id.*

[40] *See* Treaty between the United States and the Kansas Nation of Indians, U.S. Kanza Tribe, 7 Stat. 244 (June 3, 1825); Regional Director's Recommendation for Part 292 at 4; *see also* Kaw Nation Application at 8 - 13, Binder 2, Book 1, Tab 2.

treaties and congressional actions, the Kanza's land base was sequentially reduced.[41] The Nation was ultimately removed to Oklahoma in 1872, where it bought 100,372 acres for its reservation that were carved out of the existing Osage reservation using proceeds from the sale of its trust land in Kansas.[42]

In 1902, Congress enacted legislation that allotted most of the land that the Kaw Nation had purchased in Oklahoma, leaving only 100 acres of its former reservation along the Arkansas River.[43] The allotments eventually passed out of trust status.[44] The remaining Kaw reservation, primarily a town site, was flooded in the 1970s by the Corps of Engineers for the creation of the Kaw Dam and Reservoir on the Arkansas River.[45] The Nation's Council House was relocated to a parcel of land less than one acre to avoid inundation.[46]

As a result of construction of the Kaw Dam and Reservoir, the Nation no longer has land on its former reservation. This fact distinguishes the Nation from other tribes in Oklahoma. Without a sufficient land base to support its economy, the Nation is at an economic disadvantage.[47] The Nation has rebuilt its land base in Kay County through purchase and acts of Congress to over 1,000 acres of fee and trust land in Kay County.[48] These lands are not consolidated, however.[49]

After its removal to Oklahoma, the Nation made its home in Kay County.[50] The Nation has strong ties to the region as evidenced by its town sites, schools, homes, and cemeteries.[51] The Site is within the Nation's service area of Kay County.[52] The Site is only 21 miles from the boundaries of the Nation's former reservation, and is near the Nation's key governmental sites

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[41] *See* Treaty between the United States and the Kansas Indians, U.S.-Kanza Tribe, 12 Stat. 1111 (Oct. 5, 1859); Act of May 8, 1872, 17 Stat. 85; Act of June 23, 1874; Act of July 5, 1876, 19 Stat. 74; Act of March 16, 1880, 21 Stat. 68.

[42] Act of May 8, 1872, 17 Stat. 85; Act of June 5, 1872 ,17 Stat. 228.

[43] Act of July 1, 1902, 32 Stat. 636.

[44] Regional Director's Recommendation for Part 292 at 4.

[45] Act of October 23, 1962, 76 Stat. 1173.

[46] Regional Director's Recommendation for Part 292 at 26.

[47] Regional Director's Recommendation for Part 151 at 8.

[48] Act of July 1, 1902, 32 Stat. 636; Kaw Nation Application for Section 20 Determination at 13; s*ee e.g.*, acquisition of 132.5 acres of surplus land in Washunga Bay near the Kaw Dam pursuant to Act of Nov. 29, 1983, Pub. L. No. 98-173, 97 Stat. 1121.

[49] Kaw Nation Application at 13.

[50] *See id.* at 8-13.

[51] *Id.*

[52] Regional Director's Recommendation for Part 292 at 9 – 10. The Nation's service area extends from the Arkansas River on the east to Interstate 35 on the west, and from the Kansas border on the north to Old Highway 60 approximately 22 miles south of the Oklahoma-Kansa border. *Id.* at 5.

and population center at Newkirk. Newkirk is the location of the Nation's clinic, pharmacy, wellness and multipurpose centers, housing program, gaming commission, cemetery, most of its police force, and the Nation's existing casino, the South Wind Casino.[53]

The Nation has focused its efforts and resources on acquiring properties for commercial development in order to produce sufficient revenues to sustain and fund its social and economic needs and its governmental operations.[54] Gaming revenue will enable the Nation to advance its economic diversification goals, enhance the quality and quantity of governmental services it provides to its members, and create employment opportunities for its members and the surrounding community.[55] We find that the acquisition of the Site in trust is necessary to achieve these goals.

