



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

APR 30 2018

The Honorable James Floyd  
Principal Chief, The Muscogee (Creek) Nation  
P.O. Box 580  
Okmulgee, Oklahoma 74447

Dear Principal Chief Floyd:

On May 26, 2016, The Muscogee (Creek) Nation<sup>1</sup> (Nation) submitted to the Bureau of Indian Affairs (BIA) an application to acquire in trust approximately 48.58 acres known as the Fountainhead Resort Property (Site) located in McIntosh County, Oklahoma, for gaming and other purposes.<sup>2</sup> The Site includes the majority of the now-demolished Fountainhead Resort, which contained a 180-room hotel, several cabins, and other recreational amenities.<sup>3</sup> A map of the Site is included (Enclosure I). The Site is located within the Nation's former reservation boundaries,<sup>4</sup> and was part of original allotments made to two members of the Nation.<sup>5</sup> The Nation currently owns the Site in fee.<sup>6</sup> The Nation also requested a determination that the Site is eligible for gaming.<sup>7</sup>

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<sup>1</sup> Historically, the Muscogee were also known as the Creek Indians. The Nation is a federally recognized tribe listed in the Federal Register as The Muscogee (Creek) Nation. 83 Fed. Reg. 4,235 (Jan. 30, 2018).

<sup>2</sup> See letter from James Floyd, Principal Chief, The Muscogee (Creek) Nation, to Carla Norman, Superintendent, Okmulgee Agency, BIA (May 26, 2016) [hereinafter Nation's Application], in Memorandum to Director, Office of Indian Gaming Management, from Regional Director, Eastern Oklahoma Region (August 2, 2016) [hereinafter Regional Director's Recommendation]. The Okmulgee Agency requested supplemental materials from the Nation by letter dated January 12, 2016, which are incorporated in Nation's Application. In response to correspondence dated June 21, 2016, from the BIA to the Nation, the Nation compiled relevant information regarding the unmet needs of the Nation and the services they provide. The supplemental analysis was appended to the Nation's Application as Attachment 39, Unmet Needs Analysis Muscogee (Creek) Nation Fountainhead Resort Area, McIntosh County (July 2016)[hereinafter Unmet Needs Analysis].

<sup>3</sup> Environmental Assessment, Muscogee (Creek) Nation, Application for Transfer of Title to the United States of America in Trust, Fountainhead Resort Property (September 2017) [hereinafter EA] at § 1.2.

<sup>4</sup> Recently, the Tenth Circuit Court of Appeals decided the case of *Murphy v. Royal*, --- F.3d ---, 2017 WL 3389877 (10th Cir. Aug. 8, 2017), where the court held that the Creek Reservation was not disestablished. Accordingly, the "former" and "historic" modifiers for the Creek Reservation may no longer be appropriate. The Tenth Circuit denied en banc review on November 9, 2017. However, the State of Oklahoma has stated its intent to petition for *certiorari* with the Supreme Court. Regardless, the finding that the Site is located within the Nation's former reservation does not hinge on the Creek Reservation's status as a former or historic reservation or an existing reservation. For continuity, this decision will refer to the reservation as the "former reservation."

<sup>5</sup> See *infra* note 86.

<sup>6</sup> Regional Director's Recommendation at 1.

<sup>7</sup> See letter from James R. Floyd, Principal Chief, Muscogee (Creek) Nation, to Paula Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary – Indian Affairs, U.S. Department of the Interior (July 5, 2016) [hereinafter Nation's Request for Indian Lands Determination].

The Nation proposes to construct and operate a destination Casino-Resort.<sup>8</sup> The gaming facility portion would consist of approximately 40,000 square feet for class II and class III gaming, approximately 9 gaming tables and 550 gaming machines.<sup>9</sup> Phase 1 of the Casino-Resort would also include a 150-room hotel, office space, eateries, and bars.<sup>10</sup> If economically feasible, Phases 2-4 of the Casino-Resort would include a large conference center, a transit center, retail shops, and recreational venues including an amphitheater and marina with approximately 44 boat slips on Lake Eufaula.<sup>11</sup> Phase 1 of the proposed Casino-Resort is expected to create 375 construction jobs and 367 full-time permanent jobs.<sup>12</sup>

We have completed our review of the Nation's request and documentation in the record. As discussed below, it is my determination that the Site will be acquired in trust for the benefit of the Nation. Once acquired in trust, the Nation may conduct gaming on the Site.

## Background

The Nation's members are the descendants of the Mississippian culture that, prior to 1400, occupied practically the entirety of what is now the southeastern United States.<sup>13</sup> The Nation historically built expansive towns within river valleys in the present states of Alabama, Georgia, and Florida.<sup>14</sup> The Nation was formerly known as the "Creeks."<sup>15</sup> The Creeks were a sophisticated confederacy of several Tribes, and the confederacy became known to early settlers as one of the "Five Civilized Tribes," which included the Tribes of Cherokee, Chickasaw, Choctaw, and Seminole.<sup>16</sup> Through treaties in the late 1700s and early 1800s, the Nation ceded lands to the United States in westward progression from Georgia to Alabama.<sup>17</sup> The Nation ultimately ceded the remainder of its land east of the Mississippi River under the Creek Removal Treaty of March 24, 1832,<sup>18</sup> and was moved west to Indian Territory (within present-day Oklahoma). Between 1827 and 1838, more than 20,000 Creeks were removed from their ancestral homelands east of the Mississippi.<sup>19</sup> Only approximately 16,000 Creeks survived the

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<sup>8</sup> The Nation has not finalized the facility design for the proposed Casino-Resort. EA § 2.0. The size of both the gaming facility and the hotel are based on the Phase 1 conceptual plan and the recommendations found in the Gaming & Hotel Market Assessment with Pro Forma Income Statement and Economic Impact Assessment, prepared by the Innovation Group for the Site (March 2016) [hereinafter Market Assessment] in EA, Attachment 5.

<sup>9</sup> See EA § 2.0.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* The EA analyzed only the potential impacts of Phase 1 – constructing the Casino and Hotel portions of the larger Resort complex because Phases 2-4 are contingent on the economic success of Phase 1.

<sup>12</sup> *Id.*

<sup>13</sup> Nation's Application at 2, Attachment 32, Figures. 7 and 8).

<sup>14</sup> See Nation's Request for Indian Lands Determination at 4.

<sup>15</sup> Nation's Application at 2. Note that the historic Creek Nation that signed treaties prior to 1833 now exists as the Poarch Band of Creek Indians in Alabama, the Muscogee (Creek) Nation in Oklahoma, and several recognized tribal towns. See Memorandum from Heather Corson, Staff Attorney, NIGC, to Tracie Stevens, Chairwoman, NIGC (July 18, 2013) available at <https://www.nigc.gov/general-counsel/indian-lands-opinions> (citing May 19, 2008, Letter from NIGC Chairman to Poarch Band of Creek Indians Chairman at 12).

<sup>16</sup> See Nation's Application at 2.

<sup>17</sup> See Nation's Application, Attachment 32, Figure 8.

