United States Department of the Interior

OFFICE OF THE SOLICITOR

JUN 25 2003

Memorandum

To: Regional Director, Midwest Regional Office, Bureau of Indian Affairs

From: Acting Associate Solicitor, Division of Indian Affairs

Subject: Indian Land Opinion: Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan

Summary

You have asked whether any of the exceptions to the general prohibition on gaming on lands acquired in trust for an Indian tribe after October 17, 1988, in the Indian Gaming Regulatory Act would allow the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan to conduct gaming activities on land that the Tribe has asked the Secretary of the Interior to take into trust in Wayland Township, Michigan.

We conclude that the Secretary of the Interior has legal authority to exercise discretion to take land into trust for the Tribe, and to proclaim that land to be the Tribe's reservation. If the Secretary exercises that discretion, we further conclude that the Tribe can conduct gaming activities on the land under the "initial reservation exception" in Section 20 of the Indian Gaming Regulatory Act. The manner in which the Secretary should exercise her discretion in this matter is beyond the proper scope of this opinion.

Background

The Match-E-Be-Nash-She-Wish are a Federally-recognized Tribe.

The United States extended federal recognition to the Match-E-Be-Nash-She-Wish Band (Tribe) under the Department of the Interior's "Procedures for Establishing That An American Indian Group Exists As An Indian Tribe.[1] The Department published the Notice of Final Determination of the acknowledgment in the Federal Register on October 23, 1998.[2]

The final determination would have become effective ninety days after publication, but the city of Detroit objected to the acknowledgment and requested that the Interior Board of

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[1] 25 C.F.R. Part 83

[2] 63 Fed. Reg. 56936

Indian Appeals (IBIA) reconsider the Department's decision.[3] On May 21, 1999, the IBIA dismissed the city's request for reconsideration and referred four issues that the Board concluded were outside IBIA jurisdiction to the Secretary as possible grounds for reconsideration. The four issues are not relevant to the discussion and conclusions of this Memorandum.

By letter dated August 23, 1999, the Solicitor, on behalf of the Secretary, notified counsel for the city that the Secretary "[d]ecided not to exercise his discretion to direct additional review by the Assistant Secretary - Indian Affairs in this instance." In the absence of further appeal, the recognition became effective on that date.

<u>The Tribe has asked the Secretary to take specific lands into trust and to proclaim that land to be the Tribe's reservation.</u>

The Tribe does not have a reservation or other land in trust status. By resolution dated July 31, 2001, the Tribe requested that the Secretary take into trust two parcels totaling 165 acres near the city of Dorr in Wayland Township, Allegan County, Michigan (Wayland Township parcels). The resolution also requests that the Secretary proclaim the land to be the Tribe's reservation. Both parcels are to be used for gaming development. The Tribe properly filed a land-into-trust application[4] with the Midwestern Regional Office of the Bureau of Indian Affairs (BIA) on August 8, 2001. The application and Regional Director's recommendation will be reviewed by the Twin Cities Field Office of the Office of the Solicitor. The Tribe has not submitted an application for a reservation proclamation. The Secretary has not made a decision on the land into trust application.

<u>The Tribe has long and significant historical ties to the proposed trust land.</u>

The Wayland Township parcels are located in an area of Michigan to which the Tribe has long historical ties.[5] The Tribe's trust application and the Final Determination of Acknowledgment indicate that the Tribe has been centered around the town of Bradley in Allegan County since the founding of the Griswold Mission, an effort of the Episcopal church to Christianize the Indians, in 1838. In 1880, the Tribe's ancestors continued to reside on the lands of the former Griswold Mission, which was referred to as an "Indian Colony" in the 1880 Federal census of Allegan County. The Tribe's current headquarters is located in Dorr, Michigan, which lies less than 10 miles from Bradley in Allegan County.

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[3]IBIA Case No. 99-34-A

[4]25 C.F.R. Part 151

[5]Gun Lake Fee-to-Trust application dated August 8, 2001.

Discussion

The Secretary has authority to acquire the Wayland Township parcels in trust for the Tribe and to proclaim the property to be the Tribe's reservation.