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

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

The purpose of acquiring the Site in trust is to assist the Nation in developing the economic opportunities provided by the development of a gaming facility. The Regional Director's initial analysis of the Kaw Project was based primarily on a proposal for a larger casino on the Site.[56] Since that time, a major casino has begun operating near Wichita, Kansas, which is expected to draw most of its patrons from the greater Wichita area who would have otherwise visited the Kaw Project.[57] As a result, the Nation has concluded that the Site will only support a smaller casino.[58]

The Kaw Project that is the subject of this decision consists of an 11,100 square-foot class III gaming facility with 235 slot machines and 5 table games, and will include offices, secure counting and surveillance space, and a restaurant.[59] The Site is a commercially zoned property[60] with a profitable travel plaza that provides refueling to interstate traffic.[61] The Kanza Travel Plaza provides refueling to interstate traffic and food and retail services.[62] The Site also has a

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[53] Secretarial Determination at 3.

[54] Regional Director's Recommendation for Part 151 at 5.

[55] *Id.* at 5-6.

[56] Regional Director's Recommendation for Part 292 at 13.

[57] *Id.*

[58] *Id.*

[59] Kaw Nation Consulting Services, the Innovation Group (June 2011) at 3, Binder 2, Book 1, Tab 5E, Attachment 1.

[60] Regional Director's Recommendation for Part 292 at 29.

[61] *Id.* at 7.

[62] *Id.* at 7.

new water tower recently built by the Nation, a small motel that will be removed, and an evaporative wastewater treatment system.[63]

The Nation projects that the Kaw Project will create approximately 50 new jobs, of which at least 25 percent are likely to be held by Indians.[64] The number of Indians from other tribes likely to be employed will have a locally significant effect in a community of approximately 240 persons.[65]

As a result of increased revenue, the Nation expects to hire additional staff related to the Kaw Project.[66] In addition to the 50 new jobs at the casino, it is likely that the Nation's Gaming Commission will hire at least five new staff to accommodate the increased demand for licensing and surveillance operations.[67] The Nation's police will likely hire at least one additional officer to provide services to the Kaw Project.[68] These additional hires would result in approximately 56 newly-created jobs related to the Kaw Project.

We find that the use of the property for gaming purposes will benefit both the Nation and the surrounding community.

***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.

The Town of Braman does not have taxing jurisdiction over the Site and does not levy taxes on the property, and there are no special assessments or amounts currently assessed against the property by the Town of Braman.[69] Kay County reports that the annual amount of property taxes

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[63] *Id.*

[64] Regional Director's Recommendation for Part 292 at 16. This estimate of 25% Indian employment is consistent with the employment statistics from the Nation's existing South Wind Casino and national data on Indian employment at tribally-owned casinos. *Id.*

[65] *Id.*

[66] *Id.*

[67] Regional Director's Recommendation at 16; Kaw Nation April 2010 Supplemental Comments at 4-5 ("The Kaw Gaming Commissioner estimates that he would need from five to eight additional employees to manage licensing and provide surveillance ...").

[68] *Id.*

[69] Letter from Michael Barton, Mayor of Braman, to Regional Director, Southern Plains Regional Office (postmarked August 12, 2013) at 1.

currently levied on the Site is $13,433.55, [70] which is approximately 0.04 percent of Kay County's entire tax roll – $34,545,560.[71]

Noting that Kay County and the Town of Braman actively support the acquisition in trust, the Regional Director concluded there would be no negative impacts resulting from the removal of this land from the tax rolls, and we concur.[72] The removal of the land from the tax rolls will have only a minor impact on Kay County and is offset by the substantial financial benefits that will accrue to the Nation and the surrounding community.[73]

Further, the annual fee paid to the State from gross gaming revenues for the Kaw Project through the tribal-state compact ranges from $539,000 to $557,000.[74] Most of these payments would go into a State education fund and be allocated to public schools throughout Oklahoma, a portion of which would be allocated to schools in Kay County with the balance going into the State fund to assist problem gamblers.[75] The removal of the Site from the tax rolls would be more than offset by the payments to the State.