<sup>18</sup> See Treaty with the Creeks, March 24, 1832, Art. I, 7 Stat. 366.

<sup>19</sup> See Nation's Request for Indian Lands Determination at 5.

1,200-mile journey west.<sup>20</sup> The 1856 Treaty with Creeks and Seminoles ceded additional land to the Seminoles.<sup>21</sup> After the Civil War, the 1866 “Reconstruction” Treaty required the Nation to cede the western half of its remaining lands – approximately 3.2 million acres – to the United States, leaving the Nation with approximately 3 million acres.<sup>22</sup>

The Nation, with the rest of the Five Civilized Tribes, was originally exempt from the General Allotment Act (Dawes Act) of 1887 that provided for the individual allotment of Indian lands, and which eventually resulted in the loss of vast acreages of tribal lands.<sup>23</sup> The Curtis Act of 1898 extended all provisions of the Dawes Act to the Nation.<sup>24</sup> By 1900, the roughly 3 million acres of land belonging to the Nation was divided into allotments pursuant to the Curtis Act.<sup>25</sup> Today, approximately 6,856 acres are held in trust for the Nation.<sup>26</sup> Thus, over 95 percent of the Nation’s trust land was lost following the allotment process.<sup>27</sup>

### **Description of the Property**

The former Fountainhead Resort was built by the State of Oklahoma in 1965, 1 year after the reservoir known as Lake Eufaula was completed.<sup>28</sup> When it was built, the former Fountainhead Resort was part of the larger Fountainhead State Park, now known as Lake Eufaula State Park, and included an approximately 180-room hotel, cabins, a banquet hall, a dining hall, a swimming pool, a marina, and a maintained beach area.<sup>29</sup> Private investors purchased the Site in 1986.<sup>30</sup> The investors added improvements, but due to financial difficulties, discontinued operations in 2002.<sup>31</sup> The Nation purchased the Site in 2005 and demolished the former Fountainhead Resort in 2008 due to its severe state of disrepair.<sup>32</sup> The Nation currently operates, under lease from the State of Oklahoma (State), the nearby Fountainhead State Park Golf Course across Highway 150 from Site.<sup>33</sup>

The legal description of the Site is included as Enclosure II.

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<sup>20</sup> *See id.*

<sup>21</sup> *See* Treaty with the Creeks, Etc., Aug. 7, 1856, Art. 1, 11 Stat. 699.

<sup>22</sup> Treaty with the Creeks, June 14, 1866 Art. III, 14 Stat. 785.

<sup>23</sup> *See* An Act to provide for the allotment of lands in severalty to Indians on the various reservations, February 8, 1887, §8, 24 Stat. 388.

<sup>24</sup> United States Statutes at Large, 55 Cong. Ch. 517, June 28, 1898, 30 Stat. 495.

<sup>25</sup> *See* EA § 1.1

<sup>26</sup> Regional Director’s Recommendation at 6; Nation’s Application at 8, Attachment 32, Figure 14 (Muscogee (Creek) Allotted Land information obtained from Muscogee (Creek) Nation Realty & Trust and current as of February 25, 2016)).

<sup>27</sup> *Id.*

<sup>28</sup> EA § 1.2.

<sup>29</sup> *Id.*; *see also* Market Assessment at 11.

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* *See also* Nation’s Application at 4, Attachment 6 (Sheriff’s Deed dated August 06, 2005; Order Confirming Sheriff’s Sale filed in *Muscogee (Creek) Nation v. Fountainhead Resort Hotel, Inc.*, Case No. CJ-2003-317, District Court of McIntosh County, Oklahoma, filed August 23, 2005)).

<sup>33</sup> EA § 2.0.

## **Eligibility for Gaming Pursuant to the Indian Gaming Regulatory Act**

The Indian Gaming Regulatory Act (IGRA) was enacted “to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming.”<sup>34</sup> Section 20 of IGRA generally prohibits gaming activities on lands acquired in trust by the United States on behalf of a Tribe after October 17, 1988.<sup>35</sup> However, Congress expressly provided several exceptions to the general prohibition. One such exception exists for lands located within the former reservation of an Oklahoma Tribe which did not have a reservation on October 17, 1988 (Oklahoma Exception).<sup>36</sup>

The Department of the Interior’s (Department) regulations at 25 C.F.R. Part 292, set forth the procedures for implementing section 20 of IGRA. Pursuant to these regulations, gaming on newly acquired lands is allowed under the Oklahoma Exception when (1) a Tribe had no reservation on October 17, 1988, (2) the land is located in Oklahoma, and (3) is located within the boundaries of the Tribe’s former reservation or contiguous to other land held in trust or restricted status for the Tribe in Oklahoma.<sup>37</sup> Here, the Site meets the Oklahoma Exception because the Nation had no reservation on October 17, 1988, and the Site is located within the exterior boundaries of the Nation’s former reservation in Oklahoma.<sup>38</sup> Accordingly, the Nation may conduct gaming on the Site upon its acquisition in trust.

## **Trust Acquisition Determination Pursuant to 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 Indian Reorganization Act (IRA), 25 U.S.C. § 5108. The Department’s regulations at 25 C.F.R. Part 151 set forth the procedures for implementing section 5 of the IRA.

### **25 C.F.R. § 151.3 – Land acquisition policy**

Section 151.3(a) sets forth the conditions under which land may be acquired in trust by the Secretary for an Indian Tribe:

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<sup>34</sup> *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002). *See also* 25 U.S.C. § 2702(1) (stating that one purpose of IGRA is to “provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments....”).

<sup>35</sup> *See* 25 U.S.C. § 2719.

<sup>36</sup> *See* 25 U.S.C. § 2719(a)(2)(A)(i).

<sup>37</sup> *See* 25 C.F.R. § 292.4(b)(1).

<sup>38</sup> Regional Director’s Recommendation at 1. *See also* Memorandum to the Office of Indian Gaming Management from Regional Director, Eastern Oklahoma Region (August 2, 2016) [hereinafter Regional Director’s Request for Indian Lands Determination] at 4; *See also* Nation’s Application, Tab 4 (Maps depicting the Site and the surrounding area relative to the Nation’s former reservation boundary). As discussed *supra* note 4, the “former” and “historic” modifiers for the Creek Reservation may no longer be appropriate. However, even if the Creek Reservation is ultimately determined to be an existing reservation, the Nation may conduct gaming on the Site because the Site would be located within the boundaries of the Nation’s reservation on October 17, 1988. *See* 25 U.S.C. § 2719 (a)(1).

- (1) When the property 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.