Congress has granted the Secretary broad discretion to acquire land into trust on behalf of Indian tribes in 25 U.S.C. 465. The statute states:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands ... for the purpose of providing lands for Indians.
>
> Title to any lands or rights acquired pursuant to section ... 465 ... of this title shall be taken in the name of the United States in trust for the Indian tribe ...

The Department's regulations in 25 C.F.R. Part 151 that implement that grant of authority state:

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status ... when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[6]

The Tribe's resolution and trust application explain in great detail that the Wayland Township parcels are required to improve the economic well-being of the Tribe and to provide greater self-determination and self-sufficiency. The land is slated for development of a gaming facility, a use that is consistent with the regulatory requirements that property acquired in trust support economic development. The Tribe also notes that trust status will enhance the proposed economic development activities on the parcels by: accelerating depreciation on federal income taxes,[7] providing a federal income tax credit for wages and health insurance paid by an employer to a member of an Indian Tribe,[8] and making certain types of business enterprises on the land eligible for Indian Business Development Program Grants.[9] Each of these advantages accrues to

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[6] 25 C.F.R. Part 151.3(a)(3)

[7] 26 U.S.C. 168(j)

[8] 26 U.S.C. 45A

[9] 25 U.S.C. 1521, *et seq.*

the Tribe as a result of Tribal economic development on trust land. Therefore, because the Tribe's plan for the Wayland Township parcels may improve the economic well-being of the Mateh-E-Be-Nash-She-Wish, the Secretary may acquire the property in trust for the Tribe.

Congress was equally generous in its grant of authority to the Secretary to proclaim land acquired in trust to be a tribe's reservation. Under 25 U.S.C. 467, "... [t]he Secretary of the Interior is hereby authorized to proclaim new Indian reservations pursuant to any authority conferred by sections ... 465 ... of this title ..."

The only relevant statutory limitation on the Secretary's authority to proclaim a reservation is that she first take the land into trust. While there are no regulations implementing 25 U.S.C. 467, the BIA has established internal guidelines for reviewing proclamation requests.[10] Under the BIA guidelines, an application for a reservation proclamation should include much of the same information required by 25 C.F.R. Part 151, including a justification of the need for reservation status, the proposed use of the land, notice to local jurisdictions, and compliance with NEPA. Regional Directors review and make recommendations on reservation proclamation requests to the Director of the Office of Trust Responsibility. The Assistant Secretary - Indian Affairs (AS-IA) makes the final decision to proclaim land an Indian reservation.

The BIA policy contemplates a separate application for a reservation proclamation. As of the date of this Memorandum, the Tribe has not submitted an application for a reservation proclamation. The Twin Cities Field Office of the Office of the Solicitor is working with the Midwestern Regional Office of the BIA to determine the Tribe's intentions with regard to this application. However, should the Tribe submit the reservation application, the Secretary has ample legal authority to proclaim the Wayland Township parcels to be reservation land.

<u>If proclaimed to be the Tribe's reservation, the Wayland Township parcels may be used for gaming under the initial reservation exception of Section 20 of the Indian Gaming Regulatory Act.</u>

The Indian Gaming Regulatory Act[11] (IGRA) prohibits gaming on properties taken into trust for a tribe after October 17, 1988.[12] The statute provides many exceptions to this general prohibition; relevant here is the provision that allows tribes to conduct gaming activities on trust land acquired after October 17, 1988, if the lands are taken into trust as part of the "initial

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[10]The BIA is drafting regulations to govern the review and approval of tribal requests for reservation proclamations.

[11]25 U.S.C. 2701, *et seq.*

[12]25 U.S.C. 2719

reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process ..."[13]

If the Secretary acts to take the Wayland County parcels into trust and to proclaim them to be the Tribe's reservation, the tribe's land would be eligible for development of Class II or Class III gaming under the initial reservation exception of the IGRA because the land would be the Tribe's first reservation land.

[13] 25 U.S.C. 2719(b)(1)(B)(ii)