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

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

The Nation has an existing agreement with the Town of Braman for firefighting services.[76] The Town of Braman provides fire protection services and emergency management services to the Site at a minimal expense to the Town of Braman.[77] The Nation has indicated its willingness to fund improvements in the local firefighting capacity if needed.[78] The Kay County Sheriff's Department provides law enforcement services to the Site Braman Property.[79] When acquired in

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[70] Letter from Christy Kennedy, Treasurer, Kay County, to Paula Hart, Director, Office of Indian Gaming, (received Dec. 4, 2013) (Attachment 8a).

[71] *Id.* at 2.

[72] Regional Director's Recommendation for Part 151 at 6.

[73] *See* Secretarial Determination at 7-16.

[74] Secretarial Determination at 11.

[75] *Id.* at 12.

[76] Regional Director's Recommendation for Part 292 at 33.

[77] Letter from Michael Barton, Mayor of Braman, to Regional Director, Southern Plains Regional Office (postmarked August 12, 2013) at 2.

[78] Final Environmental Assessment, Kaw Nation Fee-to-trust and Section 20 Determination for 21.25 Acres Near Braman, Oklahoma, at 81. Binder 5, Book A

[79] Letter from Carol Purdy, Kay County Assessor, to Regional Director, Southern Plains Regional Office, regarding Gaming Fee-to-Trust Application for Kaw Nation's "Braman Property" (August 29, 2013) (Attachment 8b). Ms.

trust, the Kaw Nation police department will patrol the site on a 24-hour, 7-day a week basis and additional officers would be added if needed.[80]

The Site is a commercial tract in a rural setting.[81] The Site was purchased in 1990 for its commercial potential and included an operating travel plaza and motel at the time of purchase. The Site is zoned for commercial development by the County.[82] The Town of Braman has no zoning authority over the Site.[83] The Kaw Project is consistent with the existing commercial zoning, and thus, there is no potential for land use conflicts.

The Regional Director determined, and we concur, that the Kaw Project will not create jurisdiction problems or potential conflicts of land use.

***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 determined that because the Kaw Nation is a Self-Governance tribe that governs its own affairs, BIA involvement will be minimal.[84] The Regional Director states that his office is accustomed to fluctuations in tribal land bases from year to year and adjusts to meet the responsibilities of his Office.[85] We concur with these determinations.

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

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

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Purdy's letter was received in response to the July 30, 2013 request for tax and jurisdictional information under 25 C.F.R. § 151.10 sent out by the Nation on behalf of BIA.

[80] FONSI at 11.

[81] *Id.* at 1.

[82] Regional Director's Recommendation for Part 292 at 29.

[83] Letter from Michael Barton, Mayor of Braman, to Regional Director, Southern Plains Regional Office (postmarked August 12, 2013) at 2.

[84] Regional Director's Recommendation for Part 151 at 6.

[85] *Id.*

The two proposed actions for purposes of NEPA are: 1) the trust acquisition of land for the purpose of class III gaming, and 2) issuing a Secretarial Determination. A Final Environmental Assessment (EA) was completed in October 2008.[86] On December 9, 2009, the Assistant Secretary - Indian Affairs signed a Finding of No Significant Impact (FONSI) for the proposed trust acquisition of the Site and for issuance of the Secretarial Determination.[87]

*Environmental considerations*

The Final EA analyzed the development of a class III gaming facility on the Site with continued operation of the Kanza Travel Plaza, as well as two other alternative development proposals.[88] The Assistant Secretary determined that the preferred alternative – the acquisition of the Site in trust, the issuance of a Secretarial determination, and the development of the Kaw Project – did not constitute major Federal actions that would significantly affect the quality of the human environment within the meaning of NEPA.[89] This conclusion was based on the analysis contained in the Final EA, public comments made on the EA, and the administrative record.[90]

After a complete review and analysis in the Final EA, the FONSI identified no significant impacts to land, water, air, or biological resources from the Kaw Project:

*Land Resources.*[91] This section examined topographic, geologic, seismic, mineral resource, and soil effects of the Kaw Project. The principal effect would be grading for the site, including the parking area, during the construction period.