### *Self-Determination*

Acquisition of the Site will facilitate Tribal self-determination and economic development satisfying the criteria of section 151.3(a)(3).<sup>39</sup> The Nation has over 80,000 members.<sup>40</sup> From 2008 to 2013, the Nation experienced a 15.7 percent increase in enrollment, and continues to see an upward trend in population and enrollment.<sup>41</sup> Approximately 68,879 members live in the Nation's former reservation and service area, which includes a large portion of McIntosh County where the Site is located.<sup>42</sup> Approximately 15,000 enrolled members live within a 50 mile radius of the Site, with 3,500 living within 25 miles.<sup>43</sup> The Nation's Housing Authority reported that in McIntosh and Hughes Counties, approximately 60 families are on the housing assistance waiting list.<sup>44</sup>

Acquisition of the Site in trust and development of the proposed Casino-Resort is a key part of the Nation's plans to strengthen its self-determination and improve the services it provides to its members including housing assistance. The proposed Casino-Resort is expected to generate gross revenue of \$35.2 million in year 1 and \$39.9 million by year 5.<sup>45</sup>

Revenue from the proposed Casino-Resort will support a large number of the Nation's governmental services, programs, and operations. In accordance with the Nation's laws, net gaming revenue including expected revenue from the proposed Casino-Resort is allocated as follows:

- 20 percent to the Nation's Permanent Fund, the interest of which goes to fund the Nation's operations;
- 10 percent deposited in the Nation's Economic Development and Land Acquisition Fund, which is used to acquire land and create economic opportunities;

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<sup>39</sup> Although only one factor in Section 151.3(a) must be met, the Nation's application also satisfies the criteria of subsections (a)(1) and (a)(2). The Site is located within the exterior boundaries of the Nation's former reservation in Oklahoma, and, therefore, meets the regulatory definition of "Indian reservation" in Section 151.2(f) as relied on in Section 151.3(a)(1). Additionally, the Nation owns the Site in fee, and, therefore, satisfies Section 151.3(a)(2).

<sup>40</sup> Nation's Application at 1.

<sup>41</sup> Unmet Needs Analysis at 4.

<sup>42</sup> U.S. Department of the Interior, Office of the Assistant Secretary-Indian Affairs, 2013 American Indian Population and Labor Force Report, *available at* <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf> at 26. *See also* Regional Director's Recommendation at 5. The Nation defines its service area as "[t]he political jurisdiction of the Muscogee (Creek) Nation [ ] as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America ..." Muscogee Constitution, Art. 1, Section 2.

<sup>43</sup> Updated Unmet Needs Report (Jan. 4, 2018) at 1, on file with the Office of Indian Gaming.

<sup>44</sup> *Id.* (40 families in McIntosh County and 20 families in Hughes County).

<sup>45</sup> Market Assessment at 52.

- 5 percent to a Health Services Fund, used to provide medical services to the Nation’s members;
- 5 percent to the Capital Improvement Fund, for maintaining or constructing the Nation’s facilities;
- 40 percent deposited in a Gaming Fund, used to fund governmental programs including but not limited to:
  - Cultural programs,
  - Educational programs,
  - Emergency home improvement programs,
  - Energy assistance,
  - Fire protection,
  - Law enforcement,
  - Legal services,
  - Senior services,
  - Social services;
- 20 percent to the Nation’s Debt Retirement Fund, ensuring the prompt retirement of the Nation’s financed debts.<sup>46</sup>

Revenue from the proposed Casino-Resort will, thus, strengthen the Nation’s self-determination by funding a variety of social, housing, governmental, administrative, educational, health, and welfare services to the Nation’s members.<sup>47</sup>

*Economic Development*

The proposed Casino-Resort will provide economic development and employment opportunities which will benefit the Nation, its members, and the local community. The Nation’s members make up approximately 15 percent of the population living within the Nation’s jurisdictional boundaries within McIntosh County.<sup>48</sup> Median household income in McIntosh County is among the lowest of the 11 counties within the Nation’s service area, and is substantially lower than the State average.<sup>49</sup> Unemployment rates for 2015 in McIntosh County and its three neighboring counties are all substantially higher than the State unemployment rate.<sup>50</sup> The same is true for the poverty rates in these counties, which are higher than both the State and national averages.<sup>51</sup>

The Nation recognizes two Chartered Creek Communities near the Site in the cities of Checotah and Eufaula, which combined represent 690 members.<sup>52</sup> The City of Eufaula has a population

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<sup>46</sup> Regional Director’s Recommendation at 5; *see also* Muscogee (Creek) Nation Code Annotated, Title 37, § 2-203.A-K; *see also* Unmet Needs Analysis at 16.

<sup>47</sup> Regional Director’s Recommendation at 5.

<sup>48</sup> *Id.*.

<sup>49</sup> *Id.* at 5; *See also* Unmet Needs Analysis at 8 (median household income in McIntosh County is more than \$10,000 below the State average).

<sup>50</sup> Regional Director’s Recommendation at 5.

<sup>51</sup> *Id.*

<sup>52</sup> Unmet Needs Analysis at 3.

of about 3,073, of which 17.5 percent or about 540 are American Indian or Native Alaskan.<sup>53</sup> The City of Eufaula's median household income was \$29,583 with about 29.79 percent of the population below poverty.<sup>54</sup> The American Indian or Native Alaskans living in the City of Eufaula had a median household income of about \$14,444 with 53.2 percent of the American Indian or Native Alaskan population below poverty.<sup>55</sup>

McIntosh County also has higher than average rates of negative health factors. According to a 2014 State health report, McIntosh County ranked 63 out of 77 counties in mortality rates.<sup>56</sup> McIntosh County's rate of diabetes is the second highest in the State, and is 46 percent higher than the national average.<sup>57</sup> Additionally, McIntosh County has a high teen fertility rate, which is 77 percent higher than the national rate.<sup>58</sup>

Forty families in McIntosh County are on Nation's Housing Authority's waiting list.<sup>59</sup> The Nation also reported that while members have expressed interest in returning to inherited restricted allotments in McIntosh County, some families already living there have been forced to relocate out of McIntosh County for housing and economic reasons.<sup>60</sup>

Tourism is the State's third largest industry with a total State-wide impact of \$7.2 billion in 2012.<sup>61</sup> A decade after the former Fountainhead Resort closed, the U.S. Army Corps of Engineers (ACOE) conducted a Recreational Study of Lake Eufaula.<sup>62</sup> The Study estimated that the annual economic impact of recreational activities at Lake Eufaula was \$56.5 million.<sup>63</sup> The Study found that in the preceding 5 years, the Lake Eufaula recreational area had experienced level or decreased visitation and was significantly below the regional visitation.<sup>64</sup> The Study concluded that the Lake Eufaula recreational area needed additional land-based recreational opportunities.<sup>65</sup>

The proposed Casino-Resort would revitalize the Site's original intended use as a recreation destination and would provide economic development for the Nation and its members. The proposed Casino-Resort is expected to generate gross revenue of \$35.2 million in year 1 and

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<sup>53</sup> Unmet Needs Analysis, Figures 5.15.1 and 5.15.4. U.S. Census Bureau data is used because the Nation has not performed a comprehensive tribal census. *See id.* at 4. Data from the Nation's Citizenship Office and U.S. Census Bureau shows that approximately 79% of the American Indian /Alaskan Native population in McIntosh County consists of enrolled members of the Nation. *See Unmet Needs Analysis* at 6.

