



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

SEP - 7 2004

Mr. Steve Hillard
President
Native American Land Group, L.L.C.
3900 C Street, Ste. 801
Anchorage, AK 99503

Re: Cheyenne and Arapaho Tribes of Oklahoma;
Notice of Claims and Petition to Settle

Dear Mr. Hillard:

This letter is in response to the April 3, 2004 "Notice of Claims and Petition to Settle to the Assistant Secretary for Indian Affairs, U.S. Department of the Interior" by the Cheyenne and Arapaho Tribes of Oklahoma (the "Tribes") and your May 12, 2004 letter on behalf of the Tribes enclosing a settlement proposal. Due to its legal nature, the Petition was forwarded to the Solicitor's Office for review. We have carefully considered the Tribes' request to discuss a possible settlement of the claims and, for the reasons discussed below, courteously decline to pursue such a settlement.

The Tribes assert that they currently hold aboriginal title to approximately twenty-seven million acres of land in Colorado identified in the Fort Laramie Treaty of 1856 (10 Stat. 749, II Kapp. 594) and other unspecified tracts of land within the state, notwithstanding that through subsequent agreements the Tribes ceded all of their aboriginal land to the United States. The Tribes claim numerous theories of recovery, including breach of the Fort Laramie Treaty, breach of fiduciary duty, and disability as a result of the Sand Creek Massacre of 1864. It is our understanding that, in settlement of their asserted claims to the land (but not also as reparations for the events at Sand Creek), the Tribes seek to have placed in trust status one 500-acre parcel for gaming and a second parcel located in downtown Denver for non-gaming purposes.

The Indian Claims Commission ("ICC") was established in 1946 in order finally to resolve all outstanding claims of American Indians against the United States, including even "claims based upon fair and honorable dealings that [we]re not recognized by any existing rule of law or equity;" P.L. 79-726, Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70 to 70v-2 (1976) and omitted from the current Code because the ICC terminated on September 30, 1978). Accordingly, the Act establishing the ICC fixed the

time period for bringing claims at five years from the date of its enactment. Section 12 of the Act (formerly 25 U.S.C. § 70k) provided,

The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

60 Stat. 1052. Based upon our initial review, it appears that any cognizable claims the Tribes may have had accrued prior to 1946 and therefore may not now be submitted to the Secretary of the Interior for consideration. *See id.*; *see also, e.g., Catawba Indian Tribe of South Carolina v. United States*, 24 Cl. Ct. 24, 29 (1991); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987).

Moreover, the Tribes presented claims regarding the land at issue in their "Notice of Claims and Petition to Settle" to the ICC for final resolution. Days before the end of the five-year claims period the Tribes filed a petition for compensation for 51,210,000 acres of aboriginal land recognized in the Fort Laramie Treaty (26,447,516 acres of which were located in Colorado). *See Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 16 Ind. Cl. Comm. 162 (Oct. 18, 1965); *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 10 Ind. Cl. Comm. 1, 9 (Dec. 6, 1961). The Commission found that, through subsequent treaties of February 18, 1861 (12 Stat. 1163, II Kapp. 807), October 14, 1865 (14 Stat. 703, II Kapp. 887), and October 28, 1867 (15 Stat. 593, II Kapp. 984), the Tribes ceded all of their interests in the land to the United States, and determined its value as of a date agreed upon by the Tribes. 10 Ind. Cl. Comm. at 8, 32. Before the ICC determined whether the United States had sufficiently compensated the Tribes for the land, the Tribes agreed to settle the dispute for fifteen million dollars. 16 Ind. Cl. Comm. at 164-65. The ICC approved the settlement, finding it to be "fair and just to both the [Tribes] and the [United States]," and entered final judgment. *Id.* at 189. Furthermore, the parties stipulated that

[e]ntry of final judgment . . . shall finally dispose of all rights, claims or demands which the [Tribes] have asserted or could have asserted with respect to the subject matter of these claims, and [the Tribes] shall be barred thereby from asserting any such right, claim or demand against [the United States] in any future action.

Id. at 171-72. Congress appropriated the settlement money, *see* P.L. 89-309, Act of Oct. 31, 1965, 79 Stat. 1133, and provided for its distribution to the Tribes, *see* 25 U.S.C. § 1161 *et seq.* Thus, the Tribes previously submitted for final resolution claims regarding the land described in the Fort Laramie Treaty (and by not filing additional claims relinquished any claims they might have asserted with respect to other land). Just as the Secretary cannot provide redress for untimely claims, she lacks authority to undo the final judgment. *See* 60 Stat. 1052; *see also, e.g.,*

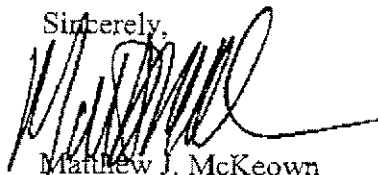
Catawba Indian Tribe of South Carolina, 24 Cl. Ct. 24 at 29; *Navajo Tribe of Indians*, 809 F.2d at 1461.

Although the Act establishing the ICC and the Tribes' final judgment appear to bar all of their claims against the United States, Congress has provided the Tribes another means for acquiring land in trust status, including for gaming purposes. Under Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, tribes may apply to the Secretary to acquire land in trust. The considerations applicable to the Secretary's exercise of discretion to acquire land in trust are set forth in the statute and in the Department's regulations, codified at 25 C.F.R. Part 151. In short, on review of an application the Secretary must consider whether the acquisition is beneficial to the tribe and necessary to facilitate tribal self-determination, economic development, or Indian housing. *See* 25 C.F.R. § 151.3(a)(3). The Secretary must also evaluate the impact on the local community by conducting an environmental review and by considering comments from state and local jurisdictions regarding jurisdictional concerns and removal of the property from the tax rolls. *See id.* § 151.10(e), (f), and (h). The Secretary will give greater scrutiny to the tribe's justification of anticipated benefits, and greater weight to local comments, as the distance between the tribe's reservation and the land to be acquired increases. *See id.* § 151.11.

Gaming generally is prohibited on land acquired in trust after October 17, 1988, the effective date of the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. § 2719. There are, however, exceptions. Due in part to reasons that were already discussed, an exception in IGRA for land taken into trust as part of a settlement of a land claim, *see* 25 U.S.C. § 2719(b)(1)(B)(i), would not apply to the acquisition contemplated by the Tribes. On the other hand, gaming may be permissible if the Secretary of the Interior determines that a gaming establishment would be in the best interest of the Tribes and their members, and not detrimental to the surrounding community, and the Governor of Colorado concurs. *See id.* § 2719(b)(1)(A). The considerations applicable to a determination to allow gaming pursuant to this exception overlap to a large degree with those examined under Section 5 of the Indian Reorganization Act and 25 C.F.R. Part 151.

We recommend that the Tribes consider the existing statutory processes that Congress supplied for acquiring land in trust and putting it to gaming uses. Should the Tribes decide to submit an application to place land in trust status for any purpose, the Secretary will give it full and appropriate consideration. Please contact either Suzanne Schaeffer or Thomas Blaser at 202-208-4361 of my staff if you have any questions.

Sincerely,



Matthew J. McKeown
Deputy Solicitor

cc: Michael D. Olsen, Acting Deputy Assistant Secretary – Indian Affairs
George T. Skibine, Director, Office of Indian Gaming Management
Christopher B. Chaney, Associate Solicitor, Division of Indian Affairs
Suzanne R. Schaeffer, Assistant Solicitor, Division of Indian Affairs