*Water Resources.*[92] Water is supplied to the property by Blackwell Rural Water Supply that uses only about 25 percent of the water available to it. With the limited amount of additional water required by the Kaw Project (0.2 percent of current supplies and 0.05 percent of capacity), there would be no stress to the water delivery potential. The water meets applicable Federal and State water quality standards. The recent addition of a 300,000-gallon water tower by the Nation will improve a current pressurization problem in the delivery system for the rural lands north and east of the Site.

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[86] Final Environmental Assessment, Kaw Nation Fee-to-trust and Section 20 Determination for 21.25 Acres Near Braman, Oklahoma, Binder 5, Book A.

[87] FONSI. *See supra* note 38.

[88] FONSI at 6-7.

[89] FONSI at 15.

[90] *Id.*

[91] FONSI at 7 -8.

[92] FONSI at 8.

Wastewater is entirely contained in the existing, on-site, lined treatment lagoons, which have substantial excess capacity.[93] The lining prevents groundwater interchange. If capacity is exceeded, the town of Braman has confirmed that it has excess capacity in its treatment system and is willing to use this excess capacity for the gaming facility.

There would be a small addition to surface run-off from the project that would be addressed by a Storm Water Pollution Prevention Plan designed to minimize water quality impacts and to assure that drainage from the Site does not violate any Clean Water Act standards.[94]

*Air Quality.*[95] Kay County is an attainment area for air emissions, and the air emissions impacts of the project would be well under the de minimus levels required by Oklahoma and Federal standards. The Kaw Project would increase traffic and vehicle emissions, but the impact would not be significant. Cumulative air quality effects were also assessed and determined to fall well below the de minimis state and national standards.

*Noise.*[96] Noise from the Kaw Project will fall within acceptable limits for residential areas.

*Biological Resources.*[97] Effects of the Kaw Project on vegetation, prime farmlands, wetlands resources, and wildlife were assessed, but no significant impacts are expected. The property is a developed commercial parcel considered unsuitable for threatened or endangered species. The U.S. Fish and Wildlife Service concurred with a "no effect finding" for the project. The Natural Resource Conservation Service District Conservationist reviewed the property for effects on prime farmland soils, unique areas, and wetlands and found none.

*Aesthetic, Recreational, and Cultural Values.*[98] The aesthetic value of the property is expected to be enhanced with a landscaped gaming facility. A record search and field survey, including use of ground penetrating radar, indicated that no prehistoric or historic site would be affected by construction on the Site. The report from the field survey concluded that the area had been so extensively disturbed by past construction that further cultural resource assessment is not warranted. The Oklahoma State Archaeologist concurred in this conclusion. There are no recreational resources on the Site, and a gaming facility would provide indoor recreational opportunities.

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[93] *Id.*

[94] FONSI at 9.

[95] *Id.*

[96] *Id.*

[97] FONSI at 10.

[98] FONSI at 10.

*Employment, Economics, Welfare, and Environmental Justice.*[99] The Final EA analyzed the socio-economic effects and concluded that the added employment from construction and operation of a gaming facility would provide a significant benefit to employment and income in an area that has been losing population and jobs. Housing availability and social services should not be greatly impacted because a gaming facility would draw its employees primarily from the local labor pool. Law enforcement, fire protection, and emergency services are not expected to be adversely affected. The Kaw Nation police department would patrol the site on a 24-hour a day, 7-day a week basis and additional officers would be added if needed. Fire protection and emergency services are already provided to the Site through an agreement with the Town of Braman. Furthermore, the Kaw Project does not have any environmental justice implications, as it will not significantly impact the local environment or pose health hazards to any underrepresented or socioeconomically disadvantaged communities in the surrounding area.

*Transportation and Parking.*[100] A transportation study for the Kaw Project concludes that there would be an incremental capture rate of approximately 127 vehicles a day from normal traffic on Interstate 35. Local traffic would add about 1,300 vehicles per day if no casino is constructed in the Wichita, Kansas, area, and about 400 if there is a casino constructed in the Wichita area. Approximately 15,000 vehicles per day on average pass the existing interchange each direction. Even with no competition from a Kansas facility, the traffic impact study indicated that the level of service at the interchange and entering and exiting the property would only be modestly affected with typical delays during peak traffic of only 10-15 seconds, which is considered to be good. The study concluded that all intersections would be expected to easily handle the additional traffic expected to be generated by a new casino at very high levels of service with no additional off-site improvements necessary.