<sup>54</sup> Unmet Needs Analysis, Figures 5.15.2 and 5.15.5.

<sup>55</sup> *Id.* at Figures 5.15.6 and 5.15.7

<sup>56</sup> EA § 5.16; Unmet Needs Analysis at 13.

<sup>57</sup> Unmet Needs Analysis at 13.

<sup>58</sup> *Id.*

<sup>59</sup> Updated Unmet Needs Report at 1.

<sup>60</sup> *Id.*

<sup>61</sup> Unmet Needs Analysis at 11.

<sup>62</sup> *Id.*; *see also* EA § 5.1.

<sup>63</sup> Unmet Needs Analysis at 11-12.

<sup>64</sup> EA § 4.3. According to the ACOE, the regional average is 90 visitors per acre while the Lake Eufaula area averaged only 40 visitors per acre. *Id.*

<sup>65</sup> *Id.* at §§ 4.3 and 5.1.

\$39.9 million by year 5.<sup>66</sup> Phase 1 of the proposed Casino-Resort is expected to support 375 construction jobs with \$14.9 million in construction wages.<sup>67</sup> Once operational, Phase 1 is expected to create 367 full-time permanent jobs with \$7.5 million in wages.<sup>68</sup> The Nation extends employment preference first to its members, then to other Tribal affiliations and veterans.<sup>69</sup> The proposed Casino-Resort is expected to draw 330,000 visitors in year 1 and reach 339,000 visitors by year 5.<sup>70</sup>

Development of the proposed Casino-Resort will improve the long term economic and social well-being of the Nation and the surrounding communities by revitalizing a recreational destination; increasing employment opportunities for the Nation's members and the local community; and developing sustainable revenue sources for the Nation.<sup>71</sup> The generated revenue will facilitate Tribal self-determination by providing funding for a variety of social programs including housing and capital for other economic development.<sup>72</sup>

The Regional Director determined, and we concur, that acquisition of the Site in trust will facilitate Tribal self-determination and economic development.<sup>73</sup>

### **25 C.F.R. § 151.10 – On-reservation acquisitions**

The Site is located within the Nation's former reservation boundaries.<sup>74</sup> Section 151.2 defines "Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma ... *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary."<sup>75</sup> The Regional Director determined and we concur that the Nation's application is properly considered under the on-reservation criteria of Section 151.10.<sup>76</sup>

### **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 the trust acquisition and, if such authority exists, to consider any limitations contained in it.

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<sup>66</sup> Market Assessment at 52.

<sup>67</sup> EA § 2; *see also* Market Assessment at 56.

<sup>68</sup> EA § 2; *see also* Market Assessment at 58.

<sup>69</sup> Updated Unmet Needs Report at 2.

<sup>70</sup> Market Assessment at 34-35.

<sup>71</sup> EA § 3.0.

<sup>72</sup> *Id.*

<sup>73</sup> Regional Director's Recommendation at 2.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> 25 C.F.R. § 151.2(f). *See supra* note 4. The finding that the Site is on-reservation for the purpose of evaluating it as an on-reservation fee-to-trust application does not hinge on the Creek Reservation's status as a former or historic reservation or an existing reservation. Rather the definition for "Indian reservation" for land in Oklahoma is set by regulation, and the Site is indisputably within the Nation's former reservation.

<sup>76</sup> Regional Director's Recommendation at 4.



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 under the first definition of "Indian" in the IRA extends only to those Tribes that were "under federal jurisdiction" when the IRA was enacted on June 18, 1934.<sup>77</sup> We have evaluated the applicability of *Carcieri* to the Nation's application, and have determined that the Secretary is authorized to place land into trust for the Nation 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 IRA, where a majority vote of Indians of the reservation voting at a special election called by the Secretary could opt out of the IRA. 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.<sup>78</sup> Section 13 of the IRA provides in relevant part:

[...] That sections 2, 4, 7, 16, 17, and 18<sup>79</sup> of this Act shall not apply *to the following-named Indian tribes*, the members of such Indian tribes, together with 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.<sup>80</sup>

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, the listing of Oklahoma tribes in Section 13 of the IRA provides prima facie evidence that those tribes were "under federal jurisdiction on June 18, 1934," and the Secretary is authorized by Section 5 of the IRA to take land into trust for those tribes.<sup>81</sup> The listing of the Nation in Section 13 is sufficient for purposes of finding the Nation to be under Federal jurisdiction in 1934.

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<sup>77</sup> 555 U.S. at 395.

<sup>78</sup> 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.

<sup>79</sup> Section 2 (25 U.S.C. § 5102) extended the existing periods of trust and any restriction on alienation placed upon Indian lands. Section 4 (25 U.S.C. § 5107) 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 (25 U.S.C. § 5110) authorized the Secretary to proclaim new reservations or add lands to existing reservations. Section 16 (25 U.S.C. § 5123) provided that any Indian tribe, or tribes, residing on the same reservation, the right to organize and adopt a constitution. Section 17 (25 U.S.C. § 5124) 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 (25 U.S.C. § 5125) provided that the adult Indians on any reservation could vote in a special election to opt out of the IRA.

<sup>80</sup> 25 U.S.C. § 5118 (emphasis added).

<sup>81</sup> See 78 Cong. Rec. 11125-26 (June 12, 1934), where Mr. Thomas of Oklahoma, discussing the land acquisition provision, offered an amendment that passes, that Section 5 expressly reference the purchase of lands for individual

## **25 C.F.R. § 151.10(b) – The need of the individual Indian or the tribe for additional land**

Section 151.10(b) requires the Secretary to consider the Tribe's need for additional land.

The Nation has a need for additional land to facilitate self-determination and economic development. The Nation seeks to restore its Tribal land base within its former reservation.<sup>82</sup> A land base is essential to the Nation, because it provides a place for members to actively preserve their culture through Ceremonial Grounds and Indian Churches.<sup>83</sup> The acquisition of the Site in trust will restore the Nation's land base in a region that its members have inhabited since the 1800s.<sup>84</sup> More than 95 percent of the Nation's land base was lost following the allotment process.<sup>85</sup> The Site was originally part of two separate allotments to Millie James and Mildred Ireland both members of the Nation.<sup>86</sup>

Acquisition of the Site in trust would provide opportunities for economic development that would assist the Nation in meeting the following objectives:

- Improve the socioeconomic status of the Nation by providing an augmented revenue source that would be utilized to strengthen the Tribal government, fund a variety of social, housing, governmental, administrative, educational, health and welfare services to improve the quality of life of Tribal members, and provide capital for other economic development;
- Improve the ability of the Nation to establish economic self-sufficiency;
- Provide employment opportunities to the Tribal and non-Tribal member communities; and
- Fund local governmental agencies, programs, and services.<sup>87</sup>

The Regional Director determined, and we concur, that acquisition of the Site in trust will address the Nation's demonstrated need for additional land.<sup>88</sup>

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Indians. He wanted 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 pointed 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.

<sup>82</sup> Regional Director's Recommendation at 5.

<sup>83</sup> Unmet Needs Analysis at 14.

<sup>84</sup> Regional Director's Recommendation at 6.

<sup>85</sup> *Id.* *See also* Nation's Application, Tab 5 (Abstracts of Title for Allotments, Allotment Deed Records, and map of Allotments showing the Site).

<sup>86</sup> *Id.*

<sup>87</sup> EA § 3.0

<sup>88</sup> *See* Regional Director's Recommendation at 6.

### **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 Nation intends to construct and operate a destination Casino-Resort at the site of the former Fountainhead Resort.<sup>89</sup> The gaming facility portion will consist of approximately 40,000 square-foot for class II and class III gaming, approximately 9 gaming tables and 550 gaming machines.<sup>90</sup> Phase 1 of the Casino-Resort will also include a 150-room hotel, office space, eateries, and bars.<sup>91</sup> If economically feasible, Phases 2-4 of the Casino-Resort would include a large conference center, a transit center, retail shops, and recreational venues including a spacious amphitheater and marina with approximately 44 boat slips.<sup>92</sup>

The Regional Director determined, and we concur, that the Nation's request adequately describes the purposes for which the land will be used.<sup>93</sup>

### **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 the land from the tax rolls**

Section 151.10(e) requires consideration of the impact on the State and its political subdivisions resulting from removal of land from the tax rolls.

The Regional Director solicited comments from the State and local political subdivisions regarding the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes, and special assessments by correspondence on September 22, 2011,<sup>94</sup> and on November 16, 2017.<sup>95</sup> The following entities were contacted:

- Governor of Oklahoma
- Oklahoma Tax Commission
- McIntosh County Board of Commissioners
- McIntosh County Treasurer
- McIntosh County Assessor
- McIntosh County Sheriff

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<sup>89</sup> The Nation has not finalized the facility design for the proposed Casino-Resort. EA § 2.0. The size of both the gaming facility and the hotel are based on the Phase 1 conceptual plan and the recommendations found in the Market Assessment, in EA, Attachment 5.

<sup>90</sup> EA § 2.0.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Regional Director's Recommendation at 7.

<sup>94</sup> See Regional Director's Recommendation, Attachment 16.

<sup>95</sup> See Memorandum to the Office of Indian Gaming, from Carla Norman, Superintendent, Okmulgee Agency, Eastern Oklahoma Region (Dec. 18, 2017). The Department received no new comments during the Nov. 16, 2017, to Dec. 16, 2017, comment period.

- Mayor of the City of Eufaula

The Department received responses from the McIntosh County Treasurer, County Assessor, County Board of Commissioners, and the Mayor of the City of Eufaula.<sup>96</sup>

### *Taxes*

The Site is currently carried on the McIntosh County tax rolls.<sup>97</sup> The McIntosh County Assessor, Treasurer, and Board of Commissioners provided property tax information but did not comment further.<sup>98</sup> Real property in Oklahoma is subject to state taxes that are collected by the respective counties to fund a variety of county services, with the largest share going to the local school districts.<sup>99</sup> The 2017 assessed tax for the Site was \$13,434.<sup>100</sup>

Potential impacts due to the loss of tax revenue resulting from the removal of the Site from the tax rolls would be more than offset by the positive economic contributions that the proposed Casino-Resort will provide to the County and State.<sup>101</sup> The proposed Casino-Resort is expected to generate gross revenue of \$35.2 million in its first year of operation, of which approximately \$1.6 million will be distributed to the State.<sup>102</sup> Construction of the proposed Casino-Resort is expected to support 375 jobs with \$14.9 million in wages during Phase 1.<sup>103</sup> Once operational, the proposed Casino-Resort is expected to create 367 full-time permanent jobs with \$7.5 million in wages.<sup>104</sup> The proposed Casino-Resort will provide substantial benefits to the regional economy. These economic gains far outweigh the loss of tax revenue from the Site.

### *Additional Comments*

The Mayor of the City of Eufaula stated that acquisition of the Site in trust and subsequent development of the proposed Casino-Resort will have a major positive financial impact on the community.<sup>105</sup> The State Representatives of the Lake Eufaula Area in the Oklahoma House of Representatives signed a Resolution dated February 16, 2016, expressing support for the Nation's development of the Site.<sup>106</sup> They noted that the Site would "create hundreds of new

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<sup>96</sup> See Regional Director's Recommendation, Attachment 16.

<sup>97</sup> *Id.* at 7.

<sup>98</sup> *Id.*, Attachment 16.

<sup>99</sup> *Id.* at 7.

<sup>100</sup> Property Tax Roll Inquiry (Dec. 18, 2017), on file with the Office of Indian Gaming.

<sup>101</sup> Regional Director's Recommendation at 8.

<sup>102</sup> Market Assessment at 52, 60. This is based on the revenue sharing provision in the Tribal-State gaming compact between the Nation and the State of Oklahoma which was approved by the Department on March 16, 2005. 70 Fed. Reg. 67, 18041(April 8, 2005).

<sup>103</sup> EA § 2; see also Market Assessment at 56.

<sup>104</sup> EA § 2; see also Market Assessment at 58.

<sup>105</sup> See Letter from Selina Jayne-Dornan, Mayor, City of Eufaula, to BIA, Eastern Oklahoma Region, Okmulgee Agency (October 7, 2011), in Regional Director's Recommendation, Attachment 16; See also Support letters from the City of Eufaula, City of Checotah, City of Henryetta, Okmulgee Chamber of Commerce, Checotah Chamber of Commerce, and the Lake Eufaula Association, in Regional Director's Recommendation, Attachment 17.

<sup>106</sup> Regional Director's Recommendation, Attachment 17.

jobs in the region, stimulate the local economy by creating new businesses as well as increasing the revenue of existing businesses, boost the tourist industry for the region, create a recreational opportunity second to none, and increase the financial well-being of Oklahoma.”<sup>107</sup> The record also contains statements of support from the City of Eufaula, the City of Checotah, the City of Henryetta, the Okmulgee Chamber of Commerce, the Checotah Chamber of Commerce, and the Lake Eufaula Association.<sup>108</sup>

The Regional Director determined, and we concur that the removal of the Site from the tax rolls would be offset by the numerous contributions and economic development provided by the proposed Casino-Resort.<sup>109</sup>

**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 BIA received no comments from the State or local jurisdictions regarding jurisdictional problems or potential conflicts of land.<sup>110</sup>

*Land Use*

No potential conflicts of land use are anticipated from the acquisition of the Site in trust. The Site is located at State Highway 150 and Megan Bell Boulevard, in McIntosh County approximately 11 miles southwest of Checotah and 8 miles north of Eufaula. Highway 150 provides access to Interstate I-40 and State Highway 69.