*Solid Waste.*[101] The increased amount of trash generated by the Kaw Project was estimated and evaluated in the Final EA, and no significant effects on the Blackwell-Davis Landfill are anticipated.

*Cumulative Effects, Indirect Effects, and Growth Inducement.*[102] Cumulative effects, indirect effects and growth inducement stemming from the Kaw Project were evaluated. There are only minor known projects underway or planned in the area, so cumulative effects in addition to those previously addressed were considered to be zero to insignificant across all of the resources and subjects addressed above. The principal cumulative effects would be on water and air resources. For water quality, the recent construction of the water tower by the Nation is expected to reduce the low rate of service disruptions in the area, improve water pressure, and provide water for refilling fire trucks in the event of wildland and other fires in the surrounding area. The Blackwell Rural Water Supply company plans to store water in the water tower and use a net

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[99] FONSI at 11.

[100] FONSI at 11-12.

[101] FONSI at 12.

[102] FONSI at 12-13.

billing approach to route water from the water tower to the rural water delivery system. Blackwell Rural Water Supply also plans to install standpipes in the rural area as part of their updates to their water system. The water tower will also have a rapid refill capacity for fire truck, which will improve emergency fire protection for Braman. The cumulative impact on the availability of water resources are considered to be positive.

A modest, cumulative effect to air quality in the area will be realized because of the continuing effect of EPA's Onboard Refueling Vapor Recovery equipment requirements on volatile organic carbon emissions from the Kanza Travel Plaza. The EPA requirements are nationwide requirements and will continually decrease total volatile organic carbon emissions from gasoline vehicles until the nation's fleet of such vehicles has been substantially replaced. Since the emissions from the property are de minimus and Kay County is in attainment for criteria pollutants, the overall effect on the environment from the Kaw Project is expected to be positive, but not significant. FEA at 5.4.

Indirect and induced effects from the Kaw Project are possible, but conjectural. The principal effects here would be on 1) the secondary effect of employing 200-250 people at the Braman site and the resulting economic effect of their purchasing power in Kay County, particularly in the nearby towns of Braman, Blackwell, and Newkirk as well as in rural areas, and 2) the purchasing of services and goods by the facilities operating under the Kaw Project. These effects are not expected to be large at a regional scale, but could be locally significant and help stabilize the population and economy in the surrounding area.

The only other major project underway in the area is the reconstruction of U.S. 177 from Blackwell to the I-35 interchange. This is being undertaken for safety and modernization purposes, rather than for handling more traffic. By far the greatest share of additional traffic is anticipated to arrive at the Braman property using I-35 from the north due to the heavy reliance for clientele on the Kansas population. I-35 is expected to also be the route of choice for persons travelling from the south, since I-35 is the faster and easiest route, even from Blackwell to the south.

A Phase I Environmental Site Assessment was completed in December 2003 for the Site with an update completed on June 10, 2004.[103] No recognized environmental conditions were identified. An updated Phase I Environmental Site Assessment will be completed prior to the land being acquired in trust.

***25 C.F.R. § 151.11(b) The location of the land relative to state boundaries and its distance from the boundaries of the tribe's reservation.***

Section 151.11(b) requires that as the distance between a tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of

[103] Environmental Investigation, Final Environmental Assessment, Appendix N (June 10, 2004), Binder 5.

anticipated benefits from the acquisition, and give greater weight to the concerns raised by the state and local governments having regulatory jurisdiction over the land to be acquired in trust.

The Site is located 4 miles south of the Kansas border and 21 miles from the boundaries of the Nation's former reservation.[104] The State and local governments have consistently expressed their support for the Kaw Project and have raised no concerns.