The ACOE designated the State Park, which is contiguous to the Site, as a high intensity recreation area.<sup>111</sup> The ACOE’s land use designation for the Site is consistent with the prior Fountainhead Resort and the proposed Casino-Resort. The proposed Casino-Resort would revitalize the Site’s original intended use as a recreation destination allowing for greater recreational utilization of the Lake Eufaula area.<sup>112</sup> The proposed use of the Site is consistent with its previous use, and, thus, no potential conflicts of land use are anticipated.<sup>113</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; see also EA Appendix 3, (Resolutions and Letter of Support).

<sup>109</sup> Regional Director’s Recommendation at 8.

<sup>110</sup> *See id.*

<sup>111</sup> EA § 5.1. At the time of the Nation’s Application, the ACOE held title to the remaining approximately 18.38 acres of the original Fountainhead Resort property contiguous to the southern border of the Site (Tract 2) and maintained jurisdictional rights over the abutting shoreline. See EA § 2.0. In 2016, Congress mandated that Tract 2 be transferred to the Secretary of the Interior to be held in trust for the benefit of the Nation. See the Water Infrastructure Improvements for the Nation (WIIN) Act, Pub. L. No. 114-322, § 1317, 130 Stat. 1628, 1700-1701 (2016)[hereinafter WIIN Act]. This transfer is in progress.

<sup>112</sup> EA § 5.1.

<sup>113</sup> *id.*

The ACOE holds a flowage easement on the Site.<sup>114</sup> The Nation has acknowledged the existence of the easement and confirmed that it will not interfere with the Nation's intended use of the Site.<sup>115</sup>

### *Law Enforcement and Fire Protection*

No jurisdictional problems are anticipated from the acquisition of the Site in trust. The anticipated increase in patronage to the area as a result of the proposed Casino-Resort is likely to result in an increased need for law enforcement services.<sup>116</sup> On-site security will be provided by the Muscogee (Creek) Nation Lighthorse Police Department and contracted security officers.<sup>117</sup> The Lighthorse Police Department has cross-deputization agreements with the United States, State of Oklahoma, City of Eufaula, and McIntosh County.<sup>118</sup> Other law enforcement entities are available, if needed, and include the McIntosh County Sheriff's Office, the City of Eufaula Police Department and the State of Oklahoma Highway Patrol.<sup>119</sup>

Fire protection services for the property are currently provided by the Fountainhead Area Improvement Council, Inc., and the City of Eufaula.<sup>120</sup> Water service to the neighboring State Park is provided by the City of Checotah Public Works Authority.<sup>121</sup> In a letter dated February 10, 2012, the State Park informed the Nation that future improvements to the Site will require the Nation to obtain their own agreements for additional water supply from the City of Checotah.<sup>122</sup> The installation of new meter and water line infrastructure, to the extent necessary, would require minimal effort to tie into the existing City water services.<sup>123</sup> The City of Checotah has expressed strong support for the project and believes it will create jobs and stimulate the local economy.<sup>124</sup> The Regional Director noted that the Nation has an established relationship with the local

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<sup>114</sup> There is a Flowage Easement Deed in favor of the United States of America recorded in Book 70, Page 68 and re-recorded in Book 71, Page 335. See Nation's Application, Attachment 25. The Flowage Easement allows the Government to occasionally overflow, flood, and submerge the land described therein lying below 602.0 feet mean seal level. See *id.* The EA states that the Casino-Resort will be at the location of the former Fountainhead Resort, which is above 600 feet mean sea level. A Surveyor's Affidavit confirms that the Flowage Easement will not adversely affect the original location of Fountainhead Lodge, See Nation's Application, Attachment 27 (Surveyor's Affidavit, and Topographic Survey); see also EA, Appendix 1, Figure 5.5.1 Topographical Map.

<sup>115</sup> The Nation stated that it will hold the United States harmless from any action relating in any way to the encroaching improvements and the real property upon which the encroaching improvements are located. See Nation's Application, Attachment 18 (Acknowledgement of Encroachments and Agreement to Hold the United States Harmless from James Floyd, Principal Chief of the Muscogee (Creek) Nation).

<sup>116</sup> See EA §5.17.

<sup>117</sup> *Id.*

<sup>118</sup> See Nation's Application, Attachment 35 (Intergovernmental Cross-Deputization Agreement Between the United States, the Muscogee (Creek) Nation, and Political Subdivisions of the State of Oklahoma)..

<sup>119</sup> Regional Director's Recommendation at 9.

<sup>120</sup> *Id.*.

<sup>121</sup> EA § 5.14.

<sup>122</sup> EA § 5.14, Appendix 3.

<sup>123</sup> EA § 5.14, Appendix 3 (email dated August 12, 2014 summarizing the discussion between a City of Checotah representative and Muscogee (Creek) Nation Civil Engineer).

<sup>124</sup> EA Appendix 3 (Letter from Daniel Tarkington, Mayor, City of Checotah to Muscogee (Creek) Nation (March 22, 2016)..

governments in McIntosh County, and will continue to work together with the local governments to address any jurisdictional problems or potential conflicts of land use that might arise.<sup>125</sup> The Regional Director noted that no political entity identified any jurisdictional problems or potential conflicts of land use, and we concur that no jurisdictional problems or conflicts of land use are anticipated.<sup>126</sup>

**25 C.F.R. § 151.10(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**

Section 151.10(g) requires the Secretary to determine whether BIA has the resources to assume additional responsibilities if the land is acquired in trust.

The Site lies within the jurisdictional boundaries of the Okmulgee Agency of the BIA's Eastern Oklahoma Regional Office. The Nation is responsible for the administration of the realty program functions associated with the management of trust lands through a self-governance compact, pursuant to 25 U.S.C. § 458aa, *et seq.* The Okmulgee Agency provides technical assistance and review and approval of real estate transactions, and does not anticipate the need to provide additional assistance.<sup>127</sup>

The Regional Director determined, and we concur, that adequate resources are available for the BIA to assume the additional responsibilities resulting from the acquisition of the land in trust.<sup>128</sup>

**25 C.F.R. § 151.10(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 DM 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 (NEPA), 42 U.S.C. § 4321 *et seq.*, and a determination on the presence of hazardous substances.

The Nation's Realty Trust Services prepared a Revised Phase I Environmental Site Assessment (ESA) for the Site in October 2013, which found no evidence of any Recognized Environmental Conditions or any Historic Recognized Environmental Conditions.<sup>129</sup> The BIA confirmed in a letter dated November 20, 2013, that it reviewed the ESA and determined that it was in compliance with the American Society for Testing and Materials (ASTM) Standard for Environmental Site Assessments, ASTM Standard E 1527-05.<sup>130</sup> The Nation will cooperate

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<sup>125</sup> Regional Director's Recommendation at 9.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 10.