As discussed in detail in the Secretarial Determination, the Kaw Project will provide significant economic benefits to the Nation.[105] For example, in the first year, the net income from the Kaw Project is projected to be $3.175 million and increase to $3.8 million in year 5.[106] It is expected that the Nation will transfer $3 million of the net income to the Nation's General Fund for governmental operations and services to members with the balance retained by the Kaw Nation Economic Development Authority (KEDA) for reinvestment in economic development.[107] The income will be available for the expansion of program services, for tribal governmental functions, and for new tribal programs for the Nation's members.[108] The Kaw Project is also projected to create employment and job-training opportunities for tribal members.[109]

The Nation has presented a strong case that it will use the income from the Kaw Project to strengthen its government, operate its tribal programs, and provide services to its citizens.

***25 C.F.R. 151.11(c) Where land is being acquired for business, the Tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.***

Section 151.11(c) requires a tribe to submit business plan which specifies the anticipated economic benefits associated with the proposed use.

In 2011, the Innovative Group prepared a Financial Statement (2011 Financial Statement) for the proposed Kaw Project.[110] These *pro forma* financial statements fulfill the regulatory requirement and include:

- Capital Cost and Other Assumptions
- Capital Cost Summary
- Statement Of Fixed Asset Accounting

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[104] Regional Director's Recommendation for Part 151 at 2 and 7.

[105] *See* Secretarial Determination at 7-16.

[106] *Id.* at 7 – 8.

[107] *Id.* at 8.

[108] *Id.*

[109] *Id.* at 8-10.

[110] Kaw Nation Consulting Services, the Innovation Group (June 2011) [hereinafter 2011 Financial Statement], Binder 2, Book 1, Tab 5E.

- Balance Sheet Analysis
- Balance Sheet
- Income Statement
- Cash Flow Statement.

The 2011 Financial Statement projects net income after deducting interest, depreciation, exclusivity payments to the State of Oklahoma under the tribal-state compact,[111] amortization, and operating expenses. The net income from the Kaw Project is projected to be:[112]

| | |
|---|---|
| Year 1 | $3,175,570 |
| Year 2 | $3,398,673 |
| Year 3 | $3,551,672 |
| Year 4 | $3,693,335 |
| Year 5 | $3,840,703. |

The capital cost summary estimates that the total cost for the Kaw Project will be $4,827,019.[113] The Debt Amortization Schedule consists of level annual payments of $637,796 per year for 20 years at 12% interest.[114] The projected cash flow from the Kaw Project before loan repayment will be approximately $4 million per year.[115]

The 2011 Financial Statement assumes that the KEDA will transfer $3 million of the net income to the Nation's General Fund for governmental operations and services to members with the balance retained by the KEDA for reinvestment in economic development.[116] The Nation will determine how much will be transferred from the net income, and the Nation may elect to receive more, or it may elect to receive less than the $3 million to allow for reinvestment in economic development.[117]

The net income projections appear reasonable. The net income will provide revenue to the Nation for governmental services and operations, and for reinvestment in further economic development.

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[111] The Nation has an existing tribal-state gaming compact with the State of Oklahoma. *See* 70 Fed. Reg. 12,230 (March 11, 2005).

[112] 2011 Financial Statement at 11.

[113] *Id.* at 4.

[114] *Id.* at 8.

[115] *Id.* at 12.

[116] *Id.* at 11.

[117] Regional Director's Recommendation for Part 292 at 15.

***25 C.F.R. § 151.11(d) Contact with state and local governments pursuant to §151.10(e) and (f) providing 30 days to submit written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.***

As more fully discussed in the sections above concerning §151.10(e) and (f), notice of the 30-day comment period was sent to Kay County and the Town of Braman on July 30, 2013.[118] Kay County and the Town of Braman have expressed support for the acquisition in trust. We conclude there would be no negative impacts resulting from the removal of this land from the tax rolls as it will have only a minor impact on Kay County and is offset by the substantial financial benefits that will accrue to the Nation and the surrounding community. Further, the submissions from Kay County and the Town of Braman indicate that the Kaw Project will not create jurisdiction problems or potential conflicts of land use.

**Decision**

I determine that the statutory and regulatory requirements for acquiring this parcel of land in trust for the Nation have been satisfied. The Regional Director is authorized to approve the conveyance document accepting the property in trust for the Nation subject to any remaining regulatory and Departmental requirements.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs

[118] *See* FN 79, *supra.*