<sup>130</sup> See Regional Director's Recommendation, Attachment 22.

with the BIA to provide an update to the ESA within 6 months prior to the trust acquisition.<sup>131</sup>

An Environmental Assessment (EA) for the Site was completed in September 2017. The EA was made available for public comment from October 13, 2017, through November 13, 2017, and notices were published in both the Okmulgee Times and the McIntosh County Democrat.<sup>132</sup> No comments were received from the public.<sup>133</sup>

The EA analyzed three alternatives:<sup>134</sup>

*Alternative A, Proposed Action:*

Under Alternative A, the United States would acquire the approximately 48.58 acre Site in trust for the benefit of the Nation. As discussed above, the former Fountainhead Resort was located on the Site and operated as a destination resort from 1965 to 2002. The Nation proposes to construct and operate a destination Casino-Resort at the Site. Phase 1 of the Nation's plan includes the construction of the gaming facility, retail shops, office space, eateries, bars, and the 150-room hotel (collectively the Casino-Resort). The gaming facility portion will consist of approximately 40,000 square-feet for class II and class III gaming, approximately 9 gaming tables and 550 gaming machines. If economically feasible, Phases 2-4 of the Resort will include a large conference center, transit center, and recreational venues including a spacious amphitheater and marina with approximately 44 boat slips.<sup>135</sup>

*Alternative B, No Action:*

Under Alternative B, the United States would not acquire the Site in trust, and the Nation would not develop a Casino-Resort or a hotel.

*Alternative C, Resort without Gaming Facility (Eliminated from Further Consideration):*

Under Alternative C, the United States would acquire the approximately 48.58-acre Site in trust for the benefit of the Nation. The Nation proposes to construct and operate a destination resort at the Site but without a gaming facility. The EA cited to the "Gaming and Hotel Market Assessment" prepared by the Innovation Group which indicated that a stand-alone hotel resort "at the Site may not be economically viable."<sup>136</sup> This is also evidenced by the failure of former Fountainhead Resort which was unable to sustain successful operations as a hotel destination.<sup>137</sup> For this reason, Alternative C does not meet the purpose and need for acquisition and was

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<sup>131</sup> Regional Director's Recommendation at 10.

<sup>132</sup> See Memorandum from Carla Norman, Superintendent, Okmulgee Agency, Eastern Oklahoma Region, to the Office of Indian Gaming (Nov. 16, 2017).

<sup>133</sup> *Id.*

<sup>134</sup> See EA §§ 4.0-4.4.

<sup>135</sup> The EA only analyzed the potential impacts of Phase I – constructing the Casino and Hotel portions of the larger Resort complex because Phases 2-4 are contingent on the economic success of Phase I.

<sup>136</sup> See EA. § 4.3.

<sup>137</sup> *Id.*



therefore eliminated from further consideration.

### *Findings*

Potential impacts to land use; land resources; water resources; floodplain; wetlands and other potential jurisdictional bodies; biological resources; cultural resources; visual resources; prime and unique farmland; air quality; climate change; solid and hazardous waste; transportation; utilities; noise; socioeconomic conditions including environmental justice; fire suppression and emergency response; and cumulative impacts are each evaluated in the EA. The EA describes the Best Management Practices (BMPs) in Section 5.0 that have been incorporated into the project design to eliminate or substantially reduce any environmental consequences to less than significant. In addition, the EA describes additional mitigation measures in Section 6.0 which will be implemented to further mitigate potential environmental impacts. The EA concludes the project design and implementation of BMPs would ensure that impacts to these resources would be less than significant.

Based on a review of the EA and its analysis of potentially affected resources, I have determined that Alternative A would best meet the purpose and need for acquiring the Fountainhead Resort Property in trust. We have further determined that a Finding of No Significant Impact (FONSI) is appropriate, and that an environmental impact statement is not required. The FONSI is enclosed (Enclosure III).

Land Use – When it was built, the former Fountainhead Resort was part of the larger Eufaula State Park State). The U.S. Army Corps of Engineers (Cors\_ has designated the State Park, which is contiguous to the Site, as a high intensity recreation area. The proposed Casino-Resort would revitalize the Site’s designated intended use and would be consistent with previous uses of the Site, neighboring recreational amenities, and local zoning. Therefore, the development of Alternative A would result in less-than-significant impacts to land use patterns.<sup>138</sup>

Prime and Unique Farmland – Because the Site was previously developed, it is not subject to the Farmland Protection Policy Act (Public Law 97-98). The development of Alternative A would result in less-than-significant impacts to prime and unique farmland.<sup>139</sup>

Land Resources – The proposed Casino-Resort would be constructed within the heavily disturbed area of the former Fountainhead Resort and its parking facilities. Ground disturbance would be minimal and site design will include storm water management measures such as retention basins and/or rain gardens. With the implementation of BMPs, the development of Alternative A would result in less-than-significant impacts to land resources.<sup>140</sup>

Water Resources – The Site is on the shore of Lake Eufaula, Oklahoma’s largest reservoir, which provides the region with flood control, water supply, hydroelectric power, navigation, and

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<sup>138</sup> *Id.* at § 5.1.

<sup>139</sup> *Id.* at § 5.9.

<sup>140</sup> *Id.* at § 5.2.

recreation. The proposed Casino-Resort is more than 200 feet from the lake. The Nation intends to utilize municipal water from the City of Checotah for the proposed Casino-Resorts water supply, but will treat the waste water on site using a sequencing batch reactor (SBR).<sup>141</sup> The SBR would discharge the treated effluent into the existing lagoons, across State Route 150, which serviced the former Fountainhead Resort. The Nation would be required to obtain a National Pollutant Discharge Elimination System) and/or Oklahoma Pollutant Discharge Elimination System permit for the SBR. With the implementations of BMPs, the development of Alternative A would result in less-than-significant impacts to water resources.<sup>142</sup>

Floodplain – The top of the flood control pool for Lake Eufaula is 597 feet above mean sea level. Because the proposed Casino-Resort would be constructed in the footprint of the former Fountainhead Resort, which is more than 600 feet above mean sea level, no floodplain impacts are anticipated. If future development during Phases 2-4 falls below the 600 foot mean sea level elevation, all necessary permits would be obtained prior to Site disturbance. With the implementation of BMPs, the development of Alternative A would result in less-than-significant impacts to floodplains.<sup>143</sup>

Wetlands and Other Potentially Jurisdictional Waterbodies – A survey of the Site identified wetlands including the pond on north edge of the Site. The identified wetlands are outside of the proposed construction area. If any additional wetlands become evident during construction, the Nation will obtain appropriate permits in compliance with the Clean Water Act. With the implementations of BMPs, the development of Alternative A would result in less-than-significant impacts to wetlands and other potentially jurisdictional waterbodies.<sup>144</sup>

Biological Resources – The Site is composed of developed land, maintained grasslands dominated by herbaceous vegetation, and scattered wooded and forested communities. The central portion of the property (approximately 15 acres) is routinely maintained as mowed grasslands. Approximately 53 percent of the Site has been previously disturbed and/or developed and still contains structures, associated parking lots and paved areas, and rubble. There are no natural communities that may be adversely affected during Site redevelopment. With the implementations of BMPs, no Threatened and Endangered listed-species will be impacted. The development of Alternative A would result in less-than-significant impacts to biological resources.<sup>145</sup>

Cultural Resources – There are no known historic properties, archeological sites, or cultural materials within the Site’s area of potential effect, therefore, no known historic, cultural, or archeological resources would be affected by the development of the proposed Casino-Resort. With the implementations of the “inadvertent discovery plan” procedures for cultural resources the development of Alternative A would result in less-than-significant impacts to cultural

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<sup>141</sup> *Id.* at § 5.14

<sup>142</sup> *Id.* at § 5.3.

<sup>143</sup> *Id.* at § 5.4.

<sup>144</sup> *Id.* at § 5.5.

<sup>145</sup> *Id.* at § 5.6.

resources.<sup>146</sup>

Visual Resources – State and Federal lands surround the Site on all sides. Of Lake Eufaula’s 800 mile shoreline, 53 percent has been protected from development by the ACOE. The Site, however, is in an area of the shoreline that is designated for high density recreation – which is consistent with the proposed use. The former Fountainhead Resort was visible from the lake, and the proposed Casino-Resort would also be visible from the lake. The implementation of BMPs, including incorporation of the Dark Sky Association lighting guidelines into the final design, will minimize impacts to visual resources. With the implementations of BMPs, the development of Alternative A would result in less-than-significant impacts to visual resources.<sup>147</sup>

Air Quality – McIntosh County and the State are designated attainment areas for all criteria pollutants. By minimizing land disturbance and utilizing dust suppression on dry windy days, the proposed project is not expected to adversely affect short or long-term local air quality impacts from particulate matter concentrations. There are no anticipated significant impacts to the region’s air quality as a result of area sulfur dioxide emissions from the Site. Building design would consider energy efficiency measures to improve operation capacity and reduce overall direct and indirect emissions. No significant changes to ozone concentrations for the area are anticipated. Based upon the attainment data for the region, the remote nature of the Site, the anticipated local market base, and the use of equipment that meets the requirements for federal emission standards, the approval of the proposed action or project will not adversely impact the local or region air quality. With implementation of BMPs, the development of Alternative A would result in less-than-significant impacts to air quality.<sup>148</sup>

Climate Change – The U.S. Council on Environmental Quality (CEQ) issued guidelines that state that agencies should consider the direct emission of 25,000 metric tons or more of CO<sub>2</sub> equivalent greenhouse gas (GHG) emissions on an annual basis as an indicator that quantitative and qualitative assessment of GHG emissions associated with a proposed action may be meaningful to both decision makers and the public stakeholders. A “worst case” emissions estimate for the proposed Casino-Resort was well below the 25,000 metric ton threshold. A quantitative and qualitative assessment of GHG emissions associated with either the proposed action or proposed project would not be meaningful to decision makers or the public stakeholders as a result of the construction and operation of the proposed Site.<sup>149</sup>

Transportation – The Site is accessed from Megan Bell Boulevard directly from State Highway 150 which connects with Interstate 40 and State Highway 69. Highway 150 primarily served the State Park and the former Fountainhead Resort until it closed in 2002. A traffic study indicated the relevant intersections can effectively accommodate the anticipated increase in traffic to the proposed Casino-Resort. The study also recommended improvements to the Megan Bell Boulevard – Highway 150 intersection regardless of the proposed Casino-Resort. If the

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<sup>146</sup> *Id.* at § 5.7.

<sup>147</sup> *Id.* at § 5.8.

<sup>148</sup> *Id.* at § 5.10.

<sup>149</sup> *Id.* at § 5.11.

recommended improvements are deemed necessary, the Nation will work with the Oklahoma Department of Transportation for implementation. The development of Alternative A would result in less-than-significant impacts to transportation.<sup>150</sup>

Utilities – Minimal modification to existing utilities (gas, electric, and water) would be required to position the services with the proposed Casino-Resort. With implementation of BMPs, the development of Alternative A would result in less-than-significant impacts to utilities.<sup>151</sup>

Solid and Hazardous Waste – The October 2013 ESA revealed no evidence of any recognized environmental conditions or any historically recognized environmental conditions or releases in connection with the use of the Site. There are no known human health or safety concerns limiting or prohibiting redevelopment at the Site. The proposed Casino-Resort will be designed to ensure optimal resource use and minimize waste. With implementation of BMPs, the development of Alternative A would result in less-than-significant impacts to solid and hazardous waste.<sup>152</sup>

Fire Suppression and Emergency Response – Primary fire and medical emergency response would be provided by the City of Checotah Fire Department with secondary support from the City of Eufaula and the Fountainhead Area Improvement Council Fire Departments. Law enforcement at the Site would be a cooperative effort between the Nation’s Lighthorse Tribal Police Department and local law enforcement agencies. Increased patronage to the proposed Casino-Resort will likely result in an increased need for law enforcement services. The Nation has a cross-deputation agreement with the McIntosh County Sheriff’s Department. The Nation will also enter into additional cooperative agreements with the other local governing authorities prior to construction. With implementation of BMPs, the development of Alternative A would result in less-than-significant impacts to public services.<sup>153</sup>

Noise – Noise from construction activities would be short term and temporary. The Site is located in a rural setting away from any sensitive receptors. Noise generated during operation of the proposed Casino-Resort would be minor and “in-house.” Anticipated increases in traffic noise would be minimal. The development of Alternative A would result in less-than-significant noise.<sup>154</sup>

Socioeconomic Conditions – The proposed Casino-Resort would generate approximately 375 temporary construction jobs and 367 permanent Casino-Resort operation jobs. These positions would primarily be filled by the available labor force in McIntosh County. The proposed Casino-Resort is anticipated to have no impacts on existing housing. The proposed Casino-Resort will have beneficial impacts for the Nation, the only environmental justice

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<sup>150</sup> *Id.* at § 5.13.

<sup>151</sup> *Id.* at § 5.14.

<sup>152</sup> *Id.* at § 5.12.

<sup>153</sup> *Id.* at § 5.17.

<sup>154</sup> *Id.* at § 5.15.

community in the vicinity of the Site.<sup>155</sup>

Cumulative Impact Analysis – Development of Alternative A would not result in cumulatively adverse impacts to land use, land resources, water resources, biological resources, cultural resources, visual resources, air quality, transportation, public services, noise, or socioeconomic conditions. The proposed Casino-Resort is anticipated to have a positive indirect effect on the local economy as more visitors seek to enjoy the increased recreational opportunities. The development of Alternative A would result in less-than-significant cumulative or indirect impacts to the resources identified above.<sup>156</sup>

### **Conclusion**

Pursuant to section 5 of the IRA, 25 U.S.C. § 5108, the Department will acquire the Site in trust for the Muscogee (Creek) Nation. Further, pursuant to section 20 of IGRA, 25 U.S.C. § 2719(a)(2)(A)(i), the Site will be eligible for gaming upon its acquisition in trust. Consistent with applicable law and Departmental requirements, the Regional Director shall accept the land in trust.

Sincerely,



John Tahsuda  
Principal Deputy Assistant Secretary – Indian Affairs  
Exercising the Authority of the Assistant Secretary –  
Indian Affairs

Enclosure

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<sup>155</sup> *Id.* at § 5.16.

<sup>156</sup> *Id.* at § 5.18.